

COMMISSIONER OF INCOME TAX-I, KOLHAPUR

A

v.

M/S. CHAPHALKAR BROTHERS PUNE

(Civil Appeal Nos. 6513-6514 of 2012)

DECEMBER 07, 2017

B

[R. F. NARIMAN AND NAVIN SINHA, JJ.]

Bombay Entertainment Duty Act, 1923 – Bombay Entertainment Duty (Amendment) Act, 2001 – s.3(13)(c),(f-1) – Subsidy scheme introduced by the State to encourage development of Multiplex Theatre complexes – Nature of – Assessment officer and the commissioner held that scheme took the form of a charge on the gross value of ticket and contributed towards the day to day running expense, therefore it was in the nature of a revenue receipt – However, Tribunal and the High Court held that subsidy was for the purpose of helping the growth of an industry, hence it was in the nature of capital receipt – Held: If the object of the assistance under the Subsidy Scheme is to enable the assessee to set up a new unit or to expand the existing unit then the receipt of the subsidy is on capital account – It is the object for which the subsidy/assistance is given which determines the nature of the incentive subsidy – The form of the mechanism through which the subsidy is given is irrelevant – In instant case, the object of the grant of the subsidy was in order that persons come forward to construct Multiplex Theatre Complexes, the idea being that exemption from entertainment duty for a period of three years and partial remission for a period of two years should go towards helping the industry to set up such highly capital intensive entertainment centers – Appeals filed by Department accordingly dismissed.

C

D

E

F

Dismissing the appeals filed by the Department, the Court

HELD: 1. The object of introducing the necessary amendments in the Bombay Entertainments Duty Act to effectuate the aforesaid subsidy scheme was first done by way of an ordinance before 4th December, 2001, which ultimately became part of an Amendment Act. The said scheme was thereafter set out in the form of an amendment to the Statute contained in Section 3(13)

G

H

A sub-clause (c) after which a new sub-clause f(1) was set out. In addition, a new sub-clause (13) was also inserted after Section 3. [Paras 2 and 3] [1086-D; 1087-D-E]

2. Applying the purpose test contained in both *Sahney Steel* as well as *Ponni Sugar* cases, the object, as stated in the statement of objects and reasons, of the amendment ordinance was that since the average occupancy in cinema theatres has fallen considerably and hardly any new theatres have been started in the recent past, the concept of a Complete Family Entertainment Centre, more popularly known as Multiplex Theatre Complex, has emerged. These complexes offer various entertainment facilities for the entire family as a whole. It was noticed that these complexes are highly capital intensive and their gestation period is quite long and therefore, they need Government support in the form of incentives *qua* entertainment duty. It was also added that government with a view to commemorate the birth centenary of late Shri V. Shantaram decided to grant concession in entertainment duty to Multiplex Theatre Complexes to promote construction of new cinema houses in the State. The aforesaid object is clear and unequivocal. The object of the grant of the subsidy was in order that persons come forward to construct Multiplex Theatre Complexes, the idea being that exemption from entertainment duty for a period of three years and partial remission for a period of two years should go towards helping the industry to set up such highly capital intensive entertainment centers. This being the case, it is difficult to accept the argument of the Revenue that it is only the immediate object and not the larger object which must be kept in mind in that the subsidy scheme kicks in only post construction, that is when cinema tickets are actually sold. The object of the scheme is only one - there is no larger or immediate object. That the object is carried out in a particular manner is irrelevant, as has been held in both *Ponni Sugar* and *Sahney Steel* cases. [Para 23] [1096-C-G]

Shri Balaji Alloys v. C.I.T. (2011) 333 I.T.R. 335 – approved.

Sahney Steel & Press Works Ltd., Hyderabad v. Commissioner of Income-Tax, A.P.-I, Hyderabad (1997)

H

7 SCC 764 : [1997] 4 Suppl. SCR 189; *Commissioner of Income Tax, Madras v. Ponni Sugars and Chemicals Limited* (2008) 9 SCC 337 : [2008] 13 SCR 570 – relied on.

A

Pontypridd and Rhondda Joint Water Board v. Ostime (1946) 1 ALL ER 668; *Seaham Harbour Dock Co. v. Crook*, 16 TC 333 – referred to.

B

Case Law Reference

[1997] 4 Suppl. SCR 189	relied on	Para 8
[2008] 13 SCR 570	relied on	Para 8
(1946) 1 ALL ER 668	referred to	Para 12
16 TC 333	referred to	Para 13
(2011) 333 I.T.R. 335	approved	Para 23

C

D

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 6513-6514 of 2012.

From the Judgment and Order dated 08.06.2011 of the High Court of Judicature at Bombay in ITA No. 1036 of 2010 and ITA No. 1147 of 2010

E

WITH

Civil Appeal Nos. 6511 of 2012, 6512 of 2012, 3362 of 2015, 10803 of 2013, 3500 of 2016, 4650 of 2016, 9320 of 2017, 11203 of 2017, 11204 of 2017, 12442 of 2017, 15565 of 2017 and Civil Appeal No. 21853 of 2017.

F

P. S. Narsimha, ASG, K. Radhakrishnan, Sr. Adv., Zoheb Hossain, Arijit Prasad, Manish Pushkarna, Mrs. Anil Katiyar, B. V. Gopala Gowda, Balaram Das, Advs. for the Appellants.

G

S. Ganesh, Jahangir Mistry, R. P. Bhatt, K. V. Gopala Gowda, Vishwanathan, Sr. Advs., Ms. Vanita Bhargava, Ajay Bhargava, Rony O. John, Abhisar Bairagi, M/s. Khaitan & Co., Ms. Shweta Kabra, M/s. Khaitan & Co., Suhas Deshpande, Rustom B. Hathikhanawala,

H

A Santosh Krishnan, Yadunandan Bansal, Abhijat P. Medh, Ms. Amrita Panda, Debesh Panda, Rituraj Gupta, Divyam Agarwal, Dhananjay Garg, Ramesh Singh, Nikhil Goel, Ashutosh Ghade, Annirudh Deshmukh, Advs. for the Respondents.

The Judgment of the Court was delivered by

B **R. F. NARIMAN, J.** 1. Leave granted.

C 2. The present appeals arise from a batch of judgments dealing with cases which come from Maharashtra and West Bengal. Insofar as the civil appeals relating to Maharashtra are concerned, the subsidy scheme of the State Government took the form of an exemption of entertainment duty in Multiplex Theatre Complexes newly set up, for a period of three years, and thereafter payment of entertainment duty @ 25% for the subsequent two years. The object of introducing the necessary amendments in the Bombay Entertainments Duty Act to effectuate the aforesaid subsidy scheme was first done by way of an ordinance before 4th December, 2001, which ultimately became part of an Amendment Act. The statement of objects and reasons for introducing the aforesaid scheme reads as follows:

E “1. As a result of the onslaught of Cable Television and advancement in the field of Information Technology, the average occupancy in cinema theatres has fallen considerably and hardly any new theatres have been started in the recent past. Public at large these days prefer to see movies at home. Keeping in view this scenario, a concept of Complete Family Entertainment Centre, more popularly known as “Multiplex Theatre Complex” has emerged. These Multiplex Theatre Complexes offer various entertainment facilities for the entire family under a single roof. However, these complexes are highly capital intensive, their gestation period is also quite long, and therefore, need Government support and incentive in entertainment duty.

F 2. Government has, therefore, with a view to commemorate birth centenary of Chitrapati late Shri V.Shantaram, decided to grant concession in entertainment duty to Multiplex Theatre Complexes to promote construction of new cinema houses in the State.

G 3. In accordance with the above decision, Bombay Entertainments Duty Act, 1923 was modified as required and Bombay

H

Entertainment Duty (Revised) Act, 2001 (Government Order: ENT-1099/C.R.765/T-1) was brought into force on 17th August, 2001.” A

3. The said scheme was thereafter set out in the form of an amendment to the Statute contained in Section 3(13) sub-clause (c) after which a new sub-clause f(1) was set out which reads as follows:

“(f-1)”Multiplex Theatre Complex” means an entertainment cum-cultural centre which provides- B

(i) within the limits of Municipal Corporation of Brihan Mumbai not less than four theatres in a complex with minimum total seating capacity of 1,250; and

(ii) any where else in the State, not less than three theatres in a complex with minimum total seating capacity of 1,000. C

And such other incidental and connected matters and facilities, and multi entertainment activities and other facilities as specified by Government in this behalf, by Notification in the official Gazette;” D

4. In addition, a new sub-clause (13) was also inserted after Section 3 which reads as follows:

“13)(a) Notwithstanding anything contained in any other provisions of this Act, but subject to the terms and conditions specified in clause (b), on and with effect from the date of coming into force of the Bombay Entertainments Duty (Amendment) Act, 2001, there shall be levied and collected by the State Government from the proprietor of a Multiplex Theatre Complex the duty in respect of any such complex as follows, namely:- E

(i) for the first three years from the date of commencement of the Multiplex Theatre complex, no duty. F

(ii) for the subsequent two years, at the rate of twenty five percent of the rate of duty leviable under clause (b) and clause (c) of sub-section (1) or, as the case may be, sub section (3); G

(iii) from the sixth year, full amount of duty leviable at the rate specified in clause (b) and clause (c) of sub-section (1) or, as the case may be sub-Section (3). H

- A Provided that, the duty leviable shall also be subject to the provisions of sub-section (2), wherever applicable
- Explanation-For the purpose of this sub-section:
- B (i) the date on which the Multiplex Theatre complex is opened to the public for admission shall be deemed to be the date of commencement of the Multiplex Theatre Complex;
- (ii) the change in the management of Multiplex Theatre Complex, or the change in the name of the complex shall not be construed as a fresh commencement of the Multiplex Theatre Complex.
- C (b) The concession in duty as provided under clause (a) shall be available to the proprietor of the Multiplex Theatre Complex subject to following terms and conditions, namely;-
- (i) The proprietor shall not charge less payment for admission than the prevailing highest rate for admission at any given time, in any of the cinema theatres in the District in which the complex is situated, till the period of concession under clause (a) is over;
- D (ii) one theatre in the complex shall be reserved for a total period of not less than one month, in a year, exclusively for Marathi Cinemas;
- E (iii) the proprietor of a complex shall not levy the service charge, till the period of concession under clause (a) is over. After the concession period is over, the proprietor may levy service charges as specified in the second proviso to clause (b) of section 2;
- F (iv) the Multiplex Theatre Complex shall be continued continuously for ten years;
- (v) no facilities provided in the complex as specified in the notification issued under clause (I-a) of Section 2, shall be discontinued or curtailed, without prior permission of the Government.
- G (c) In case of violation of the condition (iv) or (v) of clause (b), the concession shall be liable to be withdrawn and the duty shall be levied and collected from the date of commencement at the Multiplex Theatre Complex, at the rate specified in clause (b) and
- H

clause (c) of sub-section (1) or, as the case may be, sub-section (3), along with the interest leviable at the rate specified in section 9B. A

(d) If any existing cinema theatre is converted into Multiplex Theatre Complex, by not reducing its original seating capacity and by complying with the provisions of clause (f-a) of section 2, the converted theatre shall also be entitled to concession in the duty as specified in clause (a), subject to the terms and conditions specified in clause (b).” B

5. To take the facts of one of the matters before us, namely, Civil Appeal Nos. 6513-6514 of 2012, the assessment order in that case (dated 21.01.2006) found that the aforesaid scheme was really to support the on-going activities of the multiplex and not for its construction. Since the scheme took the form of a charge on the gross value of the ticket and contributed towards the day to-day running expenses, the Assessment Officer held that it was in the nature of a revenue receipt. C

6. The appeal filed before the Commissioner met with the same fate and was dismissed substantially on the same reasoning. D

7. However, the Income-Tax Appellate Tribunal by its judgment dated 30.06.2009, went into the matter in some detail, and after setting out the object of the aforesaid scheme went on to hold as follows: E

“9.2 One aspect of the scheme in question is undisputed; after considering the clauses of the scheme, that the scheme do not provide any assistance for reimbursement of day to day revenue expenditure but the scheme is meant to build up and to promote new multiplex cinema halls which are nothing but for the construction purpose hence reimbursement is to cover-up the capital expenditure. F

xxxxxxxxx

10. In the light of the above discussion, we can therefore summarize our conclusion that broadly speaking the subsidy can be of two types: G

(i) for the purpose of helping the growth of an industry;

(ii) For the purpose of supplementing the profits of an industry.

A 10.1 To ascertain whether in a particular case the subsidy in
question fall under the category (I) or (ii) one has to carefully
examine the form as well as substance of the impugned scheme.
We have done that exercise, and on close examination
undisputedly it was noticed that the scheme in question had fallen
B in the first category i.e. for the purpose of helping the growth of
an industry. Though the collection was in the form of an
entertainment Duty via sale of tickets for a limited period but its
utilization was predetermined and granted with an assurance to
cover up the cost of construction. Once it is demonstrated before
us that too undisputedly that it was not attributed in any manner
C towards supplementing of day-to-day expenditure or in the
furtherance of the profits than it cannot be said to be in the
character of a revenue receipt. Contrary to this it was in the
nature of a capital receipt being an incentive to supplement the
construction expenditure of new set up of Multiplexes hence in
the nature of capital receipt. To arrive at this conclusion we draw
D support from a plethora of decisions, few of them already cited
above. With the result we decide the ground in favour of the
assessee.”

8. The appeal before the High Court was dismissed. The High
Court’s judgment dated 08.06.2011 referred to two Supreme Court
E judgments, namely, Sahney Steel & Press Works Ltd., Hyderabad Vs. Commissioner of Income-Tax, A.P.-I, Hyderabad 1997 (7) SCC 765
and Commissioner of Income Tax, Madras Vs. Ponni Sugars and Chemicals Limited 2008 (9) SCC 337 and after discussing these
judgments, held:

F “Since the object of subsidy was to promote construction of
multiplex theatre complexes, in our opinion, receipt of subsidy would
be on capital account. The fact that the subsidy was not meant
for repaying the loan taken for construction of multiplexes cannot
be a ground to hold that subsidy receipt was on revenue account,
G because, if the object of the scheme was to promote cinema houses
by constructing multiplex theatres, then irrespective of the fact
that the multiplexes have been constructed out of own funds or
borrowed funds, the receipt of subsidy would be on capital account.
In the light of the aforesaid objects of the Scheme framed by the

H

State Government, the decision of the Income Tax Appellate Tribunal that the amount of subsidy received by the assessee is on capital account cannot be faulted. Accordingly, both the appeals are dismissed with no order as to costs” A

9. Shri P.S.Narasimha, learned ASG appearing on behalf of the Revenue, assails the judgment passed by the High Court. According to him, there may be no doubt that the large object said to be achieved in the grant of subsidy by way of complete and then partial roll back of entertainment duty may be in the nature of subsidy relating to complexes which are highly capital intensive and require Government support. But according to him, the fact that the subsidy kicks in only after the multiplexes started functioning and issued tickets on which entertainment duty is then waived, would show that in reality what has already been set up is not the immediate object of the subsidy but that it is really in the nature of a helping hand for running of the day to-day business of the multiplexes. He relied heavily upon the judgment in Sahney Steel (supra) to buttress his submission and stated that on facts, this was a case similar to Sahney Steel. On the other hand, he distinguished the judgment in Ponni Sugars (supra) stating that on the facts of that case, in paragraph 10, in particular, it was very clearly held that the benefit of the scheme had to be utilised only for re-payment of loan. Therefore, it was obviously capital in nature, and not revenue. B C D

10. On the other hand, Shri Jahangir Mistry, learned senior counsel appearing for the respondents, and Shri S.Ganesh, learned senior counsel appearing for some of the respondents, have argued that if Sahney Steel is to be read in its entirety, the judgment on facts supports the proposition that it is only the purpose of the scheme that is the test for finding out whether the scheme is, in fact, capital or revenue in nature. The source of funds for the scheme and the form of the scheme are irrelevant and if it is clear that the purpose is in order that capital expenses be met out of the subsidy granted in the scheme, then the object of the scheme points to receipt of funds being capital in nature. They both stressed the fact that the statement of object and reasons specifically state that multiplexes are truly capital intensive, their period is long and, therefore, they need government support. They also relied upon the statement that the grant of concession to such multiplexes was to promote construction of new cinema houses in the State. E F G

A 11. Having heard learned counsel for both sides, it becomes necessary to analyze the judgments relied upon.

B 12. In *Sahney Steel (supra)*, the notification issued by the Andhra Pradesh Government was concerned with certain facilities and incentives which were to be given to all new industrial undertakings which commenced production on or after 01.01.1969 with investment capital not exceeding Rs. 5 crores. The incentives were to be allowed for a period of five years from the date of commencement of production. Concession was also available for subsequent expansion of 50% and above. The incentives were in the form of, inter alia, refund of sale tax on raw materials, machinery and finished goods. This Court held, on the facts of that case, that as no financial assistance was granted to the assessee for setting up of the industry, the idea of the subsidy scheme was to provide a helping hand for five years in order to enable the industry to be viable and competent. In doing this, in paragraph 9 of the said judgment, the test stated by Viscount Simon in *Pontypridd and Rhondda Joint Water Board v. Ostime (1946) 1 ALL ER 668* was referred to. In paragraph 10, the Court went on to apply the aforesaid test and stated that, since funds were made available to the assessee to assist it in carrying on its trade and business, there can be little doubt that the object "of various assistances under the subsidy scheme was to enable the assessee to run the business more profitably".

E 14. The judgment of the House of Lords in *Seaham Harbour Dock Co. Vs. Crook*, 16 TC 333 was then referred to and distinguished. What is important for our purpose is the fact that in para 18 of that judgment, the test of whether the receipt of subsidy is capital or revenue is stated as follows:-

F "If any subsidy is given, the character of the subsidy in the hands of the recipient - whether revenue or capital - will have to be determined by having regard to the purpose for which the subsidy is given. If it is given by way of assistance to the assessee in carrying on of his trade or business, it has to be treated as a trading receipt. The source of the fund is quite immaterial."

G 15. The Court went on, thereafter, to give a telling example in para 19 of the aforesaid judgment, which is set out herein below:-

H

“For example, if the scheme was that the assessee will be given refund of sales tax on purchase of machinery as well as on raw materials to enable the assessee to acquire new plants and machinery for further expansion of its manufacturing capacity in a backward area, the entire subsidy must be held to be a capital receipt in the hands of the assessee. It will not be open to the Revenue to contend that the refund of sales tax paid on raw materials or finished products must be treated as revenue receipt in the hands of the assessee. In both the cases, the Government is paying out of public funds to the assessee for a definite purpose. If the purpose is to help the assessee to set up its business or complete a project as in Seaham Harbour Dock Co. case, the monies must be treated as to have been received for capital purpose. But if monies are given to the assessee for assisting him in carrying out the business operation and the money is given only after and conditional upon commencement of production, such subsidies must be treated as assistance for the purpose of the trade.”

A

B

C

D

16. Thereafter, the Court went on to discuss certain High Court judgments and, in para 30, specifically referred to the Bombay High Court judgment in Sadichha Chitra's case (1991) 189 ITR 774 and approved the view taken by the Bombay and Kerala High Courts as they accorded with the principle laid down in Seaham Harbour Dock Co. case. The facts in Sahney steel were distinguished from the facts of the Bombay and Kerala judgments as follows:-

E

“In the case before us, subsidies have not been granted for production of or bringing into existence any new asset. The subsidies were granted year after year only after setting up of the new industry and commencement of production. Such a subsidy could only be treated as assistance given for the purpose of carrying on of the business of the assessee. Applying the test of Viscount Simon in the case of Ostime it must be held that these subsidies are of revenue character and will have to be taxed accordingly.”

F

G

17. The next important judgment that was referred to is the judgment in Ponni Sugars & Chemicals Limited (supra). On the facts in that case, incentives given under a scheme relating to sugar production

H

A were in the nature of a higher free sale sugar quota, and also allowing the manufacturer to collect excise duty on the sale price of free sale sugar in excess of the normal quota but to pay to the government only the excise duty payable on the price of levy sugar. Clause 7 of the aforesaid scheme was set out in para 3 of the judgment as follows:-

B “The beneficiaries of the incentive scheme shall ensure that the surplus funds generated through sale of the incentive sugar are utilised for the repayment of term loans, if any, outstanding from the Central financial institutions. The sugar factories should submit utilisation certificates annually from Chartered/Cost Accountant, holding certificate of practice. Utilisation certificate in respect of each sugar season during the incentive period should be furnished on or before 31st December of the succeeding year. Failure to submit utilisation certificate within the stipulated time may result not only in the termination of release of incentive free sale quota, but also in the recovery of the incentive free sale releases already made, by resorting to adjustment from the free sale releases of future years.”

18. The Court then referred to the background of the incentive scheme and to the fact that the Sampat Committee was set up to examine the question relating to the economic viability of new sugar factories. The Court then found in para 9 of the judgment that the Sampat Committee referred to the fact that the increase in the cost of new sugar factories was because of increase in the cost of plant and machinery. The Committee then stated that five possible incentives for making a sugar plant economically viable could be provided. It is two of such incentives referred to that was the subject-matter for decision before this Court. In Para 10 this Court found:

G “We have examined in this case the 1980 and 1987 Schemes. Essentially all the four Schemes are similar except in the matter of details. Four factors exist in the said Schemes, which are as follows:

(i) Benefit of the incentive subsidy was available only to new units and to substantially expanded units, not to supplement the trade receipts.

H

(ii) The minimum investment specified was Rs. 4 crores for new units and Rs. 2 crores for expansion units. A

(ii) Increase in the free sale sugar quota depended upon increase in the production capacity. In other words, the extent of the increase of free sale sugar quota depended upon the increase in the production capacity. B

(iv) The benefit of the Scheme had to be utilised only for repayment of term loans."

19. After discussing the judgment in Sahney Steel case, this Court then held:

"The importance of the judgment of this Court in Sahney Steel case lies in the fact that it has discussed and analysed the entire case law and it has laid down the basic test to be applied in judging the character of a subsidy. The test is that the character of the receipt in the hands of the assessee has to be determined with respect to the purpose for which the subsidy is given. In other words, in such cases, one has to apply the purpose test. The point of time at which the subsidy is paid is not relevant. The source is immaterial. The form of subsidy is immaterial. The main eligibility condition in the Scheme with which we are concerned in this case is that the incentive must be utilised for repayment of loans taken by the assessee to set up new units or for substantial expansion of existing units. On this aspect there is no dispute. If the object of the Subsidy Scheme was to enable the assessee to run the business more profitably then the receipt is on revenue account. On the other hand, if the object of the assistance under the Subsidy Scheme was to enable the assessee to set up a new unit or to expand the existing unit then the receipt of the subsidy was on capital account. Therefore, it is the object for which the subsidy/assistance is given which determines the nature of the incentive subsidy. The form of the mechanism through which the subsidy is given is irrelevant." C D E F G

20. Sahney Steel was distinguished, in para 16 by then stating that this Court found that the assessee was free to use the money in its business entirely as it liked.

A 21. Finally, it was found that, applying the test of purpose, the Court was satisfied that the payment received by the assessee under the scheme was not in the nature of a helping hand to the trade but was capital in nature.

B 22. What is important from the ratio of this judgment is the fact that Sahney Steel was followed and the test laid down was the "purpose test". It was specifically held that the point of time at which the subsidy is paid is not relevant; the source of the subsidy is immaterial; the form of subsidy is equally immaterial.

C 23. Applying the aforesaid test contained in both Sahney Steel as well as Ponni Sugar, we are of the view that the object, as stated in the statement of objects and reasons, of the amendment ordinance was that since the average occupancy in cinema theatres has fallen considerably and hardly any new theatres have been started in the recent past, the concept of a Complete Family Entertainment Centre, more popularly known as Multiplex Theatre Complex, has emerged. These complexes offer various entertainment facilities for the entire family as a whole. It was noticed that these complexes are highly capital intensive and their gestation period is quite long and therefore, they need Government support in the form of incentives *qua* entertainment duty. It was also added that government with a view to commemorate the birth centenary of late D Shri V. Shantaram decided to grant concession in entertainment duty to E Multiplex Theatre Complexes to promote construction of new cinema houses in the State. The aforesaid object is clear and unequivocal. The object of the grant of the subsidy was in order that persons come forward to construct Multiplex Theatre Complexes, the idea being that exemption F from entertainment duty for a period of three years and partial remission for a period of two years should go towards helping the industry to set up such highly capital intensive entertainment centers. This being the case, it is difficult to accept Mr. Narasimha's argument that it is only the immediate object and not the larger object which must be kept in mind in that the subsidy scheme kicks in only post construction, that is when G cinema tickets are actually sold. We hasten to add that the object of the scheme is only one -there is no larger or immediate object. That the object is carried out in a particular manner is irrelevant, as has been held in both Ponni Sugar and Sahney Steel.

H 24. Mr. Ganesh, learned Senior Counsel, also sought to rely upon a judgment of the Jammu and Kashmir High Court in Shri Balaji Alloys

vs. C.I.T. (2011) 333 I.T.R. 335. While considering the scheme of refund of excise duty and interest subsidy in that case, it was held that the scheme was capital in nature, despite the fact that the incentives were not available unless and until commercial production has started, and that the incentives in the form of excise duty or interest subsidy were not given to the assessee expressly for the purpose of purchasing capital assets or for the purpose of purchasing machinery.

25. After setting out both the Supreme Court judgments referred to hereinabove, the High Court found that the concessions were issued in order to achieve the twin objects of acceleration of industrial development in the State of Jammu and Kashmir and generation of employment in the said State. Thus considered, it was obvious that the incentives would have to be held capital and not revenue. Mr. Ganesh, learned Senior Counsel, pointed out that by an order dated 19.04.2016, this Court stated that the issue raised in those appeals was covered, *inter alia*, by the judgment in Ponni Sugars, and the appeals were, therefore, dismissed.

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

27. In coming to the West Bengal cases, we find that the West Bengal Finance Act, 2003 which amended the Bengal Amusements Tax Act of 1922 also provided:

28. The Bengal Amusements Tax Act, 1922.

29. The provision seeks to provide, in order to encourage development of multiplex theatre complex, a very modern and highly capital-intensive entertainment centre, financial assistance to the proprietors of such complex by allowing them to retain, by way of subsidy, the amount of entertainment tax collected against the value of ticket for admission to such multiplex theatre complex for a period not exceeding four years;

30. Since the subsidy scheme in the West Bengal case is similar to the scheme in the Maharashtra case being to encourage development

- A of Multiplex Theatre Complexes which are capital intensive in nature, and since the subsidy scheme in that case is also similar to the Maharashtra cases, in that the amount of entertainment tax collected was to be retained by the new Multiplex Theatre Complexes for a period not exceeding four years, we are of the view that West Bengal cases must follow the judgment that has been just delivered in the Maharashtra case.
- B

31. Accordingly, the appeals filed by the Department are dismissed.

Ankit Gyan

Appeals dismissed.