* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

(ITA 258/2009)

% *Date of Decision: August 5,2010*

ITA 258/2009

COMMISSIONER OF INCOME TAX **..... Appellant**
Through Ms. Rashmi Chopra, Advocate

Versus

TRIVENI ENGINEERING & INDUSTRIES LTD. **..... Respondent**
Through Mr. Ajay Vohra, Advocate with
Mr. Kavita Jha, Advocate &
Ms.Akansha Aggarwal, Advocate.

CORAM :-

HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MS. JUSTICE REVA KHETRAPAL

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J *(Oral)*

For orders, see ITA 280 of 2008.

(A.K. SIKRI)
JUDGE

(REVA KHETRAPAL)
JUDGE

AUGUST 5, 2010
skb

* IN THE HIGH COURT OF DELHI AT NEW DELHI

ITA 235/2008,ITA 266/2009
ITA 258/2009,ITA 236/2008
ITA 280/2008

% *Date of Decision: August 5,2010*

(i) ITA 280/2008

COMMISSIONER OF INCOME TAX ..... **Appellant**
Through Ms. Rashmi Chopra, Advocate

Versus

TRIVENI ENGINEERING & INDUSTRIES LTD. ..... **Respondent**
Through Mr. Ajay Vohra, Advocate with Mr. Kavita Jha, Advocate & Ms.Akansha Aggarwal, Advocate.

(ii) ITA 235/2008

COMMISSIONER OF INCOME TAX ..... **Appellant**
Through Ms. Rashmi Chopra, Advocate

Versus

TRIVENI ENGINEERING & INDUSTRIES LTD. ..... **Respondent**
Through Mr. Ajay Vohra, Advocate with Mr. Kavita Jha, Advocate & Ms.Akansha Aggarwal, Advocate.

(iii) ITA 266/2009

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Through Ms. Rashmi Chopra, Advocate

Versus

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Through Mr. Ajay Vohra, Advocate with Mr. Kavita Jha, Advocate & Ms.Akansha Aggarwal, Advocate.

(iv) ITA 258/2009

COMMISSIONER OF INCOME TAX ..... **Appellant**
Through Ms. Rashmi Chopra, Advocate

Versus

TRIVENI ENGINEERING & INDUSTRIES LTD. ..... Respondent
Through Mr. Ajay Vohra, Advocate with Mr. Kavita Jha, Advocate & Ms.Akansha Aggarwal, Advocate.

(v) ITA 236/2008

COMMISSIONER OF INCOME TAX ..... Appellant
Through Ms. Rashmi Chopra, Advocate

Versus

TRIVENI ENGINEERING & INDUSTRIES LTD. ..... Respondent
Through Mr. Ajay Vohra, Advocate with Mr. Kavita Jha, Advocate & Ms.Akansha Aggarwal, Advocate.

CORAM :-
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MS. JUSTICE REVA KHETRAPAL

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J *(Oral)*

1. These appeals pertain to same assessee namely Triveni Engineering and Industries Ltd. Most of the issues raised in these appeals are identical. It is for this reason; these appeals were clubbed and heard together. However, we propose to discuss the issues which were raised separately.

ITA 280/2008 (Assessment Year 1995-96)

2. In this appeal we are concerned with the assessment year 1995-96. Following issues are raised by the revenue in this appeal.

"1.Whether the ITAT was correct in deleting the disallowance made by the AO u/S 37(2) by treating the expenses of Rs.17,09,463/- due to hospitality expenses and sale promotion expenditure to be in the nature of entertainment?

2.Whether ITAT was correct in law in deleting the addition of Rs. 7,87,389/- on account of selling commission?

3.Whether the ITAT was correct in law in deleting the disallowance of Rs.18,01,136 made by the IO on account of provision made for contribution towards approved gratuity fund u/s 40A (7) of the Income Tax Act?

4.Whether the ITAT was correct in law in allowing depreciation on assets in excess of 100% due to amalgamation despite provisions of 4th proviso to Section 32(1) which is clarificatory in nature having retrospective effect?

5.Whether the order of ITAT was perverse as it has ignored the relevant facts on records and provision of law?

3. In so far as question no.3 is concerned, learned counsel for the assessee has drawn our attention to the judgment dated 7th November, 2007 passed by this Court in ITA 423/2007 titled ***CIT*** Vs. ***Be chtel India (P) Ltd.*** In that case, while dealing with the interpretation of Section 40A (7) and Section 43A of the Act, the court was of the opinion that no substantial question of law arises as is clear from the following discussion:

"Further, we are in agreement with the Tribunal that Section 40A (7) (b) of the Act will have an overriding effect over Section 43B of the Act. In the first place Section 40A (1) is an unequivocal non-obstante clause and since Section 40A (7) (b) specifically permits a deduction of a sum constituting the provision towards an approved gratuity fund, the said provision will take precedence over a comparatively general provision like Section 43B. Secondly Section 40A (7) (a) which disallows deduction of any provision of gratuity to employees on their retirement is itself

made subject to Section40A (7) (b) which allows such deduction as long as it is made towards an approved gratuity fund. There is no dispute that in the instant case the provision made is towards contribution to an approved gratuity fund. Therefore, the claim by the Assessee for deduction on this score was clearly justified. We are accordingly of the opinion that no substantial question of law arises in this regard as well."

Following that judgment we are of the opinion that this question of law, as proposed by the revenue, does not call for any consideration.

4. In so far as question no.4 is concerned, the issue is as to whether two companies can avail depreciation in respect of the same machinery, which belonged to the first company for a certain period during the final year and thereafter was sold to the other company which also used the same machinery for the remaining period. Section 32 of the Act enables the assessee to claim depreciation on the machinery used by it. Two conditions are to be fulfilled namely; (a) the assessee was the owner of the plant and machinery in question;(b) it had in fact used the same during the financial year.

This provision further provides that in case the plant and machinery is used for more than 180 days during the financial year, 100% depreciation at the rates provided in the Act shall be admissible. If the period for which machinery is used less than 180 days, then depreciation is allowable @ 50% of the prescribed rate. In the instant case the plant and machinery on which depreciation was claimed was initially owned by M/s Triveni Engineering Works Ltd. in the relevant financial year w.e.f. 1st April to 30th

September, 1994. This company was merged with the assessee compan on 1st October, 1994 and all the assets and liabilities of the said company hitherto held became the assets and liabilities of the assessee company. This amalgamation was the result of the scheme amalgamation propounded and approved by the Company Judge of this Court. Erstwhile Ms/ Triveni Engineering Works Ltd. claimed depreciation on plant and machinery for the use of it from 1st April, 1994 to 30th September, 1994. Since the period was more than 180 days, the deprecation was claimed at 100% of the rate prescribed. Same very machinery came to be used by the assessee from 1st October, 1994 to 31st March, 1995. Since this period also exceeds 180 days, the assessee company also laid a claim for entire 100% . The question in these circumstances which fell for consideration was as to whether the total depreciation claimed by both the companies for the same financial year could exceed 100%. The assessee submitted that since it was fulfilling the twin conditions i.e. ownership of the machinery and its use for more than 180 days, it was entitled to depreciation at the said rate irrespective of the fact that the erstwhile owner which has used the same plant and machinery upto 30th September, 1994 had made the claim in similar manner. The Assessing Officer, however, did not accept this plea of the assessee as he was of the opinion that total depreciation in a financial year could not be in excess of 100 %. The Tribunal, however, has accepted the contention of the assessee and allowed the depreciation at the rate prescribed.

5. It cannot be disputed that both Triveni Engineering Works Ltd. an the assessee company in their own respective rights made claim of depreciation at the aforesaid rate and became eligible for that depreciation after fulfilling the condition laid down in Section 32 of the Act. This Section, in the relevant assessment year did not provide for the aforesaid contingency which arises in the instant case namely whether there can be depreciation of assets in excess of 100 per cent due to amalgamation. However, fourth proviso to Section 32(1) was added by the Finance Act, 1996 w.e.f 1st April, 1997. This proviso reads as under:-

> "Provided also that the aggregate deduction, in respect of depreciation of buildings, machinery, plant or furniture allowable to predecessor and the successor in the case of succession, referred to in section 170 or the amalgamating company and the amalgamated company in the case of amalgamation, as the case may be, shall not exceed in any previous year the deduction calculated at the prescribed rates as if the succession or the amalgamation had not taken place, and such deduction shall be apportioned between the predecessor and the successor, or the amalgamating company and the amalgamated company, as the case may be, in the ratio of the number of days for which the assets were used by them."

6. Learned counsel for the revenue submits that the aforesaid provision clearly mandates that the total depreciation allowable to amalgamating company and amalgamated company would not exceed the deduction calculated at the prescribed rate in any previous year. Her submission is that even if this proviso was inserted by amendment carried out w.e.f.1st April, 1997 it was only clarificatory in nature, inasmuch as the grant of

depreciation more than the prescribed rates should not be permissible. Learned Counsel for the assessee, on the other hand, has drawn our attention to the memorandum explaining the provisions in the Finance (2) Bill, 1996 qua this amendment namely insertion of proviso fourth to Section 32 (1). Following explanation/justification is provided therein vide clause 14(b):-

> "(b) **Depreciation in case of succession and amalgamation**:
>
> The existing provisions provide for depreciation allowance on assets acquired by an assessee during the previous year and which are put to use for the purposes of business or profession for a period of less than one hundred and eighty days in a previous year. It is provided that the depreciation allowance in such cases will be restricted to fifty per cent of the amount calculated at the prescribed rates. In the cases of succession in business and amalgamation of companies, the predecessor in business and the successor or amalgamating company and amalgamated company, as the case may be, are entitled to depreciation allowance on the same assets, which in aggregate exceeds the depreciation allowance admissible for a previous year at the prescribed rates. It is proposed to restrict the aggregate deduction for this allowance in a year to the deduction computed at the prescribed rates and apportion the allowance in the ratio of the number of days for which the assets were used by them."

The aforesaid explanation is a complete answer to the argument raised by the learned counsel for the revenue and negates the submission that the proviso was introduced only as a clarificatory measure.

7. It is clear from the reading of the aforesaid explanation that the legislature accepted the position that as per the existing law, amalgamating company and amalgamated company were entitled to depreciation on the

same assets which in aggregate exceeds the depreciation allowanc admissible for a previous year at the prescribed rates. The purpose of the said proviso is to restrict the aggregate deduction at the prescribed rates and apportion thereof between the amalgamating company and amalgamated company in the ratio of the number of days for which the assets were used by them. This explanation, thus, is a recognition of the fact that in the given circumstances, as happened in the present case, there could be a situation where in a given financial year, the total depreciation allowance admissible in favour of amalgamating company and amalgamated company could exceed the aggregate depreciation allowance admissible for a previous year at the prescribed rate. Since this provision is made applicable only w.e.f. 1st April, 1997, this will not apply to the case at hand which relates to the assessment year 1995-96.

8. That fact that in the absence of fourth proviso this was the situation prevailing would be clear from the judgment of Madras High Court in ***A.M. Ponnurangam Mudaliar*** *Vs.* ***Commissioner of Income Tax And Another***, which is stated in the following words:-

> "I have considered the rival submission I this regard. There is no difficulty in accepting the contention of learned counsel for the assessee. Though the term "owned by the assessee" is used in Section 32(1) it does not mean that the assessee should have remained the owner of the asset in question for the entire previous year in question. Admittedly, the assessee, in this case was the owner of the abovesaid buses during the previous year, that is, from April, 1979, to June, 30, 1979, though not for 365 days for a year. In fact, since the business itself was closed on June, 30th 1979, the assessee had been fully using the asset for the business during the entire

accounting year of the abovesaid three months ending with June 30, 1979.

The object of the Legislature in granting depreciation allowance under section 32 of the Act is to give due allowance to the assessee for wear and tear suffered by the asset used by him in his business so that the net income (total income) is duly arrived at. Further, the enactment read with the abovesaid rule 5, as it existed at the relevant point of time, goes to the extent of granting such allowance even where the asset in question is used for the purpose of the business at any time "during the previous year". In other words, at the relevant point of time, even if the asset has been used for a single day, in the business of the assessee, depreciation allowance, in full, was given under Section 32(1) of the Act. When such is the case, it cannot be said that the assessee cannot be granted the said depreciation allowance if he is not the owner for the entire period of the previous year or if he is not the owner on the last day of the previous year in question. There is no such stipulation in the Act.

In CIT V. S.K. Sahana and Sons {1946} 14 ITR 106 (Pat), also, full depreciation was allowed even though the assessee was the owner during the previous year only for 5 ½ months. In the said decision Fazl Ali C.J. and Manohar Lall J. made the following significant observation (page 108).

> " it is not disputed that the assessee was the owner of the building, machinery, etc. during the accounting year. I do not see any provision in the Act which authorizes an apportionment of depreciation on the assessee having sold the machinery or plant during the accounting period....I am of the opinion that there is no such provision in the Act as would justify the view that if the machinery is not the property of the assessee throughout the year then the period for which it was the property of the assessee should be calculated and depreciation should be allowed in proportion to such period... It was contended by the learned standing counsel that the acceptance of this view is mot inequitable as it would enable both the transferor and the transferee to claim full deduction for the

depreciation although the machinery, etc., have been used by either of them only for a broken period in the same year. But it has been rightly pointed out that equity and taxation are as poles as under and the court cannot invoke an equitable rule in the construction of a taxing statute."

9. The High Court of Allahabad, in ***CIT Vs. Bombay Bhushan Press***, *143 CTR 52* and the Kerala High Court in ***CIT Vs. GEO Tech Construction Corporation,*** *244 ITR 45* held same view while interpreting the un-amended provision. Therefore, we answer this question in affirmative i.e. in favour of the assessee and against the revenue.

10. Coming to question no.1 as proposed by the Department in this appeal relates to disallowing certain expenditures due to hospitality and sale promotion expenses to be in the nature of entertainment. The facts show that in the profit and loss accounts of the assessee, expenses of Rs. 3566178.08 towards hospitality were debited and in respect of sale promotion, amounting to Rs.535471.13 expenses were debited. Against this, the assessee had deducted a sum of Rs. 1231763.74 which were the expenses under different heads but not in the nature of entertainment. **Thus, total expenses in the nature of entertainment were shown as Rs.2869885.47, 35% of which amounting to Rs.990016.21 were attributable towards employees participation were adjusted thus leaving a balance of Rs. 1879869.26.** Since an amount of Rs. 20222.2 which pertain to TBG Delhi was wrongly omitted to be considered in the consolidated tax audit report, this amount was also deducted from the aforesaid balance and thus net amount considered for disallowance for the

purpose of hospitality and sale promotion was worked out by the assessee @ Rs. 1859647.06. This amount was offered by the assessee itself for taxation. It appears that the mistake which was added by the Assessing Officer was to make further deduction of Rs. 1111147.07. This is clear from the following statement:-

"However A.O. has disallowed further in the following manner:

Total Expenses Debited to P & L A/c

Hospitality	3033633.00
Sales Promotion	535471.06
	3569104.13

(Note: Amount of hospitality wrongly taken as above instead of Rs. 3566178)

Less: Hospitality & States promotion considered for disallowance by us	1859647.06
Balance also considered as Entertainment by A.O.	1709457.07
Less: 35% attributable towards employee participation Allowed by A.O.	598310.00
Additional Expenses Considered for disallowance	1111147.07

Note: As would be observed, the expenses not considered by us are Rs. 1231764 and not Rs. 170945/- as computed by the AO on erroneous calculations. As against Rs. 1231764 not considered by us, except for Rs. 130153, the details of which are presently not available for the rest details and reasons are given as above."

11. The Income Tax Tribunal found the aforesaid error and thus deleted this addition. It's a pure finding of fact which relates to calculation of the

amount offered for hospitality and sale promotion expenses as income and therefore, no question of law arises.

12. The second question of law which is raised by the revenue is as under:-

> "Whether ITAT was correct in law in deleting the addition of Rs.7,87,389/- on account of selling commission?"

13. The genesis of this question of law is rooted in the following factual back ground. The assessee had claimed deduction amounting to Rs. 70,45,627/- on the ground that this was the amount paid by it as commission to various agents. Out of this amount, a sum of Rs. 18,59,846/- was the payment towards Sugar Unit-brokerage to Sugar Artiyas and there was no dispute about the same. Thus the dispute arose in respect of balance amount of commission allegedly paid by the assessee i.e. Rs. 51,17,889/-, details of which are as under:-

"Engg. Unit, Naini	Rs. 28,938/-
Engg. Unit, Bangalore	Rs. 2,90,250/-
Engg. Unit, Mysore	Rs. 12,077/-
SPM Division	Rs. 44,32,250/-
REBG Division	Rs. 2,96,752/-
TSSD, Bangalore	Rs. 57,622/- Rs. 51,17,889/-"

14. The Assessing Officer disallowed this payment as the assessee had failed to produce the confirmation from the various parties to whom this commission was paid.

15. Before the CIT (A), the assessee could produce the confirmation letters from one M/s Om Refrigeration Pvt. Ltd. to whom commission of Rs.

41,30,500/- was paid. It also produced confirmation from M/s Pentago Sales Corporation to whom commission of Rs. 2,00,000/- had been paid. In view of this confirmatory letters filed by the assessee, the CIT (A) allowed the payment of commission to the extent of Rs.41,30,500/- and balance commission of Rs. 7,87,389/- was disallowed on the ground that it was not verifiable in the absence of confirmation. The Income Tax Appellate Tribunal has allowed the balance commission also. A perusal of the order of the Income Tax Appellate Tribunal would show that the assessee had given all the relevant details such as names and addresses of the concerned five agents as well as their GIR numbers before the Assessing Officer and also the documentary evidence in the form of agreements as well as invoices issued by the said agents. The Tribunal also took note of the argument of the assessee that the payment of commission to these agents was made by account payee cheques. On this basis, the Tribunal was of the view that the assessee was able to substantiate the payment from relevant documents and merely because confirmatory letters could not be filed by the assessee was not a valid ground to reject the claim. We may reproduce the relevant discussion in the order of the Tribunal on this aspect:-

> "After considering the rival submissions and perusing the relevant material on record, it is observed that all the relevant details such as names and addresses of the concerned five agents as well as their GIR numbers were furnished by the assessee before the authorities below and even the documentary evidence in the form of copies of agreements as well as invoices issued by the said agents was also filed by the assessee. It was also pointed out on behalf of the assessee company before the authorities below that all the payments on account of commission were paid to the said

> agents by account payee cheques and the practice of availing series of such agents on commission basis to procure the business prevalent in the trade was also brought to the notice of the authorities below. The claim of the assessee of having paid the commission to the said five agents for the purpose of its business thus was clearly supported and substantiated by the relevant evidence and without finding any fault with the same or without making any enquiry whatsoever with the concerned partiers, the Assessing Officer appears to have made the disallowance of commission amounting to Rs.51,17,889/- for want of confirmation letters which was sustained by the learned CIT(A) to the extent of Rs. 7,87,389/- for the same reasons. In our opinion, when its claim for expenditure incurred on account of payment of commission was duly supported and substantiated by the assessee company by furnishing the relevant details as well as by producing the relevant documentary evidence, there was no justification in the action of the learned CIT (A) to sustain the disallowance made by the AO on this count merely because the confirmation letters of the concerned three agents could not be filed by the assessee. We, therefore, delete the disallowance made by the AO and sustained by the learned CIT (a) on account of commission expenses and allow ground no.5 of the assessee's appeal."

16. The Tribunal may be right to the extent that the fact that confirmatory letters from the parties were not produced could not be a ground to reject the claim of payment of commission if there was otherwise sufficient evidence to substantiate and proved that the payment was actually made. The Tribunal may also be right in observing that the names and addresses of the concerned agents, their GIR numbers as well as the plea that the payments were made by account payee cheques could form sufficient material to substantiate the payment. However, merely by taking note of this contention of the assessee, the Tribunal could not have itself allowed the claim of the assessee.

17. As pointed out above, the Assessing Officer did not go into th veracity of the aforesaid documents produced by the assessee as the Assessing Officer rejected the claim only on the ground that confirmation letters were not filed. If that approach of the Assessing Officer was incorrect, after stating that principle it was incumbent upon the Tribunal to remit back the matter to the Assessing Officer for proper verification of the details and the documents which were furnished by the assessee before the Assessing Officer. In the absence of said exercise and also the satisfaction about the fact as to whether circumstances were rendered by these agents or not, claim could not have been allowed straightway. We are, therefore, of the opinion that in so far as this issue is concerned, matter needs to be remitted back to the Assessing Officer for verification of the details of names and addresses of the agents furnished by the assessee including their GIR numbers and also to verify as to whether payments were made by account payee cheques and the services were availed of. We make it clear that the Assessing Officer was not right in rejecting the claim merely because confirmatory letters were not filed. We also make it clear that if the assessee is able to prove the genuineness of the aforesaid documents, the Assessing Officer shall allow the claim.

ITA 236/2008 (Assessment Year 1996-97)

18. Three substantial questions of law are raised in this appeal which are as under:-

> "(i) Whether the ITAT was correct in deleting the addition of Rs. 4,71,109/- by the Assessing Officer

and disallowing expenditure allegedly incurred by the Assessee company on gifts and presents?

(ii) Whether the ITAT was correct in law in deleting the disallowance of Rs. 45,25,002/- made by the Assessing Officer on account of provisions made for contribution towards approved gratuity fund u/S 40A (7) of the Income Tax Act, 1961?

(iii) Whether the ITAT was correct in law in deleting the addition of Rs. 4,42,27,272/- account of selling commission?"

19. It is conceded by the learned counsel for the revenue that first question stands answered against the revenue in ITA 126/2008 which pertains to the assessment year 1994-95 in respect of the same assessee and the aforesaid appeal was dismissed by this Court vide orders dated 21.8.2009 holding that no substantial question of law arises.

20. Second question is the same as question no.3 of ITA 280/2008 which has been answered against the revenue.

21. Third question is the same as question no.2 of ITA 280/2008. This is also remitted back to the Assessing Officer for conducting the same kind of verification as directed in ITA 280/2008.

ITA 235/2008 (Assessment Year 1997-98)

22. Following four substantial question of law are proposed in this appeal by the revenue. The first question is the same as question no.1 of ITA 280/2008 in respect of which it is already opined that this question does not arise as stands covered by the earlier judgment.

23. In so far as question no.2 is concerned, it is the same as questio no.1 of ITA 236/2008 and is covered by orders dated 21.8.2009 passed in the ITA 126/2008, in favour of the assessee.

24. Question no.3 as proposed is the same as question no.3 of ITA 280/2008 and is covered by the earlier judgment of this Court as noted therein. We thus rendered that no such question of law arises.

25. Question no.4 is the same as question no. 2 of ITA 280/2008 and this question of law is disposed of in terms of same directions as given in question no.2 of the said appeal.

ITA 258/2009 & ITA 266/2009 (Assessment Year 1998-99)

26. Both these appeals relate to the same assessment year. Though three questions of law are formulated, all these three questions pertain to the payment of commission which is the question of law no.2 in ITA 280/2008. The decision therein shall govern these appeals as well.

27. These appeals are disposed of accordingly.

(A.K. SIKRI)
JUDGE

(REVA KHETRAPAL)
JUDGE

AUGUST 5, 2010
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