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

**Reserved on** : 24th February, 2012.
% **Date of Decision** : 30th March, 2012.

\+ ITA 37/2010
\+ ITA 38/2010
\+ ITA 41/2010
\+ ITA 29/2011

STEEL AUTHORITY OF INDIA LTD .... Appellant
Through: Mr.S.Ganesh, Sr.Advocate with Ms. Monika Garg, Adv.

versus

COMISSIONER OF INCOME TAX ..... Respondent
Through: Ms.Rashmi Chopra, sr. standing counsel

**CORAM:**
**HON'BLE MR. JUSTICE SANJIV KHANNA**
**HON'BLE MR. JUSTICE R.V. EASWAR**

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not ? Yes
3. Whether the judgment should be reported in the Digest? Yes

**R.V. EASWAR, J.:**

These are four appeals filed by the assessee under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as "Act"). They relate to the assessment years 2000-01 to 2003-04 and are

directed against the decision of the Income Tax Appellate Tribunal (hereinafter referred to as "Tribunal) with regard to the claim of depreciation.

2. The facts giving rise to the appeals may be noticed. The assessee is a public sector undertaking engaged in the manufacture and sale, including export, of iron and steel of various grades. It has several steel plants in India. At some point of time the Indian Iron and Steel Company Ltd. (IISCO) was taken over by the assessee and the steel plant of IISCO also became the steel plant of the assessee. In order to meet the requirements of the assessee company, the Government of India sanctioned huge loans from the Steel Development Fund (SDF). The loans were to bear interest and had been taken over a period of years (1979-80 to 1993-94) in the past. Such loans stood at ₹5,277.16 crores as on 31.3.1999 in the assessee's books of account. The assessee came under great stress and difficult times from 1997 on account of glut in the international steel market due to heavy production of steel in South East Asia and the meltdown in USA. As a result of the glut, the prices of steel fell rapidly and the assessee started incurring heavy losses. The assessee, therefore, approached the Government of India in the year 1998 for waiver of loans granted from the SDF as well as to take steps to help the steel industry in India. One of the measures taken by the

Government of India to provide relief to the steel industry in general and to the assessee in particular was to waive repayment of the loans granted to the assessee. As noted earlier, the loans stood at ₹5,277.16 crores as on 31.3.1999. The Government waived the loans to the extent of ₹5,073 crores. There were certain other Government loans to the extent of ₹381 crores, which were also waived. The waiver of the loans in the case of the assessee took place during the financial year ended on 31.3.2000 relevant to the assessment year 2000-01.

3. It is common ground that in its books of account the assessee reduced the cost of the assets such as building and plant and machinery by the amount of the loans waived by the Government of India and accordingly calculated depreciation. However, in the returns filed for the years under consideration, the assessee took a contrary stand and claimed depreciation on the assets without reducing the loans waived by the Government. In the assessments for all the years, the Assessing Officer took the view that depreciation ought to be allowed to the assessee in respect of the building and the plant and machinery and other assets on the reduced cost, after reducing the loans waived by the Government, in terms of Section 43(1) of the Act. It was his case that the loans were granted by the Government to the assessee to meet a portion of the cost of the

assets and therefore, depreciation could be allowed only on the reduced cost. According to the Assessing Officer, the waiver of the loan was a confirmation of the fact that they were originally granted by the Government towards the cost of the assets. It would be appropriate to reproduce the following paragraphs from the assessment order dated 28.3.2005 for the assessment year 2002-03 :

> "3.2 During the period ended 31.3.2000 relevant to the Assessment Year 2000-01, the Government of India, as a measure of rehabilitating the assessee company, waived the loan availed by it from the Steel Development Fund to the extent of 5703 crores. The assessee company in order to save one of its subsidiaries, namely Indian Iron and Steel Company Limited from becoming sick, wrote off a loan given by it to the extent of Rs.2072 crores. Out of the receipt exceeding the outflow i.e. 3001 crores (5073 – 2072), the value of the assets were reduced by 2578.14 crores and the balance amount of Rs.422.87 crore was reduced from work in progress.
>
> 3.4 The contention of the assessee company that since the value of the assets were reduced on its own, provisions of Section 43(1) were not applicable, appears to be completely misplaced. The reduction in the value of the assets was occasioned by the waiver of the loan by the Government and the amount of reduction was to the extent of accretion in capitalized interest."

In this view of the matter, the claim for depreciation to the extent of the loans waived was disallowed in all the assessment years under consideration. The relevant figures are as under:

| Assessment Year | Depreciation Disallowed (₹) |
|---|---|
| 2000-01 | 64,692.69 lakhs |
| 2001-02 | 47,672.00 lakhs |
| 2002-03 | 35,775.63 lakhs |
| 2003-04 | 26,871.54 lakhs |

4. The disallowance of the claim of depreciation having been confirmed by the CIT(Appeals), the assessee filed further appeals to the Tribunal. The Tribunal considered the matter elaborately and upheld the orders of the departmental authorities and hence, the present appeals.

5. On 26.08.2011, the appeals were admitted and the following substantial questions of law were framed :

> "(i) Whether on the facts and circumstances of the case, the Income Tax Appellate Tribunal erred in law and on merits in confirming the reduction of Written Down Value of block of assets by the amount of loan waived by the Central Government as per Explanation 10 to Section 43(1) of the Income Tax Act, 1961 and consequently allowing depreciation on reduced written down value?

(ii) Whether the Income Tax Appellate Tribunal was correct in law and on merits in confirming the reduction of cost of assets by the amount of waiver of loan by Central Government and thereafter computing depreciation on the reduced cost in terms of Explanation 10 to Section 43(1) and Section 32 of the Act?"

6. The main contention put forth on behalf of the assessee is that on identical facts the Ahmedabad Bench of the Tribunal in the case of ***Steelco Gujarat Ltd. Vs. Assistant Commissioner of Income Tax*** (2009) 33 SOT 437, has taken a view that the cost or the written down value of the assets cannot be reduced by the amount of loans waived by the lender and that Explanation 10 to Section 43(1) of the Act cannot apply to the waiver. It is submitted that no appeal was filed by the Income Tax Department against the aforesaid order of the Ahmedabad Bench of the Tribunal and therefore, as held by the Supreme Court in ***Union of India and Ors. Vs. Kaumudini Narayan Dalal And Anr.*** (2001) 249 ITR 219, the department is not entitled to challenge the correctness of a later order without just cause in the case of other assessees after having accepted an order on the same facts and dealing with the same issue. This decision does not apply to the present situation where the appeals have been filed by the assessee. The Assessing Officer himself did not accept the assessee's claim that the amount of loans waived should not be

reduced from the cost or WDV of the assets for the purposes of calculating depreciation. He has passed the assessment orders much before the order of the Ahmedabad Bench of the Tribunal, which was pronounced on 31.7.2009. Revenue has succeeded before the tribunal. The assessee has filed the present appeal under Section 260A of the Act. At this stage in an appeal filed by the assessee at the time of final hearing it will not be proper to ask the Revenue to verify facts whether any appeal was preferred in the case of Steel Co. (supra) and if no appeal was preferred explain the reason for the same. In this factual situation, which is much different from the factual situation considered and dealt with in the judgment of the Supreme Court cited above, we have grave doubts whether the ratio of the ruling would apply. The Revenue cited the judgment of the Supreme Court in ***C.K. Gangadharan Vs. Commissioner of Income Tax*** (2008) 304 ITR 61 in which the earlier judgment in Kaumudini Narayan Dalal And Anr. (supra) was considered and it was held that the non-filing by the department of the appeal in one case would not operate as a bar on the department to file an appeal in another case where there is just cause for doing so or it is in the public interest to do so or for pronouncement by a higher court because of divergent views expressed by the tribunals or the High Courts. The ratio of this judgment is that it is not an inviolable rule or practice that the

department cannot file an appeal in a case where an identical decision in another case had not been appealed against. There are exceptions to the rule and we are satisfied that the present appeals should not be allowed on this ground. We should examine and decide the appeals on merits. We accordingly, reject the submission made on behalf of the assessee.

7. Section 32 of the Act deals with depreciation. It says that in respect of certain tangible and intangible assets which are owned by the assessee and used for the purposes of the business, a deduction on account of depreciation would be allowed at the rate prescribed in the Rules from time to time. The depreciation would be allowed on the "actual cost" of the assessee or the "written down value". These terms are defined in Section 43 of the Act. Sub-section (1) of Section 43 defines "actual cost" to mean "actual cost of the assets to the assessee, reduced by that portion of the cost thereof, if any, as has been met directly or indirectly by any other person or authority". This definition came up for consideration before several High Courts in the context of the subsidy granted by the Central or State Governments as an incentive for development of industries. The subsidy was granted with the aim of industrialising the State and particularly the industrially backward areas. The quantification of the subsidy was made as a percentage of the capital investment made

by the assessees, which included land, building, plant and machinery etc. The Revenue treated these subsidies as amounts paid by the Government towards meeting the cost of the assets and accordingly, applying the definition of "actual cost", suitably reduced the claim of depreciation. The dispute ultimately reached the Supreme Court in the case of ***CIT v. P.J. Chemicals Ltd.*** (1994) 210 ITR 830. The dispute was resolved in favour of the assessee, with the Supreme Court holding that the object of the subsidy was to promote industrial growth in the States and merely because the quantum of the subsidy was calculated as a percentage of the capital investment made by the assessee in the assets such as land, building, plant and machinery etc., it cannot be said that the Government met a portion of the cost of the asset directly or indirectly. Accordingly, the assessees were held entitled to the depreciation on the actual cost without being reduced by the amount of the subsidy.

8. Section 43(1) of the Act is reproduced hereunder: -

> "(1) "actual cost" means the actual cost of the assets to the assessee, reduced by that portion of the cost thereof, if any, as has been met directly or indirectly by any other person or authority:"

9. By the Finance (2) Act, 1998, Explanation 10 to Section 43(1) was inserted with effect from 1.4.1999. It reads as under:

Explanation 10 - Where a portion of the cost of an asset acquired by the assessee has been met directly or indirectly the Central Government or a State Government or any authority established under any law or by any other person, in the form of a subsidy or grant or reimbursement (by whatever name called), so much of the cost as is relatable to such subsidy or grant or reimbursement shall not be included in the actual cost of the asset to the assessee:

**Provided** that were such subsidy or grant or reimbursement is of such nature that it cannot be directly relatable to the asset acquired, so much of the amount which bears to the total subsidy or reimbursement or grant the same proportion as such asset bears to all the assets in respect of or with reference to which the subsidy or grant or reimbursement is so received, shall not be included in the actual cost of the asset to the assessee."

The aforesaid Explanation was explained by the Board in Circular No.772 dated 23.12.1998 [reported in (1999) 235 ITR (St.) 35]. The relevant part of the Circular is reproduced below:

"22.2 Explanation 10 provides that where a portion of the cost of an asset acquired by the assessee has been net directly or indirectly by the Central Government or a State Government or any authority established under any law or by any other person, in the form of a subsidy or grant or reimbursement (by whatever name called), then, so much of the cost as is relatable to such subsidy or grant or reimbursement shall not be included in the

> actual cost of the asset to the assessee. Cost incurred/payable by the assessee alone could be the basis for any tax allowance. This Explanation further provides that where such subsidy or grant or reimbursement is of such nature that it cannot be directly relatable to the asset acquired, so much of the amount which bears to the total subsidy or reimbursement or grant the same proportion as such asset bears to all the assets in respect of or with reference to which the subsidy or grant or reimbursement so received, shall not be included in the actual cost of the asset to the assessee.
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> The amendment made through Explanation 10 will take effect from 1st April, 1999, and will, accordingly, apply in relation to the assessment year 1999-2000 and subsequent years."

10. The contention put forth on behalf of the assessee before us is that Explanation 10 below Section 43(1) does not take in waiver of the loan and that, in fact, the said Explanation narrows down the ambit and scope of the Section 43(1). Counsel for the assessee contends that in order to bring the case under the Explanation, it is incumbent on the income tax authorities to prove that the waiver of the loan is in truth and reality a form of either a subsidy or a grant or reimbursement of the cost and that in the present case no such attempt has been made. According to him, the revenue authorities have not been able to demonstrate or establish that the Government of India has actually given a subsidy or grant or has reimbursed the

cost of the asset in the form of waiver of the loan. The argument, with respect, erroneously assumes that the case must fall under Explanation 10. It is true that in the assessment orders, the Assessing Officer has placed strong reliance on the Explanation but in our view the main provisions of Section 43(1) themselves are sufficiently wide to cover the assessee's case. In the course of the arguments, this aspect was put to the ld. counsel for the assessee for his reply as the substantial questions of law framed on 26.08.2011 do not appear to cover this aspect specifically, though the issue/question does arise for consideration. He submitted that even under the main provisions of Section 43(1), a case of waiver of a loan can never be considered as meeting the full or a part of the cost of the assets.

11. Since the substantial questions of law framed do not cover this aspect, we have considered it appropriate to frame the following substantial question of law, in addition to the questions already framed: -

> "Whether in the facts of the present case waiver of loan would result in reduction of actual cost under Section 43(1) of the Income Tax, 1961?"

12. We are unable to accept the contention of the assessee that the case is not covered by the main provisions of Section 43(1) because

of the treatment given by the assessee in its books of account. We have earlier noticed that in the books of account, the assessee had actually reduced the cost/WDV of the assets by the amount of the loans waived by the Government of India. In the returns, however, the depreciation was claimed without reducing the loans from the cost/WDV of the assets. It is true that the manner in which entries are made in the books of account is not conclusive of the question, which has to be resolved on a true interpretation of the provisions of law. However, the real nature of a transaction can be understood by reference to the contemporaneous act of the parties, which would throw considerable light on their true intention and their understanding of the transaction. It is therefore not impermissible to look into the entries made in the books of account, in the absence of any other evidence. They show that the assessee understood the receipt of the loans from the Government as having been given towards meeting a part of the cost of the assets. The waiver cannot, therefore, have a different effect on such intention. The intention of the parties, as reflected by the accounts of the assessee, appears to be that the loans had been granted towards a part of the cost of the assets. It is also to be noted that the assessee is a Government of India undertaking and the loans have been given by the Government of India from the SDF. It is apparent to us that even when the loans

were granted, they were granted towards cost of the assets. The assessee's case is, therefore, caught within the mischief of Section 43(1) itself and in this view of the matter it may not be necessary to examine the impact of Explanation 10 to the Section inserted with effect from 1.4.1999. For the same reason it is also not necessary to refer to the other judgments cited on behalf of the assessee.

13. It is, however, necessary to refer to and distinguish the judgment of the Supreme Court in the case of PJ Chemicals Ltd. (supra). In that case, the Government gave subsidy under the Central Subsidy Scheme to the assessees. The subsidy was given as an incentive for industrial growth and not for the specific purpose of meeting a portion of the cost of the assets. The subsidy was, however, quantified as or geared to a percentage of the cost. The view of the income tax authorities was that the amount of subsidy represented a portion of the cost of the asset met by the government and, therefore, depreciation was allowable only on the actual cost of the asset as reduced by the amount of the subsidy in terms of Section 43(1) of the Act. Explanation 10 to Section 43(1) of the Act was not in the Income Tax Act at the time material time. The Supreme Court held that the payment of subsidy did not partake of the character of a payment intended either directly or indirectly to meet the actual cost. The ratio of this ruling is not applicable to the facts of the present

case. Apparently Explanation 10 was introduced to ensure appropriate computation of actual cost of assets in case subsidy is received. After the introduction of Explanation 10, it is no longer possible to contend that the subsidy given by the government, by whatever name called, cannot be reduced from the actual cost of the assets in terms of Section 43(1) of the Act for the purpose of allowing depreciation. But Explanation 10 does not cover the case of waiver of the loan. It covers only the grant of a subsidy or re-imbursement by whatever name called. The case of the assessee may not, therefore, fall under Explanation 10, but having regard to the facts as found which we have alluded to earlier, the waiver of the loan amounted to the meeting of a portion of the cost of the assets under the main provisions of Section 43(1) of the Act. The waiver of the loan is not a mere quantification of a subsidy granted generally for industrial growth. It was granted specifically to the assessee and the assessee in its books of accounts reduced the cost of the assets by the amount waived. This reflected a contemporaneous understanding of the purpose of the grant of the loan on the part of the assessee. As already mentioned earlier, the assessee is a public sector undertaking and the loan and the later waiver were from the Government of India. The loans under the SDF were specifically for meeting the capital cost of the assets, on which depreciation was being claimed.

14. In view of the aforesaid discussion, the substantial question of law framed by us in para 10 is answered in the affirmative and against the assessee and in favour of the Revenue. The questions of law framed on 26.8.2011 are academic in view of our answer to the question framed by us in para 10 and need not be answered. The appeals are dismissed with no costs.

**(R.V. EASWAR)**
**JUDGE**

**(SANJIV KHANNA)**
**JUDGE**

**March 30, 2012**
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