REPORTABLE

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

{ITR No. 21 of 1991}

% Judgment Delivered On: July 28 ,2010

THE COMMISSIONER OF INCOME TAX . . . APPELLANT

.

THROUGH: Ms. Sonia Mathur, Advocate

VERSUS

M/S SRAYA INDUSTRIES P. LTD. . .RESPONDENT

THROUGH: Mr.Krishnan, 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. The following question is referred by the Tribunal for the opinion of this Court:-

> "Whether on the facts and in the circumstances of the case, the Tribunal was right in law to held that the assessee is entitled to investment allowance u/s 32A subject to other conditions being satisfied?"

This question is referred in the application of the revenue made under Section 256 (1) of the Act.

2. The matter relates to the claim of investment allowance on plant and machinery used by the assessee. The assessee had claimed that it was eligible for the deduction under Section 32A (2) (b) (iii) of the Income Tax Act which, *inter alia*, provides for investment allowance in respect of

and for the purpose of business of construction and manufacture production of any article or thing not being an article or thing specified in the list in the Eleventh Schedule. Item 1 of the Eleventh Schedule reads as under:-

"Beer, wine and other alcoholic spirits"

3. The assessee is dealing both in industrial spirits as well as items like Indian Made Foreign Liquor (IMFL), Country liquor etc. As per the details furnished by the assessee, the Assessing Officer confirmed that the sale of denatured spirit during the year amounted to Rs. 68,76,322/- only whereas in respect of rectified spirit and country spirit, the sale amounted to Rs.61,29630/- and Rs. 6592665/- respectively. The Assessing Officer was of the view that since the assessee was manufacturing rectified spirit and country spirit i.e. IMFL, its case was fully covered by item 1 of Eleventh Schedule and on that basis he disallowed the claim of the assessee for investment allowance. The CIT (A) sustained the order of the Assessing Officer. However, the Income Tax Appellate Tribunal, in further appeal preferred by the assessee accepted the case of the assessee and directed that the assessee be allowed investment allowance.

4. At this stage, we may take note of the rival contentions being advanced by the parties before the authorities below and the manner in which these were considered by the CIT (A) as well as ITAT. The case of the revenue was that the moment the assessee starts manufacturing alcohol which is for human consumption entry one of Eleventh Schedule would be attracted and it would disqualify the assessee from claiming the investment

on the other hand was that mere production of IMFL would not debar the assessee from claiming the investment allowance. In order to attract the disability, it was also necessary to show that the said production of IMFL was the main activity of the assessee. To put it otherwise, the assessee relied upon sub Section 2A of Section 32A of the Act. Its submission was that deduction under sub-section (1) shall not to be denied in case machinery or plant installed and used 'mainly' for the purpose of the business of construction, manufacture or production of any article or thing not being an article or thing mentioned in Eleventh Schedule, by reason only that such machinery or plant is also used for the business or construction manufacture or production of any article or thing specified in the said list. Thereafter, the CIT (A) went a step further. It was held by it that even the industrial spirit manufactured by the assessee would come within the ambit of entry 1 and that was a reason that CIT (A) maintained the order of the Assessing Officer. The Income Tax Appellate Tribunal, on the other hand, was of the opinion that since the main purpose for which the machinery and plant installed by the assessee was utilized for manufacturing of industrial spirit and this aspect was not disputed, the assessee would be entitled to the investment allowance.

5. We have already reproduced above entry one which mentions "beer, wine and other alcoholic spirits". The first aspect that would require determination would be as to whether the manufacturing of industrial spirit would come with the ambit of aforesaid item. The learned counsel for the assessee has argued that the words "other

meant for human consumption and, therefore, applying the maxim *noscit a sociis,* the expression "other alcoholic spirits" is to be interpreted. When interpretation is given effect in this manner, it is only those alcoholic spirits which are meant for the human consumption that would qualify to be included in entry 1 of the 11th Schedule. To buttress this submission, learned counsel relied upon the judgment of Punjab and Haryana High Court in the case of ***Commissioner of Income-Tax*** *Vs.* ***Sangrur Vanaspati Mills Ltd.*** *311 ITR 345.*

6. We are in agreement with the aforesaid submissions of learned counsel for the respondent. The assessee is manufacturing spirits as well as IMFL spirits. The legislature, while adding entry 1 to Schedule 11th never contemplated inclusion of industrial spirits. It is well known that industrial spirits are mainly used for manufacturing purposes and are not meant for human consumption. The intention cannot be to deny the investment allowance when the machinery is used for said purpose. It is only when the machinery is used for the alcohol which is consumed by the human beings, the bar would be attracted. Reason presumably is that the consumption of alcohol is not treated as good for health and, therefore, this provision distinguishes grant of the investment allowance to such industries which are manufacturing alcohol meant for human consumption.

7. In ***Sangrur Vanaspati Mills Ltd.*** (supra), the Punjab and Haryana High Court was concerned with the interpretation of word "soap" mentioned in entry 4 of the 11th Schedule. Entire entry 4 is worded as

8. The question which arose for our consideration in that case was as whether washing soap would be covered by the expression "soap" occurring in entry 4. The High Court, going by the consideration, held that that the word 'soap' appears alongwith tooth paste, dental cream, tooth powder, the intention was to include only that kind of soap which is meant for human hygiene and, therefore, the expression "soap" in the concerned provision would not include washing soap. The relevant discussion in the said judgment is to the following effect:-

> "We find substance in the contentions raised by counsel for the assessee as against the plea of counsel for the Revenue. The principle noscitur a sociis is well accepted principle for interpretation of entries in the taxing statute. Any commodity mentioned in any entry gets its colour from the commodities or things mentioned either before or after the particular item for the purpose of assigning the same a correct meaning. In the present case, the above principle is squarely applicable. In our view, the washing soap manufactured by the assessee will not fall under entry No.4 as it cannot be included in the term soap used in the entry alongwith other items mentioned therein, rather it fits in more under entry No.20 which stood deleted on April 1, 1982."

9. The second aspect which arises for consideration is what would be the position in case the machinery is used for both in manufacture of industrial spirits as well as IMFL, which is the case here. Section 32A allows investment allowance where machinery or plant is used for the purposes which are specified in sub Section 2 thereof. However, at the same time, it also stipulates that where plant and machinery is used for the purposes mentioned in the Schedule 11, such investment allowance would not be admissible. In the present case, the plant and machinery is used for

Section 32A as it relaxes the bar contained in 11th Schedule to some exte

It reads as under:-

> "2A. The deduction under sub-section (1) shall not be denied in respect of any machinery or plant installed and used mainly for the purposes of business of construction, manufacture or production of any article or thing, not being an article or thing specified in the list in the Eleventh Schedule, by reason only that such machinery or plant is also used for the purposes of business of construction, manufacture or production of any article or thing specified in the said list".

10. It is clear from the reading of the aforesaid provision that the deduction admissible under sub Section (1) of Section 32A of the Act is not to be denied in case plant and machinery is mainly used for the purposes of business of construction, manufacture or production of any article or thing not being an article or thing specified in the list in 11th Schedule. That would mean that even if the machinery is partially used for manufacturing of article or thing specified in the list in 11th Schedule, the investment allowance shall still remain admissible and would not be denied if the assessee is able to show that the said plant and machinery is primarily used for the purposes specified in sub Section (2A) of Section 32A of the Act.

11. The judgment of Allahabad High Court in the ***Commissioner of Income Tax & Anr.*** *Vs* ***Radico Khaitan Ltd.,*** *274 ITR 354* would not be of any assistance to the revenue. No doubt, the facts of that case suggest that the assessee was engaged in manufacturing of industrial alcohol, IMFL, country liquor, fertilizers etc. and the High Court held that the investment allowance was not admissible in respect of the plant and machinery

country liquor only. The question with which we are concerned in t present case did not arise for consideration and, therefore, was not addressed at all *namely;* if the same machinery is used both for the purpose of manufacturing of industrial alcohol as well as for manufacture of IMFL and country liquor etc., whether on such plant or machinery, the investment allowance would be admissible. When such a situation arises, sub Section (2A) of Section 32A of the Act would be the governing provision.

12. We are supported in our view from the Circular No. 229 dated 9th August, 1977 issued by the CBDT explaining the amendment in Section 32A of the Act by the Finance Act, 1977. The relevant portion of the said Circular reads as under:-

> "The Finance (No.2) Act, 1977, has substituted sub-clauses (ii) and(iii) of clause (b) of section 32A (2) referred to above by two new sub-clauses. Under the new provision s, investment allowance will be allowed in respect of new machinery or plant installed for the purposes of business of construction, manufacture or production of all articles or things, except certain articles or things of low priority specified in the list in the new Eleventh Schedule inserted in the Income-Tax Act by section 28 of the Finance (No.2) Act, 1977. The list of articles or things contained in the new Eleventh Schedule is giving in Annexure II* to this circular. The disqualification arising from the installation of machinery or plant for the purposes of business of manufacture or production of any article or thing specified in the list in the Eleventh Schedule will, however, not apply in respect of machinery or plant installed in small-scale industrial undertakings, and such machinery or plant will be eligible for investment allowance even though it used for purposes of business of manufacture or production of any article or thing specified in the said list.
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> 13.2 Under new sub-section(8A) inserted in section

> specified in the new Eleventh Schedule, if it considers necessary or expedient so to do.
> 13.3. Sometimes, a machinery or plant installed and used mainly for the purposes of business of construction, manufacture or production of any article or thing not specified in the list in the new Eleventh Schedule may have been partly used for the purposes of business of manufacture or production of any article or thing specified in the said list. As investment allowance is not intended to be denied in such cases, a new sub-section (2A) has been inserted in Section 32A to provide that investment allowance will not be denied by reason only that machinery or plant installed and used mainly for the purposes of business of construction, manufacture or production of any article or thing not specified in the list in the Eleventh Schedule is also used for the purposes of business of manufacture or production of any article or thing specified in the said list."

13. In view of the aforesaid, we are of the opinion that the CIT (A) was not correct when he denied the investment allowance on the ground that even when industrial spirit is manufactured by the assessee, the case would come within the ambit of entry 1 of Schedule 11. The Income Tax Appellate Tribunal has rightly held that if the plant and machinery is mainly used for manufacturing of industrial spirit, the assessee would be entitled to the allowance. The Tribunal, replying upon this interpretation, allowed the investment allowance to the assessee by observing that the assessee was mainly engaged in industrial spirit and it was not disputed. However, there is no discussion in the entire judgment to show that how the assessee was mainly engaged in manufacturing of industrial spirit. Such findings have to be arrived at. The Assessing Officer had not dealt with this aspect. The CIT (A) also refused to deal with this aspect. Though, detailed arguments were advanced by the assessee in support of its

14. In any case, we also find from the order of the Tribunal that t Tribunal had sent back the case to the Assessing Officer with the direction to give the investment allowance to the assessee "subject to other conditions being satisfied" and to determine the admissible claim under Section 32A in respect of plant and machinery installed by the assessee. In such circumstances, while remitting back the case to the Assessing Officer, the Tribunal should have left it for the Assessing Officer to determine as to whether the plant and machinery is mainly used for manufacturing of industrial spirit or not. However, it may not be necessary to give this direction, inasmuch as, we are informed that after the case was remanded back to the Assessing Officer, the Assessing Officer has gone into this exercise and has passed afresh assessment order. We have given a copy of that order and perusal thereof would demonstrate that the Assessing Officer has specifically stated that the main activity of the assessee is to manufacture industrial spirit which is also known as ethyl alcohol and rectified spirit. Thus, when the Assessing Officer, after examining the matter, has arrived at the conclusion that the main activity of the assessee is manufacturing of industrial spirit, it is clear that the assessee would be entitled to the investment allowance. On that basis, the Assessing Officer has also worked out investment allowance afresh to which the assessee is entitled to.

15. Accordingly, we answer the reference in affirmative i.e. in favour of the assessee and against the revenue.

(A.K. SIKRI)
JUDGE