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

\+ **ITA 782/2016**

PR. COMMISSIONER OF INCOME TAX-6 ..... Appellant
Through: Mr. Rahul Chaudhary, Senior Standing Counsel with Ms. Lakshmi Gurung, Advocate

Versus

NATIONAL FERTILIZERS LTD. ..... Respondent
Through: Mr. Ved Jain, Mr. Pranjal Srivastava & Ms. Rano Jain, Advocates

WITH

\+ **ITA 784/2016**

PR. COMMISSIONER OF INCOME TAX-6 ..... Appellant
Through: Mr. Rahul Chaudhary, Senior Standing Counsel with Ms. Lakshmi Gurung, Advocate

Versus

NATIONAL FERTILIZERS LTD . ..... Respondent
Through: Mr. Ved Jain, Mr. Pranjal Srivastava & Ms. Rano Jain, Advocates

WITH

\+ **ITA 817/2016**

PR. COMMISSIONER OF INCOME TAX-6 ..... Appellant
Through: Mr. Rahul Chaudhary, Senior Standing Counsel with Ms. Lakshmi Gurung, Advocate

Versus

NATIONAL FERTILIZERS LTD. ..... Respondent
Through: Mr. Ved Jain, Mr. Pranjal Srivastava & Ms. Rano Jain, Advocates

AND

\+ **ITA 551/2016**

PR. COMMISSIONER OF INCOME TAX-6 ..... Appellant
Through: Mr. Rahul Chaudhary, Senior Standing Counsel with Ms. Lakshmi Gurung, Advocate

Versus

NATIONAL FERTILIZERS LTD . ..... Respondent
Through: Mr. Ved Jain, Mr. Pranjal Srivastava & Ms. Rano Jain, Advocates

CORAM: JUSTICE S.MURALIDHAR
JUSTICE CHANDER SHEKHAR

ORDER

% 24.04.2017

CM APPL Nos. 41563/2016, 41565/2016, 43359/2016

1. Allowed, subject to all just exceptions.

CM APPL No. 27836/2016 (delay of 240 days in re-filing)

1A. For the reasons stated therein, this application is allowed. The delay of 240 days in re-filing the appeal is condoned.

ITA Nos.782/2016, 784/2016, 817/2016, 551/2016

2. ITA Nos.782/2016, 784/2016, 817/2016 are appeals by the Revenue under Section 260 A of the Income Tax Act 1961 ('Act') directed against the common order dated 31st May, 2016 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA Nos. 3947, 3948, 3949/Del/2013 for the Assessment Years ('AY') 2006-07, 2007-08 and 2008-09. ITA 551 of 2016 again by the Revenue is against the order dated 20th May, 2015 of the ITAT

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in ITA No. 4076/Del/2013 for AY 2009-10.

3. These four appeals seek to raise a common question whether the ITAT was justified in deleting the disallowance of demurrage and wharfage charges, which according to the Revenue was in the nature of penalty and, therefore, not amenable to deduction under Section 37(1) of the Income Tax Act, 1961?

4. The said question already stands answered in favour of the Assessee and against the Revenue by the judgment of this Court in ***Mahalaxmi Sugar Mills Company v. Commissioner Of Income Tax,(1986) 157 ITR 683 (Delhi)*** and of the Allahabad High Court in ***Nanhoomal Jyoti Prasad v. Commissioner Of Income Tax, (1980) 123 ITR 269 (All).***

5. However, learned counsel for the Revenue seeks to rely on the judgment of the Rajasthan High Court in ***Tata Iron & Steel Co. Ltd. v. Union of India*** (decision dated 28th January 2014 in SB Civil Misc. Appeal No. 65/1997). Having perused the said judgment, the Court is not persuaded to take a view different from that earlier taken by this Court ***Mahalaxmi Sugar Mills Company v. Commissioner of Income-Tax*** *(supra)*.

6. The other question raised by the Revenue concerns the provision made for superannuation/post-retirement benefits of the employees of the Assessee. The Assessee made the provision on the basis of an actuarial report. Its consistent stand was accepted by the Commissioner of Income Tax (Appeals) ['CIT(A)'] who came to the conclusion that it was not an item of deduction covered under Section 43B of the Act. The ITAT in the

impugned order followed the decision of the Supreme Court in ***Bharat Earth Movers v CIT [2000] 245 ITR 428 (SC)*** and the decision of this Court in ***CIT vs. Bharat Heavy Electrical Ltd.*** **[2013]** ***352 ITR 88 (Del)*** and upheld the order of the CIT (A).

7. The Court's attention is drawn by learned counsel for the Assessee to the decision in ***CIT v Ranbaxy Laboratories Ltd. (2011) 334 ITR 341 (Del).*** The ratio of the above decision is that where there are actuarial reports supporting the provision to meet a contingent liability, it cannot be gone behind by the Assessing Officer (AO) unless it is shown to be not based on any scientific or know financial principles.

8. It is sought to be urged by learned counsel for the Revenue that only because the actual payouts by way of post-retirement benefits to the employees in the AYs in question were far less than the provision made for that purpose, the actuarial report cannot be said to have been prepared on a scientific basis and was therefore not binding on the AO.

9. The Court is unable to accept this submission. The making of a provision to meet a contingent liability need not be in order to meet such liability entirely in the year of its creation. The provision having been made on the basis of an actuarial report, which is not shown by the Revenue to b unacceptable on the ground that it is not based on known accounting or financial principles, the mere fact that the actual pay out in a particular AY may be far less than the provision cannot provide a justification to deny the deduction. The Court concurs with the view of the CIT (A) and ITAT that the provision does not attract Section 43 B of the Act. The concurrent

findings of the CIT (A) and the ITAT on the above issue does not give rise to any substantial question of law.

10. The third ground urged by the Revenue is regarding the failure by ITAT to disclose as part of its income, the interest accrued on the advance made by it to M/s. Karsan. Learned counsel for the Revenue pointed out that by a judgment dated 4th December 2006 of this Court, the arbitral award in favour of the Assessee under the Arbitration Act, 1940 was made rule of the Court. He submitted that although up to that date it could be said that the interest on the advance had not crystallized (as was held by this Court in its order dated 24th September, 2012 in ITA 541/2012 in the Assessee's own case for the AY 2005-2006), for the subsequent AYs the right to receive interest had accrued to the Assessee and should have been added to its income.

11. Learned counsel for the Assessee, on the other hand, states that the concept of 'real income' has been accepted by the Supreme Court in ***Godhra Electricity Co. Ltd. v. CIT, (1997) 225 ITR 746 (SC)*** and this was followed by this Court in its decision dated 19th May, 2015 in ITA No.268/2008 (***Liquidator Polymerland India Pvt. Ltd. v. DCIT***). It is pointed out that where no part of the advance has been able to be recovered by the Assessee, notwithstanding the Award in its favour, no 'real income' can be said to have accrued to it.

12. The ITAT has in the impugned order held as under:

> "There is no dispute that the ICA has awarded interest to the assessee @ 5% p.a. on the advance made to M/ s. Karsan. It is also not

disputed that the assessee could not make recovery against the advance (principal amount) of Rs.130.69 crores, an amount of Rs.1.05 crores only could be recovered leaving balance advance of Rs.129. 64 crores which could not be recovered till date. The notional interest awarded by the International Court of Arbitration, which has now attained finality is a hypothetical income which cannot be subjected to tax. Merely because the said amount has been awarded by way of an order, does not mean that the assessee has received such income. The assessee followed mercantile system of accounting where there cannot be a situation of hypothetical income being taxed"

13. Indeed, it is seen that no part of the advance given by the Assessee to M/s. Karsan has been able to be recovered by it. As pointed out by learned counsel for the Assessee, there was a case registered with the Central Bureau of Investigation (CBI) in that regard and any prospect of the money being recovered has all but vanished. Since no part of the principal amount could actually be recovered by the Assessee, there was no 'real income' and the question of adding any notional accrued interest to its income on such amount does not arise. In the entire facts and circumstances of the case, the Court agrees with the concurrent findings of the CIT (A) and ITAT. No substantial question of law arises as regard this issue as well.

14. The appeals are accordingly dismissed.

S.MURALIDHAR, J

CHANDER SHEKHAR, J

APRIL 24, 2017/tp