

Assistant Commissioner of Vs. Upper Ganges Sugar and Industries

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Court : Income Tax Appellate Tribunal ITAT Kolkata

Decided On : Dec-09-1991

Reported in : (1992)40ITD614(Kol.)

Judge : V Dongzathang, R Easwar

Appellant : Assistant Commissioner of

Respondent : Upper Ganges Sugar and Industries

Judgement :

1. These cross appeals filed by the Department and the assessee are directed against the order of the CIT(Appeals) dated 1-11-1988 for the assessment year 1985-86. We shall take up the appeal filed by the Department first for disposal. The grounds raised by the Department are against- (1) Deletion of the Excise Duty Rebate of Rs. 26,13,819 from the assessment; (2) Deletion of the disallowance of the expenses on running and maintenance of Jeeps and cars under Section 37(3A).

2. The assessee is a Public Limited Company. During the previous year relevant to the assessment year 1985-86, the assessee was running its own Sugar Mill and Distillery at Seohara in U.P. It was also manufacturing oil and confectionery in Bihar and tea in Assam.

3. In the course of manufacture of sugar in its factory, the assessee-company was liable to pay excise duty. In order to compensate the sugar companies for the

lower recovery of sugar from cane during the summer months, the Government of India formulated a scheme of rebate on the excise duty payable by the sugar companies. This scheme was announced by the Ministry of Finance (Deptt. of Revenue), New Delhi, on 21-4-1982 by Notification No. 132 of 1982-Central Excise.

Broadly speaking the Notification announced a rebate of Rs. 40 per quintal of free sale sugar and Rs. 24.50 per quintal of levy sugar from the excise duty payable by the sugar factories. The Scheme, in short, provided that the rebate shall be allowed in respect of excess production during a particular sugar year as compared to the production of sugar during the lean period in the preceding three sugar years. The preceding three sugar years were called the 'base period'. All sugar mills were entitled to the rebate on the excise duty in respect of the excess production during a particular year over and above the average production of sugar during the base period. According to the Notification vide para 3 thereof, the average sugar production during the base period was to be worked out in such a way that if there was no production in any of the three years forming the base period, then that year had to be ignored for the purpose of computing the average production. By paragraph 4 of the said Notification, it was provided that the benefit of the Notification will not be available to a sugar factory where production during all the years of the base period was nil.

4. On 11-6-1982 the Government of India, through the Ministry of Finance (Department of Revenue), issued another Notification No. 193 of 1982. This Notification substituted a new paragraph 4 for paragraph 4 of the earlier Notification dated 21-4-1982. This paragraph provided that even though production of sugar in all the preceding three sugar years forming the base period was nil, the entire production of the sugar during the months of May to September 1982, will be entitled to excise duty rebate. A similar Notification (No. 135/83) was also issued by the Government of India on 30-4-1983 through the Ministry of Finance (Deptt. of Revenue) governing the excise duty rebate allowable for excess production during May 1983 and September 1983 (Sugar year 1982-1983). It is seen that the provisions of this Notification are similar to the earlier Notification.

5. Now in order to appreciate the real controversy in the case before us a few figures may be given :-May to September Sugar year Production in quintal(Lean period) (in the assessee's sugar factory)1979 1978-79 73,4151980 1979-80 Nil1981 1980-81 Nil1982 1981-82 1,16,5311983 1982-83 1,77,146 The above chart shows the sugar year and the production for that year in the assessee's factory. The three years' period commencing from 1978-79 to 1980-81 forms the base period in the assessee's case. The assessee wanted to claim the benefit of excise duty rebate for the sugar years 1981-82 and 1982-83. According to the interpretation placed by it on the aforesaid Notifications issued by the Government of India, it was entitled to excise duty rebate on 92,059 quintals for the sugar year 1981-82 and 1,52,674 quintals for the sugar year 1982-83. As per the assessee's interpretation of the aforesaid Notifications, the average production during the base period and the excess production had to be worked out as under:-Production during the three years (base period) = 73,415 quintals Average = 73,415 quintals = 24,472 quintalsProduction of sugar during the sugar year 1981-82 = 1,16,531 quintalsExcess production entitled to excise duty rebate is Similarly, the excess production of sugar entitled to excise duty rebate for the sugar year 1982-83 was worked out by the assessee at 1,52,674 quintals as under:-Production of sugar in the sugar year 1982-83 = 1,77,146 quintalsAverage production during base period = 24,472 quintalsExcess production = 1,52,674 quintals seen that the average production of sugar during the base period will be only 73,415 quintals since during the sugar years 1979-80 and 1980-81 the sugar production was nil. Consequently, the excess production in the sugar year 1981-82 qualifying for excise duty rebate would be only 43,116 quintals which is arrived at by deducting 73,415 quintals from 1,16,531 quintals. Similarly, the Excise Department worked out the excess production for the sugar year 1982-83 which qualified for excise duty rebate at 1,03,731 quintals only, which is less than what the assessee had asked for. In terms of money, applying the rates of rebate provided in the relevant notifications, the excise duty rebate worked out as follows:-Sugar year Rebate as per Rebate as per Difference assessee (Rs.) Excise Deptt. (Rs.) (Rs.)1 2 3 41981-82 27,54,875 12,90,246 14,64,6291982-83 35,64,793 24,35,603 11,49,190Total = 26,13,819 7. Aggrieved by the non-acceptance of its claim to higher excise duty rebate for the sugar years 1981-82 and 1982-83 the assessee filed writ petitions

before the Hon'ble Calcutta High Court and canvassed for the acceptance of its method of calculating the excess production and the consequent excise duty relief. On the 2nd September, 1983, the Hon'ble High Court dealing with the writ petition for the sugar year 1981-82 directed the assessee by an interim order to furnish bank guarantee for the excess amount of excise duty of Rs. 14,64,629 and subject to this, directed the Government of India to permit the assessee-company to take credit for the excess amount as claimed by it. On 29-9-1983, a similar interim order was passed by the Hon'ble High Court containing similar directions in respect of the sum of Rs. 11,49,189 for the sugar year 1982-83. In deference to the interim orders passed by the Hon'ble High Court as aforesaid, the assessee-company furnished the bank guarantee and it is also not in dispute that the respective amounts claimed by the assessee as excise duty rebate were allowed to be credited to the personal ledger account by the Excise Department.

8. The assessee-company filed its return of income on 27-9-1983. While scrutinising the return of income and the companying statements filed by the assessee the Assessing Officer found that Note 4 of Schedule 'H' to the printed accounts filed by the assessee for the relevant accounting year contained the following narration:- The accounts in respect of insurance, excise and other claims receivable and interests receivable on deposits under Company Deposits (S.C. & I.T.) Scheme, 1983, have been maintained partly on cash basis.

The Assessing Officer further found that Note 8 of the same Schedule mentioned that- The Company had received Rs. 26,13,819 towards excise duty rebate for the years 1981-82 & 1982-83 in terms of an interim order of the Calcutta High Court by furnishing a bank guarantee of the like amount. The said amount has not been credited to the profit and loss account but has been included under the head Current liabilities and the same has been disputed by Excise Authorities.

On finding this Note appended to the Balance-sheet, the Assessing Officer called upon the assessee to explain as to why the excise duty rebate of Rs.26,13,819 should not be included in the assessment of the assessee as its income for the assessment year 1985-86. In response to this query from the Assessing Officer, the assessee-company filed the following written explanation:

The company is liable to pay excise duty on the sugar manufactured and cleared from factory. The Govt. of India in order to compensate the Sugar Industry for lower recovery due to continuing crushing operations in summer months by a notification, bearing no. 132/82 Central Excise dt. 21st April, 1982, announced rebate of excise duty @ Rs. 24.50 per quintal on levy sugar and Rs. 40 per quintal on free sugar produced during the period commencing on the first day of May, 1982 and ending on 30th Sept., 1982 in excess of the average production of the corresponding period of the preceding three years.

Paragraph 4 of the aforesaid notification no. 132/82 Central Excise was subsequently substituted by notification bearing no. 193/82 Central Excise dated 11th June, 1982. The assessee contended that rebate should be allowed under the aforesaid notifications in respect of excess production taking into consideration average production by dividing the total production in the relevant months of the preceding three years in which there was nil production should not be ignored. The Excise Deptt. did not accept the assessee's contention. The assessee filed a writ petition in the Calcutta High Court and the Calcutta High Court by interim order passed on 2nd Sept. 1983 for 1981-82 and on 29th Sept., 1983 for reason 1982-83 directed the Excise Deptt. to grant refund to the assessee on furnishing the bank guarantee for the amount so refunded. A copy of the writ petition and the copy of the interim orders passed by High Court are enclosed. The assessee has furnished a bank guarantee in favour of the Registrar. Appellate Side, Calcutta High Court and the said guarantee is still pending. The Excise Deptt. in terms of writ petition filed by the assessee has granted refund of Rs. 26,13,819 and the same has not been credited to P&L A/c. but shown in the Balance sheet in the liability side as the same is disputed by the Excise Authorities. The High Court of Punjab & Haryana in L.P.A. No.854 of 1978 by a judgment dated Feb. 12, 1981 in the case of Union of India v. Morinda Co-operative Sugar Mills Ltd. has held amongst others that on true interpretation of the relevant notification and having regard to the intention of the notification granting exemption of the sugar factories that if a sugar factory did not produce sugar in 1 or 2 of the three specified years the same should not be ignored while arriving at the average. In other words, year or years with nil production should also be taken into account for the purpose of finding out the average in the cases falling under paragraph 3 of the said

notification. The Union of India has filed a special leave petition to the Supreme Court against the judgment of the Punjab & Haryana High Court and same is pending in the Supreme Court. On a transfer petition filed the writ petition in the instant case has also been transferred to the Supreme Court. All the matters are tagged together and pending in the Supreme Court.

The Supreme Court in the case of CIT v. Hindustan Housing & Land Development Trust Ltd. [1986] 161 ITR 524 has held that the amount realised in terms of interim order cannot be treated as income as the dispute remains pending.

As regards your contention that in our accounts we are showing the excise duty rebate on cash basis and since the amount was received the same should be included in the total income, we have to inform you that excise duty rebate was received in terms of the interim order of the High Court and not voluntarily. Even if you take cash system of accounting the excise duty rebate allowed cannot be considered as our income till the matter is finally decided in view of the judgment of the Supreme Court mentioned above.

The interim orders of the Hon'ble High Court at Calcutta dated 2-9-1983 and 29-9-1983 were also filed before the Assessing Officer.

9. The Assessing Officer did not accept the contention of the assessee-company that the excise duty rebate of Rs. 26,13,819 did not accrue to it and, therefore, the receipt of the same could not be brought to tax for the assessment year 1985-86. On a perusal of the orders of the Hon'ble High Court and the explanation furnished by the assessee, the Assessing Officer came to the conclusion that income in the form of excise duty rebate did accrue to the assessee in terms of the Court's interim orders and the amount was also received by it during the previous year relevant to the assessment year 1985-86 and, therefore, the same was taxable as the assessee's income. While coming to this conclusion, the Assessing Officer referred to the fact that the assessee had clearly stated in the Note 4 of Schedule 'H' of the printed accounts that in respect of the excise duty rebate the accounts have been maintained on cash basis. He also referred to the decisions of the Supreme Court in the case of Keshav Mills Ltd. v. CIT [1953] 23 ITR 230, in the case of CIT v. Durga Prasad More [1971] 82 ITR 540, in the case of State Bank of

Travancore v. CIT [1986] 158 ITR 102 and in the case of CIT v Bihar State Agro Industries Development Corpn. [1986] 158 ITR 96 (Pat.) in support of his conclusion that the excise duty rebate was taxable as the assessee's income for the assessment year 1985-86.

10. The assessee appealed to the CIT(Appeals). In a detailed statement of facts furnished before the CIT(Appeals), the assessee brought to his notice the various notifications issued by the Government of India, the letters written by the assessee to the Excise Department elaborating its claim and the interim orders by the Hon'ble Calcutta High Court.

The assessee contended, on the basis of these documents, that even though it has followed the cash basis of accounting in respect of the excise duty rebate and also received the amounts during the previous year relevant to the assessment year 1985-86, the amount did not represent income at all and till the dispute between the assessee and the excise department regarding the rebate is finally settled the amount received by it under the interim orders could not be stated to partake the character of income in its hands. It was also pointed out before the CIT(Appeals), as was done before the Assessing Officer, that the writ petitions filed by the assessee before the Hon'ble Calcutta High Court challenging the notifications dated 21-4-1982, 11-6-1982 and 30-4-1983 were transferred to the Supreme Court of India to be heard along with the Special Leave Petition filed by the Union of India against the judgment of the Punjab & Haryana High Court in SLP No. 854 of 1978 dated February 12, 1981, involving the same issue. It was stated by the assessee that the matter is still pending before the Supreme Court. The assessee also brought to the notice of the CIT(Appeals) the decision of the Supreme Court in the case of CIT v. Hindustan Housing & Land Development Trust Ltd. [1986] 161 ITR 524 and another decision of the Hon'ble Calcutta High Court in the case of Orient Paper Industries Ltd. [In Civil Order No. 18069(W) of 1985 dated 10th July, 1986]. It was pointed out by the assessee that in its judgment the Calcutta High Court had specifically held on similar circumstances that a payment made to an assessee under the interim orders of the Court on the strength of bank guarantee without any decision being rendered on the merits of the case will not constitute income in the hands of the assessee, and that until the

Court decides the dispute finally, the income cannot be said to have accrued to the assessee.

11. The assessee further contended before the CIT(Appeals) that even under the cash system of accounting any receipt by a businessman cannot be said to be his income and that the actual receipt of excise duty rebate in the assessee's case during the accounting year relevant to the assessment year 1985-86 was merely in the nature of an advance allowed to be drawn by the assessee under interim orders of the Hon'ble High Court of Calcutta on furnishing a bank guarantee and, therefore, the amount was not taxable as its income in the said assessment year.

It was further contended that the Hon'ble High Court had not decided the question as to whether the assessee was right in claiming a higher excise duty rebate which it actually did and the matter was sub judice before the Supreme Court of India. It was the contention of the assessee before the first appellate authority that until the issue regarding the proper interpretation of the relevant notifications issued by the Government of India formulating the scheme of excise duty rebate was resolved by the Supreme Court, the excise duty rebate could not be said to have accrued or arisen to the assessee and, therefore, the receipt was not taxable as income.

12. The CIT(Appeals) on a consideration of all the claims put forth by the assessee accepted the same. He was of the view that the issue before the Court did not involve merely the quantification of the correct amount of excise duty rebate, but that it raised a substantial issue, namely, whether the larger rebate claimed by the assessee is at all allowable to it under the relevant notifications. He was of the considered opinion that till the decision of the Supreme Court on the proper interpretation of the notifications became available it was not correct to treat the receipt as income, since, according to him, the amount merely represented an advance drawn by the assessee under the interim orders of the Hon'ble High Court and even though the assessee followed the cash system of accounting, the receipt of money by way of advance did not constitute income in the hands of the assessee. In this view of the matter, the CIT(Appeals) held that the rebate of Rs. 26,13,819 was not the income of the assessee for the assessment year 1985-86.

13. It has to be mentioned here that in the course of the appellate order, the CIT(Appeals) had also referred to the decision of the Supreme Court in the case of Hindustan Housing & Land Development Trust Ltd. (supra). He has also referred to a decision of his own in the case of Gobindaram Sugar Mills Ltd. for the assessment year 1985-86 (Order dated 19-7-1988) in which case also he appears to have taken the same view. He also drew support for his conclusion from the decision of the Hon'ble Calcutta High Court in the matter of Orient Paper Industries Ltd. v. CIT [Civil Order No. 1869(W) of 1986, dated 18-7-1986].

14. In appeal before us, the learned departmental representative Shri B. Biswas, contended that the receipt of excise duty rebate of Rs. 26,13,819 constituted income in the hands of the assessee for the assessment year 1985-86 and was rightly brought to tax by the Assessing Officer. He elaborated the contention by pointing out to the fact that the assessee admittedly was following the cash system of accounting as far as the rebate of excise duty was concerned. In this connection, he invited our attention to the Note 4 of Schedule 'H' to the printed accounts filed by the assessee along with the return of income. He further contended that the dispute between the assessee and the excise department regarding the excise duty rebate was not one of substance, but was merely one of quantification. He drew our attention to the papers filed by the assessee before the excise department authorities and pointed out that it was only the working of the average production of sugar during the base period that was in dispute between the assessee and the excise department and that the assessee's right to have the excise duty rebate was not in dispute at all. Commenting on the interim orders of the Hon'ble Calcutta High Court, he contended that the Hon'ble High Court had directed the excise department to allow the assessee to take credit for the excise duty rebate in accordance with the latter's working in the personal ledger account and, therefore, it could not be said that the assessee had not received the income during the year of account. He also contended that under the Income-tax Act, income was taxable on accrual basis or on receipt basis and even if the rebate of excise duty cannot be said to have accrued or arisen to the assessee by way of right, the same was taxable on receipt basis.

15. The learned counsel for the assessee Shri R.N. Bajoria, contended before us that the CIT(Appeals) had rightly held that the amount of Rs. 26,13,819 did not constitute the income of the assessee for the assessment year under appeal. His first contention was that there was no adjudication by the Hon'ble Calcutta High Court on the writ petition filed by the assessee challenging the various notifications issued by the Government of India. Solong as there was no adjudication of the rights of the parties, Mr. Bajoria contended, the assessee was not entitled to excise duty rebate as a matter of right and that the right to receive the excise duty rebate did not accrue to the assessee. He elaborated his contention by pointing out the fact that it was only pursuant to the interim orders passed by the Hon'ble Calcutta High Court that the assessee was allowed to withdraw the excise duty rebate, that too on furnishing bank guarantee for a like amount, and that under these circumstances it can only be said that the assessee had received an advance of the excise duty rebate. He stated that if ultimately the assessee was to lose the dispute, the entire rebate obtained by it by credit to the personal ledger account has to be foregone. His contention was that since the right to the excise duty rebate itself was not accepted by the excise department, there was no accrual of any income and the receipt during the year of account was merely in the nature of an advance to be adjusted later. The learned counsel for the assessee drew our attention to the decision of the Supreme Court in Hindustan Housing & Land Development Trust Ltd.'s case (supra). He also invited our attention to the fact that the Supreme Court had on 25-11-1983 rejected the Special Leave Petition filed by the department against the judgment of the Andhra Pradesh High Court declining to call for a statement of case where on identical circumstances the Tribunal had held that the amount did not constitute the income of the assessee [Please see 145 ITR (Statutes) 5]. He also relied on the decision of the Special Bench of ITAT, Pune Bench, in the case of Shri Someshwar Sahakari Sakhar Karkhana Ltd. v. ITO [1985] 11 ITD 335.

16. We have carefully considered the rival contentions before us. We have also perused the paper books filed by the assessee and the decisions cited by both the sides. In our opinion, the amount of Rs. 26,13,819 representing the excise duty rebate received by the assessee during the accounting year relevant to the assessment year 1985-86 does not constitute income in its hands. The assessee

has stated in its printed accounts that it has followed the cash system of accounting as far as excise duty rebate was concerned. Even on the cash basis of accounting it is well settled that the receipt, in order that it is taxable, should partake the character of income and it is not as if every receipt is taxable in the hands of the assessee. Receipt in order that it may be taxable, should have been received by the assessee by virtue of a right to receive the same and not merely as an advance in anticipation of future contingency. Analysing the facts of the present case, we find that the assessee had questioned the very basis of working the excise duty rebate. We find ourselves in agreement with the learned counsel for the assessee as also the learned CIT(Appeals) that what is in dispute between the assessee and the excise department is not merely a matter of quantification but a very substantive issue as could be seen from the facts narrated in the earlier part of our order.

The assessee had challenged the very basis of the notifications. It had questioned the very basis of determining the average production of sugar during the base period. In the Writ petitions filed by the assessee before the Hon'ble High Court of Calcutta, the assessee had alleged, inter alia, that the notifications were also discriminatory and violative of Article 14 of the Constitution of India, that the Government had no authority to lay down or specify the mode or manner of exemption in such a way that would be discriminatory and that the Government was bound to recognise the years where production was 'nil' even in cases falling within para 3 of the notification (No.132/21-4-1982) as has been recognised by the Government itself in para 4 of the said notification. It is also seen from the correspondence exchanged between the assessee and the excise department that the excise department did not accept the basis of computing the production of sugar during the base period. As stated earlier, it was the case of the assessee in the Writ petitions that the notifications themselves recognised the distinction between the years where production is nil and the years where there was some production. When the very basis of the notifications was questioned by the assessee and resisted by the excise department we find it difficult to accept the submission made by the learned departmental representative Shri Biswas that there was no substantive dispute between the assessee and the excise department and that the dispute is really one of quantification only.

17. The Special Bench of ITAT, Pune Bench in the case of Shri Someshwar Sahakari Sakhar Karkhana Ltd. (supra) was concerned with a somewhat similar issue. The facts of the case are that the assessee was a manufacturer of sugar and had to sell part of its production, known as levy sugar,' to the Government at the price fixed by the Government from time to time. The price was originally fixed at Rs. 156.99 per quintal but was subsequently modified to Rs. 140.31. The assessee filed a Writ petition asking for higher price because of rise in costs. The Writ petition was admitted by the High Court which also stayed the operation of the Government order fixing the price at Rs. 140.31 per quintal by a consent order. The Court permitted the assessee to receive the price of Rs. 156.99 per quintal pending final determination by the Court. The assessee was also directed by the Court to furnish a bank guarantee for the amount of, difference between Rs. 156.99 and Rs. 140.31. The amount collected by the assessee during the accounting year relevant to the assessment year 1975-76 was Rs. 25,27,126. This amount was credited to 'sugar sales suspense account' and not to the sales account. The amount was added as income by the ITO and also upheld by the CIT(Appeals). While disposing of the appeal by the assessee, the Special Bench of the Tribunal held that the payments received by the assessee under the orders passed by the Hon'ble High Court pending final adjudication of the dispute about the additional price to be paid for the levy sugar did not partake the character of income. It was further held that the nature of the right of the assessee (before the S.P.L. Bench) was precarious in the sense that the excess amount received by the assessee under orders of the Hon'ble High Court, pending final adjudication of the dispute, would have to be refunded by the assessee if ultimately the Court decides against it. The Special Bench further pointed out that what the assessee received under the orders of the Court was only a provisional or interim receipt pending final decision of the Court on the price payable to the assessee. It was finally held that the amount did not have an element of revenue or income till the final decision of the Court was available.

18. We may now refer to the decision of the Supreme Court in Hindustan Housing & Land Development Trust Ltd.'s case (supra) which affirmed the decision of the Calcutta High Court in CIT v. Hindusthan Housing & Land Development Trust Ltd. [1977] 108 ITR 380. This was a case dealing with compulsory acquisition of land.

Certain lands belonging to the company were compulsory acquired by the State Government. The Land Acquisition Officer awarded a particular sum as compensation. The award was enhanced by the Arbitrator on appeal by the company. Thereafter, the State Government preferred an appeal to the High Court against the enhancement made by the Arbitrator. Pending the appeal, the State Government was directed to deposit in the Court the additional compensation of Rs. 7,36,691. The company was permitted to withdraw the amount upon the condition that it should furnish a security bond for refunding the amount in the event of appeal of the State Government being allowed. The Company received the amount after furnishing a bank guarantee and credited the same to the Suspense Account. The question was whether the amount was taxable in its hands as income. The Calcutta High Court while disposing of the matter at the instance of the Commissioner of Income-tax and while dealing with the assessee's claim that the enhanced compensation withdrawn by the assessee from the Court by furnishing bank guarantee was not its income, held as follows :- With regard to the enhanced amount which was subsequently fixed by the order of the arbitrator, the said amount cannot be said to be a determinate amount as the said amount is now pending appeal in the High Court. The enhanced amount may be affirmed by the High Court, may be reduced by the High Court or the entire enhanced amount may be disallowed. In the instant case the claim for the said further amount is in jeopardy and the right of the assessee to receive any further amount is also clearly unsettled. Unless the question of payment of any enhanced compensation is decided and the amount of enhanced compensation becomes determinate and payable, the said amount cannot, in our opinion, be said to accrue or arise. The further amount awarded by the arbitrator is in reality at this stage the subject-matter of a mere claim or an assertion on the part of the assessee to receive the said amount, but the said claim has yet to be accepted by the court. The facts that the assessee was allowed to withdraw the said amount after furnishing the security bond, does not, in our opinion, alter the position and does not make the amount of compensation either determinate or payable." [Hindusthan Housing & Land Development Trust Ltd. 108 ITR 380, at page 394.] 19. Against the decision of the Calcutta High Court the Commissioner of Income-tax, West Bengal-II, Calcutta, filed an appeal to the Supreme Court. The Supreme Court upheld the

judgment of the High Court and dismissed the appeal. In course of its judgment the Supreme Court decision in *E.D. Sassoon & Co. Ltd. v. CIT* [1954] 26 ITR 27 and held that unless and until there is credited in favour of the assessee a debt owed by somebody it cannot be said that he has acquired right to receive the income or that the income has accrued to him. Referring to the decision of the Gujarat High Court in *Topandas Kundanmal v. CIT* [1978] 114 ITR 237, the Supreme Court observed that it was only on final determination of the amount of compensation that right to such income in the nature of compensation would arise or accrue and till then there was no liability in praesenti in respect of the additional amount of compensation claimed by the owner of the land. The Court further pointed out that there was a clear distinction between the cases where the right to receive payment is in dispute and it is not a question of merely quantifying the amount to be received and cases where the right to receive payment is admitted and the quantification only of the amount payable is left to be determined in accordance with settled or accepted principles. Mr. Biswas, learned departmental representative, sought to distinguish the decision of the Supreme Court in *Hindustan Housing & Land Development Trust Ltd.'s case*(supra) by saying that it dealt with the case of compensation payable on acquisition of land and that the principle laid down therein would not apply to the present case. We fail to see any distinction in principle.

The Supreme Court held that it was only when a dispute is finally adjudicated upon that the rights of parties can be said to have crystallised. Only then income can be said to arise or accrue. It follows that any payment made under interim orders of the Court or the Tribunal can only be received as money or advance, subject to the condition that it should be refunded or returned if the recipient's claim is not ultimately upheld by the Court or Tribunal. The observations of the Supreme Court, in our view, are wide enough to cover cases of the present type also, and if we keep in mind the basic principle on which the decision rested there can be no doubt as to its application to different sets of facts. Even on facts, the decision bears close similarity to the present case. We, therefore, do not see any scope for distinction. In our view, the ratio of the said decision is equally applicable to the case before us.

20. Mr. Biswas, thereafter, stressed that since the assessee had, admittedly, adopted the cash system of accounting for the excise duty relief, the receipt was taxable in the assessment year 1985-86 when it was received. While it is undoubtedly true that under the cash system of accounting, income is taxable in the year in which it is received, it is equally true that the receipt should be of 'Income' and not merely of money. It is axiomatic that all receipts are not income [see CIT v. Shoorji Vallabhdas & Co. [1962] 46 ITR 144(SC) at page 148]. This principle is enshrined in the Income-tax Act itself (see Section 5(1) of the Act which defines the ambit and scope of total income). In order that a particular receipt is to be brought to tax as income it must be established that the receipt possesses all the characteristics of income. The burden of proving that the amount is taxable because it was received in the year of account lies upon the department [please see the decision of the Supreme Court in CIT v. Bikaner Trading Co. Ltd. [1970] 78 ITR 12]. In our view, the Assessing Officer has not discharged the burden.

21. At one stage of his arguments Mr. Biswas expressed concern that if the receipt is not treated and brought to tax as income for the assessment year 1985-86, the Assessing Officer will be helpless when the Court ultimately decides the dispute in favour of the assessee. He pointed out that the balance of convenience would suggest that the receipt be brought to tax in the assessment year 1985-86 subject to the stipulation that if ultimately the amount is directed by the Court to be repaid or refunded by the assessee the same would be allowed as deduction in the year of such repayment. This argument is one of convenience. A receipt can be brought to tax only if it is found, on a proper analysis of the nature thereof and the rights of the parties to the dispute, to be income and not merely because it would be convenient to assess it in a particular year. We are unable to accept this submission of the learned departmental representative.

22. In view of the foregoing discussion, we are of the opinion that the excise duty rebate of Rs. 26,13,819 received by the assessee during the accounting year relevant to the assessment year 1985-86 was rightly directed by the CIT(Appeals) to be excluded from the assessment.

23. to 31. [These paras are not reproduced here as they involve minor issues.]

