



**Reportable**

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

**ITR 251 OF 1990**

Reserved On: August 12, 2010

% *Judgment Pronounced On: August 26, 2010*

**THE COMMISSIONER OF INCOME TAX**

Through :

**. . . APPLICANT**

Mr. Sanjeev Sabharwal,  
Advocate with Mr. Uppal Saha,  
Adv.

VERSUS

**M/S MODI INDUSTRIES LIMITED.**

Through:

**. . . RESPONDENT**

Mr. Ajay Vohra, Advocate with  
Ms. Kavita Jha and Mr. Shukla,  
Advocates.

**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.**

1. Following four questions were formulated by this Court in the reference petition filed by the department and the Tribunal was directed to prepare and transmit the statement of case based thereupon:-

“1. Whether ITAT was correct in law and on facts in holding that on the amount of salary and perquisites paid to Sh. Umesh Kumar Modi, provisions of Section 40A(5) (c) were not applicable and the case was covered by First Proviso to section 40A(5) (a) of I.T. Act?

2. Whether ITAT was correct in law and on facts in holding that the 10 ton Furnace Division and Steel Unit 'B' constitute new industrial undertaking to enable the assessee to claim deduction u/s 80J of I.T. Act.”



price realized by the assessee on sale of Sugar was not a revenue receipt in hands of assessee and as such not taxable in its hands?.

4. Whether ITAT was correct in law and on facts in holding that assessee is entitled to initial depreciation u/s 32(1) (iv) on the cost of new residential quarters”.

2. In so far as first question is concerned, learned counsel for the assessee has drawn our attention to the judgment of Supreme Court in the case of **CIT Vs. Continental Construction Ltd.** 230 ITR 485 which squarely answered the question in affirmative i.e. in favour of the assessee and against the revenue.

3. Second question relates to the claim of the assessee for deduction under Section 80J of the Income Tax Act in respect of its new unit namely 10 ton Furnance Division and Steel Unit ‘B’. This case pertains to the assessment year 1976-77. Perusal of the order of the Assessing Officer would reveal that for the first time, claim under Section 80J of the Act was made by the assessee in the assessment year 1973-74. The assessee was denied that claim by the Assessing Officer. For this reason, the Assessing Officer denied the claim in this assessment year as well, taking note of the fact that the matter pertaining to 1973-74 was pending before the Income Tax Tribunal.

4. It is a matter of record that the appeal filed by the assessee for the assessment year 1973-74 was allowed by the ITAT. The effect thereof was that the assessee was granted the requisite deduction under Section 80J of the Act for the assessment year 1972-73. The Department has sought reference under Section 256 (1) of the Act which reference application was also rejected by the Tribunal. Likewise, for the assessment years 1974-75 and 1975-76, the claims of the assessee were allowed. The assessee, once given the deduction under Section 80J of the Act is entitled to such a deduction for a period of 5 years. If the assessee has been allowed the benefit of Section 80J in the last



assessment year. We, therefore, answer this issue also in favour of the assessee and against the revenue.

5. As far as question no.3 is concerned, the same arises in the following factual background:-

The assessee had challenged the fixation of price by the Government for sale of levy sugar under the Essential Commodities Act by filing a writ petition in the High Court of Allahabad. The Allahabad High Court granted interim order in favour of the assessee. However, this order was subject to the condition that in case the writ petition is ultimately decided against the assessee, the assessee will have to refund the excess amount charged alongwith the interest to be calculated @ 12.5 per annum. Thus, in the relevant assessment year, the assessee had sold the levy sugar at a price in excess of the price fixed by the government and in this manner calculated the excess amount of Rs. 1,02,037/-. The question is as to whether the receipt of this amount has to be treated as revenue receipt i.e. income at the hands of assessee or it has to be treated as contingent receipt which was the position taken by the assessee in the return filed by it.

6. The writ petition filed by the assessee was ultimately dismissed and the amount in question was refunded by the assessee alongwith the interest. Similar position, in the case of the assessee itself, had arisen in the assessment year 1975-76 also. In that year too, the Tribunal had decided the issue in favour of the assessee holding that the excess price charged by the assessee, while the writ petition was still pending, would not be treated as a revenue receipt in the hands of the assessee company, inasmuch as, the excess receipt was contingent upon the success in the writ petition filed by the assessee. The said decision of the Tribunal was upheld by the High Court of



Allahabad in **CIT Vs. M/s Modi Industries Ltd. Modi Nagar**, ITR 57 of 19

in the following manner vide its decision dated 2.5.2007:-

“So far as the second question is concerned, it is covered by a decision of a Division Bench of this Court in the case of CIT Vs. Dhampur Sugar Mills (2005) 194(TR Reports 170 in favour of the assessee and against the department. No good reason has been shown to us from the department’s side to take a different view. Accordingly, the second question is answered in favour of the assessee and against the department in the light of the aforesaid decision of a Division Bench of this Court.

Reference is disposed of finally.”

7. It is clear from the above that the High Court followed its decision in **Dhampur Sugar Mills** (supra). We have been taken through the said judgment. In that case also, conditional stay order was granted in the writ petition filed by the respondent. The respondent in that case, vide interim order, was permitted to sell sugar at a price different from the price fixed by the government. However, condition was imposed upon the respondent to furnish bank guarantee before the Registrar of that Court in respect of the difference between the price fixed by the Government and the price at which the sugar was actually sold by the respondent. It was also made clear that it would be open to the court to deal with the bank guarantee and pass order as to how the amount is to be distributed at the time of final orders in the writ petition. Keeping in view that it was a conditional order passed by the High Court in the writ petition challenging the fixation of the price levy sugar, the High Court opined that the interim order was not unconditional and as it was hedged with certain condition, the excess price charged would not be treated as revenue receipt/income at the hands of the assessee.

8. We may point out at this stage that the Supreme court in the case of **K.C.P. Ltd. Vs. CIT**, 245 ITR 421 had occasion to deal with such type of



interim order passed by the Andhra Pradesh High Court whereby operation the Notification issued by the Union of India was suspended during the pendency of the writ petition and the assessee was specifically permitted to sell the sugar at the rate prevailing prior to the impugned Notification. Taking note of the fact that no condition was imposed which passing such an order, the Supreme Court held that receipt of the excess amount would be treated as revenue receipt as it was not hedged with any condition. The Supreme Court specifically drew distinction between the interim orders passed by the Courts where the stay orders were not hedged with conditions and the orders which were conditional like the case of the assessee here and this distinction is discussed by the Supreme Court in the following words:-

“Learned senior counsel for the assessee-appellant relied on three decisions by different High Courts and submitted that in identical facts and circumstances the price of sugar realized in excess of the levy price was held not to be a trading receipt of the assessee and hence not liable to tax. The decisions so relied on are: CIT Vs. Mysore Sugar Co. Ltd. (1990) 183 ITR 113 (Kar); CIT Vs. Seksarai Biswan Sugar Factory Pvt. Ltd. (1992) 195 ITR 778 (Bom) and CIT Vs. Chodavaram Co-operative Sugars Ltd. (1987) 163 ITR 420 (AP). We have carefully perused the decisions. It is clear from the facts stated by the High Courts that in each of the cases the assessee’s right to realize the excess price was the subject matter of dispute pending in the High Court and the High Courts had passed different interim orders pursuant to which the respective assesseees were collecting the excess price. Though the interim orders of the High Courts are differently worded in the three cases, one common feature of all the orders is that the realization of the excess price by the respective assesseees was hedged by several conditions one of which was that the assessee shall refund the amount received in excess of the price fixed in the event of the pending dispute being decided adversely to the assessee by the court. Thus, the receipt of the amount by the assessee was clearly associated with a liability to refund the amount by the assessee, which liability was ascertainable and quantified. Such is not the case at hand”



9. In ***Dhampur Sugar Mills*** (supra) the Allahabad High Court took note the aforesaid judgment of the Supreme Court in ***KCP Ltd.*** (supra) and highlighted the distinction made by the Supreme Court. We may reproduce the following portion from that judgment for our benefit

“Applying the principles laid down by the apex court in the cases of *K.C. P. Ltd.* (2000) 245 ITR 421 and *Hindustan Housing and Land Development Trust Ltd.* (1986) 161 ITR 524 (SC) to the facts of the present case, we find that here also the right to collect/realize extra levy sugar price was on account of the interim order dated July 27, 1972, passed by this Court which was hedged with certain conditions. Thus, the right to receive the payment had been in dispute. It, therefore, did not form part of the trading receipt of the respondent-assessee. We are in respectful agreement with the earlier decision of this Court, which is inter partes relating to the previous assessment year 1972-73. In this view of the matter, we answer the first question of the law in the affirmative, i.e. in favour of the assessee and against the revenue.”

10. It is thus clear that in those cases where the interim orders are passed permitting the assessee to recover excess amount than the amount fixed by the government for levy sugar without any condition of refund etc., such receipt of these amounts would be treated as revenue receipt.

11. On the other hand, where conditions are imposed and particularly the condition that this amount would be refunded in case the petitioner fails in the writ petition, the excess realization at the hands of the assessee is not to be treated as revenue receipt but contingent receipt. Thus we answer this question also in favour of the assessee and against the revenue.

12. Question no. 4 which relates to the initial depreciation under Section 32 (1) (iv) of the Act. The relevant portion of Section 32 (1) (iv) is reproduced hereunder:-

**“Section 32 Depreciation:**

(1) In respect of depreciation of buildings, machinery, plant or



purposes of the business or profession, the following deductions shall, subject to the provisions of section 34, be allowed-.....

(iv) in the case of any building which has been newly erected after the 31<sup>st</sup> day of March, 1996, where the building used solely for the purpose of residence of persons employed in the business and the income of each such person chargeable under the head “salaries” is seven thousand five hundred or less, or where the building is used solely or mainly for the welfare of such persons as a hospital, creche, school, canteen, library, recreational centre, shelter, rest room or lunch room, a sum equal to twenty per cent of the actual cost of the building to the assessee in respect of the previous year of erection of the building; but any such sum shall not be deductible in determining the written down value for the purposes of clause (ii) of sub-section (1)”

13. Admittedly, the term “building” is not defined under the Income Tax Act. Therefore, one will have to fall back on the meaning which is assigned to this term in common parlance. The English language dictionaries define the word “building” to mean any structure for whatsoever purpose and of whatsoever materials constructed and any part thereof, whether used as human habitation or not. Therefore, part of the structure is also known as building. This meaning should be taken alongwith the purpose for which the aforesaid provision was enacted, *namely*, to afford incentives to businesses to construct buildings for housing lowly paid employees. Providing such type of accommodation is now treated an important facet and part of corporate social responsibility. The avowed purpose of the aforesaid provision was to engage and inspire the corporate sector to discharge such social responsibility.

14. Having regard to these factors, we are of the opinion that the Tribunal rightly held that the assessee was entitled to initial depreciation under this



Section. We, thus, answer question no.4 in affirmative i.e. in favour of tl  
assessee and against the revenue.

**(A.K. SIKRI)**  
**JUDGE**

**(REVA KHETRAPAL)**  
**JUDGE**

**AUGUST 26, 2010.**  
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