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

+ **INCOME TAX APPEAL NO. 187/2004**

Date of order: 11th November, 2011

COMMISSIONER OF INCOME TAX Appellant
Through Mr. Sanjeev Sabharwal,
Advocate.

versus

M/S JAGATJIT INDUSTRIES LIMITED Respondent
Through Mr. Satyen Sethi & Mr. Arta
Trana Panda, Advocates.

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 Reporter or not ?
3. Whether the judgment should be reported in the Digest?

SANJIV KHANNA, J.:

By order dated 27th July, 2004, the following substantial question of law was framed:-

“Whether on the facts and in the circumstances of the case, the Tribunal was right in law in allowing the investment allowance on enhanced liability representing the increase in actual cost under Section 43A on account of fluctuations in foreign currency rates?”

2. The respondent-assessee is a company and the assessment year involved is 1989-90.

3. The Assessing Officer while computing investment



allowance under Section 32A of the Income Tax Act, 1961 (the Act, for short) has held that the addition of Rs.1,76,175/- to the plant and machinery under Section 43A for computing investment allowance on account of foreign exchange rate prevailing on the last date of the financial year was improper and not permissible under the Act. Foreign exchange rate fluctuations as stipulated under Section 43A cannot be taken into consideration for computing investment allowance.

4. On first appeal filed by the assessee, the order of the Assessing Officer was upheld.

5. On further appeal by the assessee before the Income Tax Appellate Tribunal (the tribunal, for short), by the impugned order dated 25th August, 2003, it was held that the foreign exchange rate fluctuation can be taken into consideration while computing investment allowance. The tribunal after referring to the several decisions did not follow their earlier orders after relying upon decision of the Supreme Court in ***CIT versus Hindustan Electro Graphites Limited***, (2000) 243 ITR 48.

6. We need not refer to the factual matrix in detail as the legal issue pertains to computation of investment allowance on enhanced liability of Rs. 1,71,527/- representing increase in capital cost



under Section 43A of the Act. The enhanced investment allowance was claimed on the basis of fluctuation in the foreign currency rate on account of depreciation in the value of the Rupee at the end of financial year. This as per the stand of the appellant-assessee had to be accounted and added to the capital cost of the imported plant and equipment, payment for which was due and payable. There is no dispute that the appellant-assessee is entitled to investment allowance in the year in question in respect of the “Glass Unit”.

7. The question raised is covered by the decision of the Supreme Court in ***Commissioner of Income Tax versus Gujarat Siddhi Cement Limited***, (2008) 307 ITR 393 (SC). Subject matter of challenge before the Supreme Court was the decision of the Gujarat High Court, following their earlier Full Bench decision in ***Commissioner of Income Tax versus Gujarat State Fertilizers Company Limited***, (2003) 259 ITR 526 in which it was held that investment allowance is allowable on actual cost or adjusted cost as enhanced due to fluctuation in exchange rate of the foreign currency. The ratio of the said judgment was examined by the Supreme Court in ***Gujarat***



Siddhi Cement Limited (supra). The specific issue examined was whether while computing investment allowance under Section 32A, foreign exchange fluctuation in terms of Section 43A can be taken into consideration and accordingly accounted. The Supreme Court referred to an earlier decision in **Commissioner of Income Tax versus Arvind Mills Limited**, (1992) 193 ITR 255 (SC), wherein it has been observed as under:-

“22. Nor is there any in-appropriateness of statutory language as urged. As we have discussed above, the provisions of sub-section (1) apply to the present case and the increased liability should be taken as ‘actual cost’ within the meaning of section 43A(1). All allowances including development rebate or depreciation allowance or the other types of deductions referred to in the sub-section would therefore have to be based on such adjusted actual cost. But then sub-section (2) intercedes to put in a caveat. It says that the provisions of sub-section (1) should not be applied for purposes of development rebate. The effect is that the adjusted actual cost is to be taken as the actual cost for all purposes other than for grant of development rebate. Read thus, there is no difficulty in the application of the language of the section to the present case. There is no inappropriateness of language either in sub-section (1) or in sub-section (2). The language used is quite appropriate and meets the situation fully.

23. For the reasons discussed above, we are



of the opinion that the language of the provision is perfectly clear. It cannot be interpreted in a restrictive manner as contended for by the learned counsel for the assessee. In our opinion, it is a clear requirement of the statute that, for purposes of development rebate, any increase or decrease in the actual cost consequent on fluctuations in exchange rate should not be taken into account. It may be that the Legislature intended to give a different treatment to development rebate from depreciation and other allowances because the allowance of development rebate can result in an assessee claiming allowances exceeding the original cost. It may be that the Legislature thought that, though development rebate was intended to promote development of industries, this could not be allowed at the cost of the foreign exchange resources of the country which are also depleted when there is an increase in liability due to devaluation of the currency. It is unnecessary to attribute any particular reason for the provision when the language of the section is otherwise plain and unambiguous. We do not think that, in face of the language of sub-section (2), it would be right to permit the assessee to claim development rebate on the increased cost. We, therefore, allow the appeal and uphold the action of the Assessing Officer granting development rebate to the assessee only in respect of a sum of Rs. 52.48 lakhs and not on Rs. 61 lakhs on the basis of which it was claimed. Having regard, however, to the fact that the assessee had succeeded before all the High Courts we make no order regarding costs."

8. ***In Gujarat State Fertilizers Company Ltd.*** (Supra), it

has been observed:-



On a bare reading of the provision, i.e., section 43A(1) the position is clear that it relates to the fluctuation in the previous year in question. If any extra benefit is taken the same has to be taxed in the year when the liability is reduced as provided in terms of section 41(1)(a), Explanation 2. Therefore, whenever there is fluctuation in any previous year, section 43A(1) comes into play. Section 43A(1), as it stood at the relevant point of time, reads as follows :

“43A. Special provisions consequential to changes in rate of exchange of currency.—(1) Notwithstanding anything contained in any other provision of this Act, where an assessee has acquired any asset from a country outside India for the purposes of his business or profession and, in consequence of a change in the rate of exchange at any time after the acquisition of such asset, there is an increase or reduction in the liability of the assessee as expressed in Indian currency for making payment towards the whole or a part of the cost of the asset or for repayment of the whole or a part of the moneys borrowed by him from any person, directly or indirectly, in any foreign currency specifically for the purpose of acquiring the asset (being in either case the liability existing immediately before the date on which the change in the rate of exchange takes effect), the amount by which the liability aforesaid is so increased or reduced during previous year shall be added to, or, as the case may be, deducted from, the actual cost of the asset as defined in clause (1) of section 43, or the amount of expenditure of a capital nature referred to in clause (iv) of sub-section (1) of section 35 or in section 35A or in clause (ix) of sub-section (1) of section 36, or, in the case of a capital



asset (not being a capital asset referred to in section 50), the cost of acquisition thereof for the purposes of section 48, and the amount arrived at after such addition or deduction shall be taken to be the actual cost of the asset or the amount of expenditure of a capital nature or, as the case may be, the cost of acquisition of the capital asset as aforesaid.

Explanation 1.—In this sub-section, unless the context otherwise requires,—

(a) 'rate of exchange' means the rate of exchange determined or recognised by the Central Government for the conversion of Indian currency into foreign currency or foreign currency into Indian currency ;

(b) 'foreign currency' and 'Indian currency' have the meanings respectively assigned to them in section 2 of the Foreign Exchange Regulation Act, 1947 (7 of 1947).

Explanation 2.—Where the whole or any part of the liability aforesaid is met, not by the assessee, but directly or indirectly, by any other person or authority, the liability so met shall not be taken into account for the purposes of this sub-section.

Explanation 3.—Where the assessee has entered into a contract with an authorized dealer as defined in section 2 of the Foreign Exchange Regulation Act, 1947 (7 of 1947), for providing him with a specified sum in a foreign currency on or after a stipulated future date at the rate of exchange specified in the contract to enable him to meet the whole or any part of the liability aforesaid, the amount, if any, to be added to, or deducted from, the actual cost of the asset or the amount of expenditure of a capital nature or, as the case



may be, the cost of acquisition of the capital asset under this sub-section shall, in respect of so much of the sum specified in the contract as is available for discharging the liability aforesaid, be computed with reference to the rate of exchange specified therein.”

After the substitution by the Finance Act, 2002, with effect from April 1, 2003, the position is quite different.

In the instant case, as rightly submitted by learned counsel for the Revenue, the Commissioner of Income-tax (Appeals) recorded a categorical finding that no argument was advanced and no details were given.

In the aforesaid background we feel that it would be appropriate to grant opportunity to the assessee to establish the factual position relating to fluctuation in the foreign exchange rate. For that limited purpose the matter is remitted to the Tribunal to consider whether the assessee is justified in claiming deduction in the background of section 43A(1), as it stood then, keeping in view the legal position as highlighted above.”

9. Thus, the Supreme Court had referred to the provisions of Section 43A as they existed prior to the amendment with effect from 1st April, 2003 by Finance Act, 2002 (in the present case, the assessment year involved in 1984-85 and, therefore, the amendment to Section 43A with effect from 1st April, 2003 is not relevant) and it was held that in the background of Section 43A, the decision of the Gujarat High Court was correct and in



accordance with law.

10. We may now refer to the recent decision of the Supreme Court in ***Commissioner of Income Tax, Delhi verses Woodward Governor India Private Limited***, (2009) 13 SCC 1, wherein Section 43A was examined with reference to foreign exchange fluctuation and the exchange rate prevailing at the end of the financial year. It has been held in ***Wood Ward Governor India Private Ltd. (supra)*** as under:-

“56. As stated above, what triggers the adjustment in the actual cost of the assets, in terms of unamended Section 43-A of the 1961 Act is the change in the rate of exchange subsequent to the acquisition of assets in foreign currency. The section mandates that at any time there is change in the rate of exchange, the same may be given effect to by way of adjustment of the carrying cost of the fixed assets acquired in foreign currency. But for Section 43-A which corresponds to Para 10 of AS 11 such adjustment in the carrying amount of the fixed assets was not possible, particularly in the light of Section 43(1). The unamended Section 43-A nowhere required as condition precedent for making necessary adjustment in the carrying amount of the fixed asset that there should be actual payment of the increased/decreased liability as a consequence of the exchange variation. The words used in the unamended Section 43-A were “for making payment” and not “on payment” which are now brought in by amendment to Section 43-A vide the Finance Act, 2002.



57. Lastly, we are of the view that amendment of Section 43-A by the Finance Act, 2002 w.e.f. 1-4-2003 is amendatory and not clarificatory. The amendment is in complete substitution of the section as it existed prior thereto. Under the unamended Section 43-A adjustment to the actual cost took place on the happening of change in the rate of exchange whereas under the amended Section 43-A the adjustment in the actual cost is made on cash basis. This is indicated by the words “at the time of making payment”. In other words, under the unamended Section 43-A, “actual payment” was not a condition precedent for making necessary adjustment in the carrying cost of the fixed asset acquired in foreign currency, however, under amended Section 43-A w.e.f. 1-4-2003 such actual payment of the decreased/enhanced liability is made a condition precedent for making adjustment in the carrying amount of the fixed asset. This indicates a complete structural change brought about in Section 43-A vide the Finance Act, 2002. Therefore, the amended section is amendatory and not clarificatory in nature.”

11. In the light of the aforesaid discussion, it is apparent that the enhanced liability representing the increase in the actual cost on account of fluctuations in the foreign exchange rates on the last date of the accounting year can be taken into consideration for the purpose of Section 43A for the assessment years prior to the assessment year 2003-04 for computing investment allowance.

12. Necessary sequitor is that the ITAT was right in allowing the appeal of the assessee holding that the foreign exchange



fluctuation or the exchange rate prevailing on the last date of the financial year can be taken into consideration in computing the investment allowance. The question of law is answered in affirmative, i.e., against the Revenue and in favour of the appellant-assessee.

The appeal is disposed of. No order as to costs.

SANJIV KHANNA, J.

R.V. EASWAR, J.

**NOVEMBER 11, 2011
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