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

\+ **INCOME TAX APPEAL NO. 574/2009**

Date of decision: 29th July, 2013

ESTER INDUSTRIES LTD

..... Appellant

Through Mr. R. Santhanam, Advocate.

versus

COMMISSIONER OF INCOME TAX

..... Respondent

Through Mr. Sanjeev Sabharwal, Sr. Standing Counsel.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJIV KHANNA, J. (ORAL):

This appeal by the assessee-M/s Ester Industries Limited impugns order of the Income Tax Appellate Tribunal dated 14th December, 2007, which relates to Assessment Year 1997-98.

2. Learned counsel for the appellant submits that adjustments required for computing book profits under Section 115JA of the Income Tax Act, 1961 (Act, for short) have been wrongly made by the Assessing Officer and benefit of Section 80HHC has not been granted.

3. For the assessment year in question, the assessee had filed return on 28th November, 1997 declaring "nil" taxable income under the normal provisions. The assessee did not compute taxable income

under MAT provisions, i.e., Section 115JA and a specific note w attached that the said provisions were not applicable.

4. The Assessing Officer passed an order under Section 143(1)(a) of the Act making adjustments and computing 30% of the book profit at Rs.4,07,72,346/-. This was made subject matter of challenge in the appellate proceedings but we need not refer to the orders passed as this aspect is not relevant.

5. In the meanwhile, the Assessing Officer passed a regular assessment order and calculated the tax payable under Section 115JA at Rs.4,07,72,346/-. The Assessing Officer directed levy of interest under Sections 234B and 234C and observed that penalty proceedings under Section 271(1)(c) had already been initiated.

6. The assessee filed first appeal but was not successful before the Commissioner of Income Tax (Appeals). Order passed by the first appellate authority has, however, not been placed on record. The assessee thereupon filed second appeal before the Income Tax Appellate Tribunal raising the following grounds:-

> "1. In upholding Rs.14,175/- U/s 40A(3) of the Income Tax Act illegally and unjustifiably.
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> 2. In disallowing the appellant's claim for gratuity liability of Rs.22,48,530/-.
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> 3. In confirming a disallowance of 50% of the expenditure as if it is in the nature

of entertainment when it is not at all falling U/s 37(2) as entertainment expenditure for disallowance.

4. In confirming an illegal demand of Rs.1,75,32,108/- towards Minimum Alternate Tax U/s 115JA ignoring the fact that U/s 115 JAA the deposit of any amount will be considered as available as credit and in the absence of any deposit, the credit would be denied and in the absence of any tax liability being determined in the normal assessment and adjusted within the 5 years period, the entire amount of credit would be swallowed by the Government and non-payment of any amount towards interest-free credit cannot, therefore, be considered as tax payable by the appellant and hence the imposition of Minimum Alternate Tax on the appellant is clearly illegal and unauthorised by law and must be set aside and quashed.

5. In not directing the disallowance U/s 43 43B of Rs.72,17,146/- to be deleted instead of remanding the matter to the Assessing Officer who does not act in a fair and just manner."

7. Subsequently, an application raising two additional grounds was filed but the said application was rejected by the tribunal by the impugned order. Additional grounds raised but were not entertained read:-

"1. On the facts and in the circumstances of the case, the entire amount of MAT sought to be levied and collected is required to be given credit mandatorily and the amount of such credit ought to be refunded with interest to the assessee in the event of there being no such

> liability in the next five years in the case of the appellant, the refund of the entire amount collected with interest being granted to the appellant.
>
> 2. On the facts and in the circumstances of the case, the authorities below have erred, both on facts and in law, in disregarding the provisions for grant of credit u/s 115 JAA and the consequent non-existence of liability to MAT during the five years following the year 1997-98 and hence, the orders passed by the authorities below and denied refund with interest to the appellant cannot be upheld."

8. It is noticeable from the grounds of appeal raised before the tribunal as well as the additional grounds that the assessee never challenged the computation made under Section 115JA or challenged or questioned the assessment order on the ground that adjustments had not been made, as required and mandated by law. The assessee in the grounds of appeal as well as additional grounds did not challenge the assessment on the said ground. To this extent, he did not raise grievance or protest. Tribunal in the impugned order dated 13th/14th December, 2007 has dealt with the grounds as originally raised on merits and has dismissed the appeal of the assessee. There is no discussion in the impugned order on the question of adjustments, which should be permitted and allowed under Section 115JA or computation of taxable book profits under Section 115JA. It is apparent and crystal clear that this issue/question was not raised before

the tribunal as the petitioner, who appears, did not want to raise t said contention and issue. The tribunal in the impugned order has specifically recorded as under:-

> "The grounds of appeal raised by the assessee does (sic) do not challenge the manner of determination of book profits under Section 115JA of the Act."

9. In view of the aforesaid position, we do not think the assessee can now in the fourth appeal, (maintainable only on the ground of substantial question of law arising out of the order of the tribunal) can be allowed and permitted to raise this contention and set the ball rolling back once again to the Assessing Officer, after lapse of several years. The appeal relates to the Assessment Year 1997-98. Allowing the appellant to now question the computation will be allowing a person to raise stale issue and to question a decision which was accepted. In these circumstances, we do not think the appellant-assessee should be permitted and allowed to raise this ground belatedly at this stage. The issue was not raised before the tribunal, and has not been dealt and decided by them. The appeal is accordingly dismissed.

SANJIV KHANNA, J.

SANJEEV SACHDEVA, J.

JULY 29, 2013
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