$~

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

Date of Decision: 19.03.2018

\+ **ITA 303/2018, C.M. APPL.10257/2018**

\+ **ITA 310/2018, C.M. APPL.10604/2018**

VEDANTA LIMITED (SUCCESSOR TO CAIRN INDIA LIMITED) ..... Appellant

versus

PRINCIPAL COMMISSIONER OF INCOME TAX-9, NEW DELHI ..... Respondent

Present: Sh. Ajay Vohra, Sr. Advocate with Sh. Prakash Kumar, Advocates for appellant.
Sh. Ruchir Bhatia, Sr. Standing Counsel for the Revenue.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A. K. CHAWLA

S. RAVINDRA BHAT, J.

Admit.

The following questions of law arise for consideration:

"(i) Did the Tribunal err in law in regard to disallowances made under Section 14A of the Income Tax Act, 1961 [hereafter "the 1961 Act"] read with Rule 8D(2)(iii) of the Income Tax Rules, in the facts and circumstances?

(ii) Did the Tribunal fall into error in holding that the transactions between the assessee and its Associated Enterprise (AE) had to be disregarded for the purpose of Arm's Length

Price (ALP) determination under Section 92C of the 1961 Act?"

2. The third question urged by the assessee is with respect to the interpretation of Section 32(1)(iia). This is the compulsory allowance of the claim of additional depreciation amounting to ₹538,66,55,780/- under Section 32 (iia) of the Act holding the same as mandatory.

3. Facts in respect of this issue are that the assessee claimed depreciation amounting to ₹503.24 crore apart from additional depreciation (₹538.66 crore) in the revised return. Later, by a letter dated 07.01.2005 filed during the course of assessment proceedings, the assessee withdrew the claim of additional depreciation amounting to ₹538.66 crore. Resultantly, the original deduction claim under Section 80IB from ₹2042.81 crore shot up to ₹2579.07 crore. The Assessing Officer (AO) allowed the claim of additional depreciation by relying on Explanation 5 to Section 32 (ii) and also holding that the judgment of the Supreme Court in *Goetze India Ltd. Vs. Commissioner of Income Tax* (2006) 284 ITR 323 (SC) ruled out claims during the course of assessment proceedings after the completion of the time for filing revised return. The assessee was aggrieved against the decision of the Assessing Officer in this regard. Its appeal to the ITAT on this aspect was turned down; the tribunal held, *inter alia* as follows:

"20. Having heard both the sides and perused the relevant material on record, we find that the judgment of the Hon'ble Supreme Court in the case of Goetze India Ltd. (supra) though restricts the power of the Assessing Officer in entertaining a new claim made before him otherwise then by way of a revised return, but such decision does not affect the powers of the appellate authorities in entertaining such a claim if it is legally sustainable. However, we find that the on the facts and in the circumstances of the case, the assessee does not deserve any

relief on this score.

21. The Hon'ble Supreme Court in the case of Commissioner of Income Tax Vs. Mahendra Mills (2000) 243 ITR 56 (SC), has held that "if an assessee does not claim the depreciation and does not furnish particulars for claiming depreciation, as prescribed, depreciation cannot thrust upon him." To remedy the situation flowing from such judgment, the Legislature brought in Explanation 5 to Section 32 (ii) through the Finance Act, 2001 w.e.f. 01.04.2002. The Explanation provides that the "... provisions of this sub-section shall apply whether or not the assessee has claimed deduction in respect of depreciation in computing his total income". The effect of this Explanation is that deduction on account of depreciation has to be mandatorily allowed under Section 32 (ii) of the Act notwithstanding the fact that assessee claims or does not claim it in the computation of its total income.

22. The ld. Authorized Representative contended that the Explanation does not cover the assessee's case inasmuch as the amount of additional depreciation originally claimed but subsequently withdrawn by the assessee is an incentive and not depreciation, and the same is admissible under Section 32 (iia)(. It was submitted that Explanation 5 operates only for the purposes of Section 32 (ii) and not Section 32 (iia) of the Act.

23. In order to appreciate the contention, it will be significant to note the prescription of the relevant parts of Section 32 as under : -

********** **********

24. In our considered opinion, the contention that additional depreciation is an incentive and not depreciation has no legal legs to stand. It can be noticed that Section 32 with caption "Depreciation" opens through sub-section (1) with the expression "In respect of depreciation of" and then sets out tangible and intangible assets owned and used by the assessee

for the purposes of business or profession and then provides that 'the following deductions shall be allowed'. Then there are clauses (i), (ii), (iia) and (iii). This shows that the deduction on account of depreciation is relevant to all the clauses including clauses (ii) and (iia). Thus, it is not correct to contend that relief provided u/s 32(1)(iia) is a separate incentive de hors depreciation.

25. A cursory look at clause (iia) divulges that the assessee is entitled to deduction equal to 20% of the actual cost of such machinery or plant, which shall be allowed as a deduction under clause (ii). Contention of the ld. Authorized Representative that the mandate of Explanation 5 does not apply to relief under clause (iia) as the same has been placed under clause (ii), in our view, is far-fetched. It is no doubt clear that Explanation 5 granting mandatory depreciation is placed in clause (ii) of Section 32 (1) of the Act, but when we consider the language of clause (iia) providing further deduction for depreciation @ 20%, it becomes vivid that such further claim "shall be allowed as deduction under clause (ii)". It ergo becomes overt that the claim for additional depreciation as provided under clause (iia) has to be allowed as deduction under clause (ii). So, for all practical purposes, the claim for additional depreciation has to be considered and allowed as deduction only under clause (ii) and there is no separate provision for allowing additional depreciation under clause (iia) so as to make the prescription of Explanation 5 inoperative.

26. We agree with the ld. Authorized Representative that the word "shall" is not always conclusive of the mandatory nature and can be read as the word "may" in certain circumstances. However, when we consider the text and the context of the word "shall" as employed in clause (iia), there remains no doubt whatsoever that the grant of additional claim at the rate of 20% has necessarily to be allowed as deduction under clause (ii). Once the claim of additional depreciation under clause (iia) is to be allowed as deduction under clause (ii), a fortiori, the

command of Explanation 5 which applies to clause (ii) automatically becomes applicable to such a claim of additional depreciation. Once we hold that the claim for additional depreciation is allowable as deduction under Section 32 (1) (ii), the writ of Explanation 5 providing for allowing depreciation mandatorily, gets magnetized. Explanation 5, even if placed under clause (ii), applies to sub-section (1) of Section 32, which also covers clause (iia). We, therefore, hold that the Assessing Officer was fully justified in granting additional depreciation amounting to Rs. 538.66 crore under ITA No.1459/Del/2016 clause (iia) read with clause (ii) of Section 32 (1). This ground is not allowed."

4. Mr. Ajay Vohra, learned senior counsel urged that an Explanation must be interpreted having regard to the context, purpose and legislative history. Reliance was placed on *M/s. Patel Roadways Ltd. v. MIS. Prasad Trading Co. (*AIR 1992 SC 1514) and *Mohanlal Hargovinddas v. State of M.P.*(AIR 1967 SC 1022) and *Deputy Commissioner of Income Tax v. Bagri Foundation* (2012) 344 ITR 193 (Del), to advance this proposition. It was further argued that additional depreciation under Section 32(l)(iia) of the Act is in the nature of an incentive and cannot therefore, be treated at par with normal depreciation (on account of wear and tear and obsolescence) and as mandatory and not optional in nature. Counsel urged that Explanation 5 was inserted below Section 32(l)(i) and (ii) of the Act and thus applies to normal depreciation only. He further argued that Section 32 (iia) of the Act was inserted w.e.f. 01.04.2003. On the other hand, Explanation 5 was inserted w.e.f. 01.04.2002. The expression "*this sub-section"* in Explanation 5 thus only refers to Section 32(l)(i) and 32(l)(ii) of the Act. Mr. Vohra also argued that Section 32(l)(iia) is in the nature of an incentive providing for accelerated depreciation and hence cannot be imposed upon the assessee.

5. The relevant provisions of the Act read as follows:

"Depreciation.
32. (1) In respect of depreciation of--
(i) buildings, machinery, plant or furniture, being tangible assets;
(ii) know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998, owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed--
(i) ....
(ii) in the case of any block of assets, such percentage on the written down value thereof as may be prescribed:
Provided that .....
Explanation 5.--For the removal of doubts, it is hereby declared that the provisions of this sub-section shall apply whether or not the assessee has claimed the deduction in respect of depreciation in computing his total income;
(iia) in the case of any new machinery or plant (other than ships and aircraft), which has been acquired and installed after the 31st day of March, 2005, by an assessee engaged in the business of manufacture or production of any article or thing or in the business of generation or generation and distribution of power, a further sum equal to twenty per cent of the actual cost of such machinery or plant shall be allowed as deduction under clause (ii) : ....."

6. This court is of opinion that the plain text of the explanation leaves no room for admitting the interpretive gloss that the assessee wishes to place over it. There can be a multitude of circumstances where, but for the provision, the incentive, available to all those for whom the benefit of additional depreciation was intended, could have been deprived of it. Undoubtedly, the amount of the assessee's claim for Section 80IB deduction

increased, when it sought to withdraw the additional depreciation claim. However, that single circumstance should not influence this court to ignore the plain intendment of the statute, since Parliament clearly stated that the provisions of "this sub-section" would apply, *"whether or not the assessee has claimed the deduction in respect of depreciation in computing his total income".*This court cannot re-write the statute, as is sought to be urged. For these reasons, the Court is of the opinion that no question of law arises on this aspect.

7. The last question urged by the assessee is with respect to the investment in redeemable preference shares that was treated as international transaction and subjected to adjustment. The Tribunal remitted the matter for fresh consideration by the Assessing Officer (AO) after decision of the CIT(A) on that issue in respect of pending appeal for AY 2010-11; the present appeal pertains to AY 2011-12.

8. This Court is of the opinion that the Tribunal need not have felt constrained by the pendency of appeal (for another year before the CIT (A)) and could have proceeded to decide the issue on merits since it did not involve elaborate fact finding. As the highest appellate authority, it has jurisdiction in its own right to decide such question. Accordingly, the direction of remand is hereby modified; the Tribunal shall decide this issue in accordance with law, after hearing parties afresh. It is clarified that the Tribunal does not need to await the decision of CIT(A) in regard to AY 2010-11 on this issue.

9. The parties are directed to be present before the Tribunal further to the limited remand on 09.05.2018 for decision on the last question. The ITAT shall decide the issue, on merits, after hearing the parties.

10. The appeals are accordingly admitted in respect of the above two questions. List on 08.08.2018.

Order *dasti* under the signatures of the Court Master.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

MARCH 19, 2018/ajk