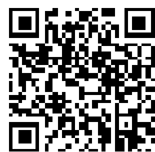


THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 23.12.2015

\+ **ITA 374/2003**

M/S DALMIA CEMENT (BHARAT) LTD. .....Appellant

versus

THE COMMISSIONER OF INCOME TAX ..... Respondent

Advocates who appeared in this case:

For the Appellant :Mr Simran Mehta.

For the Respondent :Mr N.P. Sahni, Senior Standing Counsel for Mr Nitin Gulati, Junior Standing Counsel and Ms Sri Tanuja N.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The appellant has filed the present appeal under Section 260A of the Income Tax Act, 1961 (hereafter the 'Act') impugning a common order dated 11th February, 2003 passed by the Income Tax Appellate Tribunal (hereafter 'ITAT') disposing of the appeals preferred by the Assessee as well as the Revenue against an order dated 14th January, 1994 passed by the Commissioner of Income Tax (Appeals) [hereafter 'CIT(A)']. The said order dated 14th January, 1994 passed by CIT(A) disposed of the appeal preferred by the Assessee against the assessment order dated 26th March, 1991 in respect of the assessment year (AY) 1988-89.

2. The present appeal was admitted on 28th November, 2005 and the following question of law was framed:-

> "Whether on the facts of the case borne on the record, the Appellate Tribunal was right in law in holding that the liability accrued against the assessee-appellant company during the relevant previous year ended on 31.3.1988 in respect of cess and cess surcharge levied on it an amount of Rs.238.25 lakhs (approx.) under the Madras Panchayats Act, 1958, in respect of certain minerals raised by it as raw materials for its industrial unit had ceased to exist during the relevant previous year?"

3. Thereafter, on 23rd November, 2015, the Court also framed the following question of law for consideration:-

> "Whether the Appellant Assessee is entitled to investment allowance under Section 32A(1) of the Act in the sum of Rs.67,17,352/- for AY 1988-89?"

4. The Assessee is a public company having its registered office at Dalmiapuram in the State of Tamil Nadu. The Assessee is, *inter alia*, engaged in the business of manufacturing cement at its unit at Dalmiapuram; Dead Burnt Magnesite in its unit at Salem; electronic items in its unit at Ballabhgarh; and iron ore lumps in its unit at Hospet. In addition, the Assessee is also engaged in the business of running a travel agency.

Question No.1: Admissibility of claim for deduction of Rs.2,38,24,673/- on account of 'Cess'and 'Cess Surcharge'.

5. Briefly stated, the relevant facts necessary to consider the first question of law are as under:-

5.1 The Assessee, in its computation of income for the previous year relevant to the AY 1988-89, claimed a deduction of Rs.2,38,24,673/- on account of accrued liability of 'cess' and 'cess surcharge' levied under the Madras Panchayats Act, 1958 as amended by Madras Act No.18 of 1964.

5.2 Under Section 115 of the Madras Panchayats Act, 1958 as amended by Madras Act No.18 of 1964, a local cess at 45 paisa for every rupee of land revenue was payable to the State Government in respect of any land for every Fasli. By virtue of Section 116 of the Madras Panchayats Act, 1958, every Panchayat Union Council was also enabled to levy on every person liable to pay land revenue to the Government, a local cess surcharge in addition to the local cess levied under Section 115 of the Madras Panchayats Act, 1958. An explanation to Section 115 of the Madras Panchayats Act, 1958 was added by the Tamil Nadu Panchayats (Amendment and Miscellaneous Provisions) Act, 1964, which expanded

the meaning of 'land revenue' as used in Section 115 and Section 116 of the Madras Panchayats Act, 1958 to also include *"water cess payable to the Government for water supplied or used for irrigation of land, royalty, lease amount or other sums payable to the Government in respect of land held direct from the Government on lease or licence, but does not include any other cess or the surcharge payable under Section 116, provided that land revenue remitted shall not be deemed to be land revenue payable for the purpose of this section."*

5.3 In view of the expanded definition of land revenue, the Assessee was liable to pay 'cess' and 'cess surcharge' on royalty payable under the Mines and Minerals (Regulation and Development) Act, 1957 in respect of the mining/quarrying of minerals (limestone, magnesite etc.). Aggrieved by the same, the Assessee as well as other persons who were similarly situated challenged the levy of cess and cess surcharge on royalty before the Madras High Court on the ground that the same was beyond the legislative competence of the State Legislature. They canvassed that the explanation to Section 115 of the Madras Panchayats Act, 1958 contravened the provisions of Section 9 of the Mines and Minerals (Regulation and Development) Act, 1957. The Madras High Court repelled the said

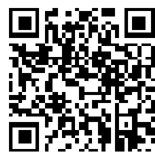
challenge and held that the cess levied under Section 115 of the Madras Panchayats Act, 1958 was in the nature of tax on land and, thus, within the legislative competence of the State Legislature. Aggrieved by the decision of the Madras High Court, the Assessee as well as other persons approached the Supreme Court by filing special leave petitions and writ petitions. These petitions were allowed by a Constitution Bench of the Supreme Court in ***India Cement Ltd. v. State of Tamil Nadu***: **(1991) 188 ITR 690 (SC)**. The Supreme Court held that the *"impugned legislation in its pith and substance levied a tax on royalty and not tax on land"* and, therefore, was beyond the competence of the State Legislature. The Court held that Section 9 of the Mines and Minerals (Regulation and Development) Act, 1957 covered the legislative field and, therefore, the State legislature was denuded of its competence under entry 23 of List II of the Seventh Schedule to the Constitution of India to exact the levy in question. The aforesaid decision was rendered on 25th October, 1989. In the meanwhile - prior to the aforesaid decision - the Supreme Court had, by an order dated 4th May, 1973, granted interim stay of proceedings initiated for recovery of the local cess and cess surcharge, which was the subject matter of challenge before the Supreme Court.

5.4 The Assessee filed its return of income for the AY 1988-89 on 29th July, 1988. Although the Assessee had not debited the cess and cess surcharge in its profit and loss account, nonetheless, it claimed a deduction of Rs. 2,38,24,673/- on account of accrued liability for payment of cess and cess surcharge in the computation of income that was filed along with the return. The Assessing Officer (hereafter 'AO') rejected the aforesaid claim. He held that, first of all, the liability had not accrued in view of the stay granted by the Supreme Court of India. Secondly, he held that since Supreme Court had rendered the final decision holding the levy of cess and cess surcharge as unconstitutional during the pendency of the assessment proceedings – on 25th October, 1989 – the Assessee could have filed a revised return withdrawing its claim for deduction on account of the liability for payment of cess and cess surcharge. The AO reasoned that such liability had not been recorded by the Assessee in its final accounts and, therefore, there was no impediment for the Assessee to withdraw its claim. Thirdly, the AO held that since the liability had not been paid, no deduction could be granted by virtue of Section 43B(a) of the Act. The AO held that the 'cess' and 'cess surcharge' were taxes and, therefore, by virtue of Section 43B of the Act, no deduction on account of liability to pay cess

and cess surcharge could be allowed except in the year in which the same were paid. Since the Assessee had not paid the cess and cess surcharge during the year in question, its claim for deduction was rejected. The Assessee's contention that Section 43B of the Act was only applicable in respect of liabilities relating to a tax and the same did not cover 'cess' and 'cess surcharge' was not accepted.

5.5 Aggrieved by the decision of the AO, the Assessee preferred an appeal before the CIT(A). The CIT(A) also rejected the Assessee's claim and held that in cases where the liability claimed is not reflected in the books of accounts but only in the computation of income, then the nature of the liability would have to be considered only at the time of passing the assessment order. The CIT(A) held that since the levy of cess and cess surcharge had been held to be unconstitutional, no liability as claimed by the Assessee was in existence at the time of making the assessment. Consequently, no deduction on that account was permissible.

5.6 Aggrieved by the decision of the CIT(A), the Assessee preferred an appeal before the ITAT. The Assessee, *inter alia,* contended that the decision of the Supreme Court in ***India Cement*** *(supra)* would not affect the liability accrued during the relevant previous year as the Supreme Court



had struck down the levy of cess and cess surcharge 'prospectively'. The ITAT did not accept the Assessee's contention and held that the use of the word 'prospectively' in the decision of the Supreme Court was in the context of undue enrichment so that the State is not liable to refund the cess and cess surcharge collected. The ITAT was of the view that the observations of the Supreme Court regarding prospectively striking down the levy would not affect the Assessee as the Assessee had not paid the cess and cess surcharge. The ITAT also concurred with the AO as well as the CIT(A) that the Assessee could have filed a revised return withdrawing its claim as the Assessee had not reflected the liability in its books. Insofar as the applicability of Section 43B of the Act is concerned, the ITAT following its decision in earlier years, accepted the contention that the provisions of Section 43B were not applicable to 'cess' and 'cess surcharge' during the AY 1988-89.

Submissions

6. Mr Simran Mehta, the learned counsel for the Assessee submitted that levy of cess and cess surcharge was a statutory liability and was deductable from the income of the Assessee till the said liability was finally quashed. He stated that the decision of the Supreme Court in ***India Cement***

(supra) finally quashing the levy of cess and cess surcharge on royalty was delivered during the financial year 1989-90 and, consequently, the deductions claimed by the Assessee in the earlier years would be taxable under Section 41(1) of the Act during the previous year 1989-90 relevant to the AY 1990-91. He also drew the attention of this Court to the observations of the AO in the assessment order, specifically recording that the Assessee had offered the amount of deduction claimed on account of 'cess' and 'cess surcharge' to tax under Section 41(1) of the Act by way of cessation of liability in AY 1990-91.

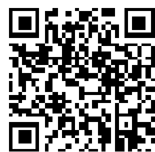
7. Mr Sahni, learned Senior Standing Counsel for the Revenue, advanced contentions in support of the orders passed by the AO, CIT(A) and ITAT. He emphasized that the Assessee had not charged the amount of cess and cess surcharge in the profit and loss account and, thus, had also not reflected the same as a liability. He contended that, therefore, in the normal circumstances the Assessee would not be entitled to claim any deduction on account of the said liability which it had neither accepted nor acknowledged. He argued that the Assessee had claimed the deduction only in its computation of income and, therefore, could have withdrawn the same immediately on the Supreme Court striking down the aforesaid levy.

He contended that the AO, in any event, could not make an assessment allowing the deduction on account of a liability that had already been negated by the Supreme Court.

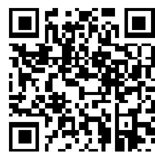
7.1 Mr Sahni further submitted that by virtue of Section 43B of the Act, a deduction in respect of a liability on account of tax would be admissible only in the year in which the tax is so paid. He submitted that the expression 'tax' was wide enough to include 'cess' or any other statutory duty. He pointed out that clause (a) of Section 43B of the Act was substituted by the Finance Act, 1988 and the clause as substituted expressly included "tax, duty, cess or fee". He submitted that this statutory amendment was clarificatory in nature and, thus, notwithstanding the said amendment a deduction on account of liability to pay 'cess' or 'cess surcharge' would be admissible only in the year in which the cess or cess surcharge was paid.

Reasoning and Conclusion

8. Having heard the rival contentions, we may, at the outset, point out that the scope of controversy in the present case is restricted. The question whether Section 43B of the Act is applicable is covered in favour of the



Assessee by a decision of this Court in ***M/s Dalmia Cements (Bharat) Ltd. v. Commissioner of Income Tax, Delhi-IV*** **: (2013) 357 ITR 419 (Delhi)**, whereby it was held that the provisions of Section 43B(a) would not be applicable to 'cess' and 'cess surcharge' prior to AY 1989-90 as the amended clause (a) of Section 43B of the Act came into force only with effect from 1st April, 1989. The question whether the Assessee can claim a deduction on account of a statutory levy even though the same is disputed by the Assessee, is also no longer *res integra.* It is now well settled that the Assessee would be entitled to claim deduction on account of accrued liability and in case of a statutory demand, there could be no dispute that a liability exists, even though the Assessee disputes the same. Thus, in cases where a statutory demand is raised, an Assessee would be entitled to claim deduction in respect of the same, if otherwise admissible, even though the Assessee disputes the levy as there could be no doubt as to the accrual of the statutory liability. Following the aforesaid principle, the claim of the Assessee for deduction on account of 'cess' and 'cess surcharge' demanded under the Madras Panchayats Act, 1958 has been upheld in the preceding years even though the Assessee had all along claimed the same to be *ultra vires* the Constitution of India. In the circumstances, the only limited



controversy to be addressed is whether such deduction could have been disallowed in AY 1988-89 only on the ground that the decision holding the levy of 'cess' and 'cess surcharge' to be unconstitutional had been delivered while the assessment for the year in question was pending and, thus, the Assessee could withdraw its claim by filing a revised return.

9. In our view, the aforesaid issue needs to be answered keeping in view the fundamental principles while assessing the income of an Assessee on the mercantile basis of accounting. In the mercantile system of accounting, the income and expenses are recognized on accrual basis. Thus, the only question to be answered is whether the liability to pay 'cess' and 'cess surcharge' amounting to Rs.2,38,24,673/- had accrued during the financial year ending 31st March, 1988. Indisputably, as on 31st March, 1988, 'cess' and 'cess surcharge' was payable by the Assessee in terms of the levy imposed under the Madras Panchayats Act, 1958. At the material time this was an ascertained liability. The fact that the levy had been quashed by the Supreme Court subsequently cannot possibly lead to the conclusion that the same was non-existent as on 31st March, 1988. The decision of the Supreme Court in ***India Cement*** *(supra)* was rendered on 25th October, 1989 and the impost of cess and cess surcharge stood

invalidated and the liability to pay the same was extinguished. However, the income of the Assessee for the previous year ended on 31st March, 1988 would have to be assessed on the basis of income and expenses that had accrued in that period. As pointed out earlier, the liability on account of cess and cess surcharge as claimed by the Assessee had accrued. The fact that it was extinguished by virtue of a judgment delivered in a subsequent period would have to be accounted for in the financial year 1989-90, that is, the previous year in which the judgment in ***India Cement*** *(supra)* was delivered.

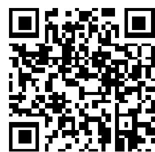
10. The AO has held that *"had the assessments been completed before the decision of the Supreme Court, the Assessee could not have revised the return and his action for applying the provisions of Section 41(1) in AY 1990-91 would have been justified"*. This conclusion, in our view, is palpably erroneous. It is at once seen that following such principle would introduce arbitrariness in determining the income chargeable to tax in a particular year as it would be contingent on the date of making the assessment. The income of a relevant year has to be determined on the basis of the accounting principles and in accordance with the provisions of the Act. The computation of income chargeable to tax in a given assessment

year is not dependent on the date on which the assessment for that year is completed. The events having a bearing on the income of an Assessee have to be accounted for in the year in which the events occur. Thus, the effect of cessation of liability by virtue of the decision of the Supreme Court in ***India Cement*** *(supra)* would have to be assessed in AY 1990-91.

11. The next issue to be addressed is whether the deduction claimed by the Assessee is liable to be denied on the ground that the Assessee had not recorded the liability in question in its books but had claimed the same in the computation of income filed along with the return. The AO had reasoned - and the CIT(A) as well as the ITAT had concurred - that this enabled the Assessee to withdraw its claim without reopening its books of accounts or altering its final accounts. On this basis, the AO, CIT(A) and ITAT had concluded that the Assessee could have withdrawn its claim on the basis of the decision in ***India Cement*** (*supra*). In our view, the aforesaid reasoning is also erroneous. As pointed out earlier, the AO is required to assess the income of the Assessee based on the accounting system followed as well as the provisions of the Act. The question whether a deduction is to be allowed is not contingent on whether the Assessee can reopen its books or withdraw its claim; it has to be allowed on the basis

whether such deduction is admissible or not. Thus, the question whether a deduction was admissible on account of the liability to pay cess or cess charge would have to be determined on the basis whether such a liability had accrued at the material time. The decision of the Supreme Court in ***Kedarnath Jute Mfg. Co. Ltd. v. CIT***: **(1971) 82 ITR 363** (SC) explains this principle in the following words:-

> "We are wholly unable to appreciate the suggestion that if an assessee under some misapprehension or mistake fails to make an entry in the books of account and although under the law, a deduction must be allowed by the Income Tax Officer, the assessee will lose the right of claiming or will be debarred from being allowed that deduction. Whether the assessee is entitled to a particular deduction or not will depend on the provision of law relating thereto and not on the view which the assessee might take of his rights nor can the existence or absence of entries in the books of account be decisive or conclusive in the matter. The assessee who was maintaining accounts on the mercantile system was fully justified in claiming deduction of the sum of Rs. 1,49,776/- being the amount of sales tax which it was liable under the law to pay during the relevant accounting year. It may be added that the liability remained intact even after the assessee had taken appeals to higher authorities or Courts which failed. The appeal is consequently allowed and the judgment of the High Court is set aside. The question which was referred is answered in favour of the assessee and against the Revenue. The assessee will be entitled to costs in this Court and in the High Court."



12. Thus, whether the Assessee could withdraw its claim by filing a revised return is wholly extraneous to the issue whether the deduction claimed by the Assessee was admissible under the provisions of the Act.

13. In view of the aforesaid, the first question is answered in the negative, that is, in favour of the Assessee and against the Revenue.

Question No.2: Admissibility of Investment Allowance of Rs.67,17,352/- under Section 32A of the Act.

14. The second question projected by the Assessee relates to the admissibility of deduction on account of investment allowance.

15. Briefly stated, the relevant facts to consider the controversy involved are as under:-

15.1 The Assessee had claimed a deduction of Rs.67,17,352/- on account of investment allowance under Section 32A of the Act. This was on account of plant and machinery claimed to have been installed by the Assessee prior to 31st March, 1987 and brought in use during the previous year 1987-88 relevant to the AY 1988-89.

15.2 By virtue of the proviso to Section 32A(2) of the Act inserted by the Direct Tax Laws (Amendment) Act, 1989, deduction under Section 32A(1)

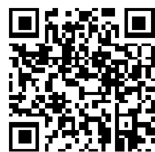
of the Act would not be available in respect of any new plant and machinery installed after 31st day of March, 1987 but before 1st day of April, 1988, unless such plant and machinery was installed in circumstances specified under Section 32A(8B)(a). It is not in dispute that in view of the aforesaid proviso to Section 32A(2) of the Act, deduction on account of investment allowance was admissible only if the plant and machinery in question had been 'installed' prior to 31st March, 1987.

15.3 The Assessee claimed that it had installed a coal mill and auxiliaries costing Rs.2,68,65,409/- on 26th March, 1987 – that is, during the previous year relevant to the AY 1987-88 – but the plant was commissioned on 14th August, 1987 during the next financial year. The Assessee neither claimed any depreciation nor investment allowance in respect of the coal mill and other machineries in question during the AY 1987-88 as they were not put to use during that period. In order to substantiate its claim that the coal mill and auxiliaries had been installed prior to 1st April, 1987, the Assessee furnished a copy of the letter dated 26th March, 1987 sent by the representative of M/s KHD Humboldt, Switzerland who were entrusted with the work of erection of modernization project that included the coal

mill and auxiliaries in question. The relevant extract of the said letter reads as under:-

> "The VRM, IBAU Silo, Kiln, Cooler, etc. are ready in all respects. Also the entire coal mill plant has been installed and is ready, except one coal dust bin and coal ESP. With one fine coal bin and without the coal mill ESP, the plant could be started without any problem, as we have got provision to take the coal mill gases to precalcinator by passing the ESP. We, however, understand that the Computer Software for Sequencing, interlocking, etc. are not ready. It is not advisable to run the coal mill without such interlocking."

15.4 The AO referred to various decisions in ***CIT v. Saraspur Mills Ltd.***: **(1959) 36 ITR 580 (Bom.)**, ***CIT v. Indian Turpentine and Rosin Co.***: **(1970) 75 ITR 533 (All.)**, ***CIT v. Sri Rama Vilas Service (Pvt.) Ltd.***: **(1960) 38 ITR 25 (Mad.)** and ***CIT v. Saurashtra Wire-Healds Manufacturing Co. P. Ltd.***: **(1968) 67 ITR 524 (Guj.)** for interpretation of the word 'installed' and he concluded that the word 'installed' *"refers to a stage when the asset is ready for use"*. He further held that the plant and machinery in question formed a part of the coal mill plant and was not ready for use without installation of the other plant and machinery, which was admittedly installed after 31st March, 1987. The AO noted that the part of the coal mill costing Rs.2,68,65,409/- (in respect of which deduction of investment allowance was claimed) and other machinery costing



Rs.2,11,24,780/- were commissioned together on 14th August, 1987. He also observed that the production from the entire plant was recorded on one sheet and inferred that this indicated that the plant and machinery, in respect of which investment allowance was claimed, could not be brought to independent and separate use. He concluded that in the circumstances, the Assessee's claim that the plant and machinery in question was installed and ready to use on 26th March, 1987 was not admissible.

15.5 On appeal by the Assessee, the CIT(A) concurred with the finding of the AO that the machinery in question was not installed prior to 31st March, 1987. On a further appeal, the ITAT held that no interference was called for in the specific facts and circumstances of the case.

Submissions

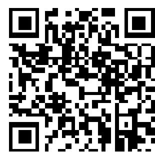
16. Mr Simran Mehta, learned counsel for the Assessee submitted that the certificate of M/s KHD Humboldt, Switzerland furnished by the Assessee clearly indicated that the machineries in question were ready in all aspects on 26th March, 1987 and, therefore, the conclusion of the AO that the machineries in question were not installed prior to 31st March, 1987 was erroneous. He submitted that the coal mill plant was not brought into use in

the preceding year i.e. ended 31st March, 1987 because the software required for regulation and control over running of the coal mill in coordination with other units of the plant such as precalcinator and kiln, was acquired later. He submitted that the software was not an integral part of the coal mill and, therefore, the fact that such software had not been acquired prior to 31st March, 1987 could not lead to the conclusion that the coal mill had not been installed. He further submitted that the coal mill ESP, which was acquired after 31st march 1987 was a pollution control device and, therefore, the coal mill could also be run by bypassing the ESP and conveying the hot gases to a precalcinator directly as indicated in the letter of M/s KHD Humboldt. He further contended that the coal dustbin was only to collect the coal dust and was also not an essential part of the coal mill plant and, therefore, the Assessee's claim for investment allowance could not be denied.

17. Mr Sahni, learned Senior Standing Counsel for the Revenue, argued that the Assessee had not claimed any depreciation in respect of the machineries in question for the AY 1987-88. He contended that if the machines had been installed and were ready to use, the Assessee would be entitled to claim depreciation for the year ended 31st March, 1987 and the

fact that no such depreciation was claimed indicated that the machineries in question had not been installed prior to 31st March, 1987. He further contested the claim of the Assessee that the plant and machinery were ready for use as on 26th March, 1987. He pointed out that the letter of M/s KHD Humboldt, Switzerland, which was relied upon by the Assessee, also indicated that a part of the plant and machinery was yet to be installed. He further contended that a careful reading of the said letter would indicate that M/s Humboldt, Switzerland had certified that the plant could be started by taking the coal mill gases to the precalcinator by bypassing the ESP. He pointed out that as on 26th March, 1987 the precalcinator had also not been installed, therefore, even if ESP was bypassed the mill plant could not be brought to use. He submitted that even the necessary computer software for sequencing and inter-locking the different machines necessary for the purposes of running the coal mill in coordination with other units of the plant had not been acquired. In the circumstances, he submitted that the finding of the AO could not be faulted.

18. We must note, at the outset, that there is no dispute between the parties with respect to the interpretation of the expression 'installed'. Both the learned counsel for the Assessee as well as the Revenue have argued

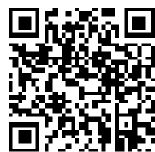


that plant and machinery can be considered as 'installed' only if it is ready for use. The fact that the plant and machinery may not have been used for production is not relevant provided that the plant and machinery is in a state where it can be brought to use. In the circumstances, the question whether the plant and machinery in question was ready to use is essentially a question of fact. Thus the only issue that can be considered is whether the finding of the AO, CIT(A) and ITAT that the plant and machinery was not ready for use prior to 31st March 1987 is perverse.

19. The fact that the Assessee had not claimed any depreciation in respect of the machinery in question is not determinative of whether the machineries in question had been installed or not, as it is always open for an Assessee not to claim a deduction which he is otherwise entitled to. However, the following findings are material:-

a) Admittedly, the plant and machinery in question had not been commissioned prior to 31st March, 1987 and was, in fact, commissioned on 14th August, 1987 along with other units of the plant.

b) That even according to the Assessee, the coal mill plant was kept idle for want of software. This also indicates that notwithstanding



the submissions made that such software was not essential, the Assessee also felt necessary to keep its plant idle for want of such software.

c) Admittedly, the coal dustbin was an integral part of the plant which had not been installed. The fact that the coal mill could be operated without the coal bin does not lead to the conclusion that it was not an integral part of the plant.

d) That coal mill ESP, which is for controlling pollution, had admittedly not been installed. Although it has been contended that the same was not a part of the coal mill plant, the authorities below found it difficult to accept that the pollution control device of a substantial value (Rs.45,62,536/-) was not an essential part of the plant.

e) The AO's finding that the precalcinator was also acquired after 31st March, 1987 is not disputed. Therefore, the contention that the gases could be diverted directly to the precalcinator in absence of coal ESP is also of no assistance to the Assessee.

f) No test report, acceptance report, or any other material was produced by the Assessee, which would indicate that a trial run of

the coal mill plant had been conducted or that the plant was operational. There was no material to indicate that the Assessee had accepted the installation of the plant in question.

g) The AO had noted that major machineries costing Rs.2,11,24,780/- forming a part of the plant - Coal Mill ESP costing Rs.45,62,536/-; Coal Mill & Auxiliaries costing Rs.1,05,18,706/-; Pre-heating and Precalcinators costing Rs.15,14,707/-; and Clinkering Including coal fixing costing Rs.45,23,831/- – were acquired after 31st March 1987.

20. In view of the aforesaid, we are unable to hold that the concurrent findings of the AO, CIT(A) and the ITAT are not supported by reason. Accordingly, the second question is answered in favour of the Revenue and against the Assessee.

21. The appeal is partly allowed. In the circumstances, the parties are left to bear their own costs.

VIBHU BAKHRU, J

S.MURALIDHAR, J

DECEMBER 23, 2015
RK