

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, सी.मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL

MUMBAI BENCHES "C", MUMBAI

श्री जोगिन्दर सिंह, न्यायिक सदस्य एवं

श्री राजेन्द्र, लेखा सदस्य, के समक्ष

**Before Shri Joginder Singh, Judicial Member, and
Shri Rajendra, Accountant Member**

ITA NO 5751/Mum/ 2009

Assessment Year: 2005-06

DCIT, CC-34, R. No.104, First Floor, Aayakar Bhavan, Mumbai-400020	बनाम/ Vs.	M/s Prism Cement Ltd. 2 nd Floor, Rahejas, Main Avenue, V.P. Road, Santacruz (W), Mumbai-400054
(राजस्व /Revenue)		(निर्धारिती /Assessee)
PAN No.AAACP6224L		

ITA NO. 5957/Mum/2009

Assessment Year : 2005-06

M/s Prism Cement Ltd. 2 nd Floor, Rahejas, Main Avenue, V.P. Road, Santacruz (W), Mumbai-400054	बनाम/ Vs.	DCIT, CC-34, R. No.104, First Floor, Aayakar Bhavan, Mumbai-400020
(निर्धारिती /Assessee)		(राजस्व /Revenue)
PAN No. AAACP6224L		

ITA NO 3859/Mum/ 2010
Assessment Year: 2006-07

DCIT, CC-34, R. No.104, First Floor, Aayakar Bhavan, Mumbai-400020	बनाम/ Vs.	M/s Prism Cement Ltd. 2 nd Floor, Rahejas, Main Avenue, V.P. Road, Santacruz (W), Mumbai-400054
(राजस्व /Revenue)		(निर्धारिती /Assessee)
PAN No.AAACP6224L		

ITA NO. 3275/Mum/2010
Assessment Year: 2006-07

M/s Prism Cement Ltd. 2 nd Floor, Rahejas, Main Avenue, V.P. Road, Santacruz (W), Mumbai-400054	बनाम/ Vs.	DCIT, CC-34, R. No.104, First Floor, Aayakar Bhavan, Mumbai-400020
(निर्धारिती /Assessee)		(राजस्व /Revenue)
PAN No. AAACP6224L		

ITA NO 8503/Mum/ 2010
Assessment Year: 2007-08

DCIT, CC-34, R. No.104, First Floor, Aayakar Bhavan, Mumbai-400020	बनाम/ Vs.	M/s Prism Cement Ltd. 2 nd Floor, Rahejas, Main Avenue, V.P. Road, Santacruz (W), Mumbai-400054
(राजस्व /Revenue)		(निर्धारिती /Assessee)
PAN No.AAACP6224L		

ITA NO. 8049/Mum/2010
Assessment Year : 2007-08

M/s Prism Cement Ltd. 2 nd Floor, Rahejas, Main Avenue, V.P. Road, Santacruz (W), Mumbai-400054	बनाम/ Vs.	DCIT, CC-34, R. No.104, First Floor, Aayakar Bhavan, Mumbai-400020
(निर्धारिती / Assessee)		(राजस्व / Revenue)
PAN No. AAACP6224L		

निर्धारिती की ओर से / Assessee by	Shri Parag Pardiwala & Shri Nitesh Joshi
राजस्व की ओर से / Revenue by	Shri M. Dayasagar CIT-DR & Shri Abhishek Sharma-DR

सुनवाई की तारीख / Date of Hearing :	09/05/2016
आदेश की तारीख /Date of Order:	16/05/2016

आदेश / O R D E R

Per Joginder Singh (Judicial Member)

This bunch of six appeals is by the assessee as well as by the Revenue for the different assessment years challenging the impugned orders of the respective date passed by the Ld. First Appellate Authority, Mumbai.

2. First, we shall take up appeal of the assessee in ITA No.5957/Mum/2009 for Assessment year 2005-06, wherein, first ground pertains to upholding the disallowance of claim u/s 35E, amounting to Rs.3,44,00,000/-. The crux

of argument advanced on behalf of the assessee is that for Assessment year 2000-01, identically, the claim of the assessee was accepted by the Assessing Officer by passing an order u/s 143(3) of the Act and no notice u/s 147/148 of the Act was given to the assessee. Our attention was invited to statement of facts filed before the Ld. Commissioner of Income Tax (Appeal). It was claimed that if there is recurring issue and, if allowed in first year, then in the later year, the relief cannot be denied. Reliance was placed upon the decision in CIT vs Paul Brothers (1995) 216 ITR 548 (Bom) and CIT vs Western Outdoor Interactive (P.) Ltd. (2012) 349 ITR 309 (Bom.) and also the decision of the Tribunal in ITA No.3285 & 5087/Mum/2007 for Assessment year 2001-02 & 2002-03 in the case of assessee itself, order dated 25/02/2009. This factual matrix was not controverted by the ld. DR and he merely relied upon the impugned order.

2.1. We have considered the rival submissions and perused the material available on record. The facts, in brief, are that the assessee is engaged in the business of extraction of lime stone, which is used for manufacturing

cement. During the relevant previous years to Assessment year 1994-95 to 1998-99, the assessee incurred expenditure for development of mine amounting to Rs.5,64,12,225/-. The assessee commenced commercial exploitation in the previous year relevant to Assessment year 1998-99. For the year under consideration, the assessee claimed 1/10th of the expenditure amounting to Rs.56,41.223/- and aggregate of installments of the above assessment years was not claim due to adequacy of profit amounting to Rs.2,88,02,610 (para 2 of statement of facts). This claim was accepted in Assessment year 2000-01 by the Assessing Officer. The copy of computation of income and assessment order was handed over to the Assessing Officer during assessment proceedings. Now, question arises, if the recurring issue is accepted in past and the claim is continuing whether the same should have been allowed in the later years. We find that Hon'ble jurisdictional High Court in CIT vs Paul Brothers and Western Outdoor Interactive Pvt. Ltd. (supra). We find that in the case of Paul Brothers and Western Outdoor Interactive Pvt. Ltd (supra), wherein, the assessee was engaged in the business of development of software for in

flight entertainment of aircraft passengers. For the assessment years 2000-01 and 2001-02 the relief granted under section 10A of the Act to the SEEPZ unit had not been withdrawn. There was no change in the facts which were inexistence during the asst. year 2000-01 vis-à-vis the claim to exemption under section 10A of the Act. Therefore, it was held that it is not open to the department to deny the benefit of section 10A for the subsequent assessment years, where a benefit of deduction available for a particular number of years on satisfaction of certain conditions under the provisions of the Income-tax Act, 1961, then unless relief granted for the first assessment year in which the claim was made and accepted is withdrawn or set aside, the Income tax Officer cannot withdraw the relief for subsequent years. More particularly so, when the revenue has not even suggested that there was any change in the facts warranting a different view for subsequent years. (A.Y. 2002-03, 2003-04 and 2004-05). While coming to this conclusion, the Hon'ble High Court followed CIT vs. Paul Bros (1995) 216 ITR 548 (Bom.)(HC), Direct Information P. Ltd.vs. ITO (2012) 349 ITR 150 (Bom.)(HC).

2.2. It is also noted that in the case of the assessee for Assessment year 2001-02 and 2002-03 (ITA No.3285 & 5087/Mum/2007) vide order dated 25/02/2009 dismissed the appeal of the Revenue. However, the Ld. Commissioner of Income Tax (Appeal) concluded/observed as under:-

“7.3 I have considered the facts of the issue and the submissions made by the AR but do not find any merit in them. First of all, the objection of the AO that no material had been substantiated to prove that the said expenditure had been incurred on the prospecting or development of mines has not been addressed even during the appellate proceedings by the appellant. The appellant has merely made a statement that the said expenditure had been incurred to remove the overburden. Even by the appellant's own admission, the development of mine would mean the work of digging openings as tunnels, raises and winzes to give access to new workings, to provide access to the ore. No evidence has been lead by the AR to support that the said expenditure had been incurred for any of these activities. The expenditure for removal of overburden, per-se would not qualify as an expenditure for either prospecting or development of mines.

7.3.1 Further, a perusal of the assessment records for the A.Y.2000-01 wherein, the AR has claimed that a similar claim was allowed by the AO earlier indicates that the said issue regarding allowability of claim u/s.35E has not been discussed anywhere in that assessment year. Part of the claim made u/s.35E was allowed by default as claimed. Hence, of the issue regarding allowability or otherwise of the said claim u/s.35E was never considered or adjudicated

upon by the AO even in the A.Y.2000-01. Hence, there is no question of taking different view in the year under consideration, no view whatsoever having been formed by the AO earlier.

7.4 In view of the discussion above, this ground of appeal is dismissed”

However, we find that the issue for Assessment year 2000-01 and 2002-03, the Tribunal has dismissed the appeal of the Revenue, therefore, in view of the decision from Hon'ble jurisdictional High Court in CIT vs Paul Brothers and Western Outdoor Interactive Pvt. Ltd. (Bom.)(Supra), we allow this ground of the assessee as in the absence of any contrary facts. The Department is not expected to a different view.

3. The next ground pertains to disallowance of depreciation in respect of badminton court amounting to Rs.1535/-. The crux of argument advanced on behalf of the assessee is that the Tribunal for Assessment year 2000-01 (ITA No.889/M/2005) and ITA No.5308 & 5039/M/2007) for Assessment year 2003-04 and 2004-05 decided the issue in favour of the assessee. On the other hand, the ld. DR

contended that the assessee is not the owner of the badminton court.

Considering the totality of facts and the factum that in earlier years, it was decided in favour of the assessee, therefore, the ld. Assessing Officer is directed to follow the same order, thus, this ground of the assessee is allowed.

4. The next ground pertains to disallowance in respect of reimbursement of school expenses amounting to Rs.20,95,807/- at Satna. The crux of argument advanced on behalf of the assessee is that on identical fact in earlier years, in order in ITA No.889/Mum/2005 (Assessment year 2000-01) and ITA No.5308 & 5039/Mum/2007 for Assessment year 2003-04 and 2004-05, the issue was decided in favour of the assessee. This factual matrix was not controverted by the ld. DR.

4.1. We find that the Tribunal identically vide para 8 page 5 & 6 and Para 13 & 14 at page 9 of the aforesaid order of the Tribunal has discussed the issue and finally vide order dated 09/05/2014 decided the issue in favour of the assessee, dismissing the appeal of the Revenue. No contrary

fact was brought to our notice, therefore, this ground of the assessee is allowed.

5. Ground no.4 raised by the assessee is with respect to disallowance of community expenses at Rs.1,53,815/-. Due to smallness of the amount involved, this ground was not pressed by the assessee, therefore, it is dismissed as not pressed.

6. The last ground pertains to claim in respect of sales tax and VAT subsidy received by the assessee. This ground was taken as additional ground. Since, this ground was not raised before the Revenue authorities, therefore, in all fairness, this ground is sent to the file of the Assessing Officer to examine the claim of the assessee and decide in accordance with law. The assessee be given opportunity of being heard.

7. The appeal of the assessee is partly allowed for statistical purposes.

8. Now, we shall take up appeal of the Revenue (ITA No.5751/Mum/2009), wherein, first ground pertains to holding that it is not open for the Assessing Officer to

assume the allowance of depreciation for earlier years, when such depreciation was not actually allowed in those years. Without taking into consideration, explanation-5 below section 32(1)(ii) inserted by the Finance Act, 2001, which will apply retrospectively with effect from 01/04/1988.

8.1. The crux of argument advanced on behalf of the Revenue is in support of the assessment order, whereas, the counsel for the assessee explained that for Assessment year 2000-01 & 2001-02, identical claim was accepted by the Assessing Officer and explanation-5 to section 32 was w.e.f. Assessment year 2002-03. Reliance was placed upon the decision in K. K. Doshi Vs CIT (O2008) 297 ITR 38(SC).

8.2. We have considered the rival submissions and perused the material available on record. We note that the assessee did not claim depreciation while computing business profit for Assessment year 2000-01 and 2001-02, which position had become final as the ld. Assessing Officer did not allow depreciation in those years. However, the Explanation-5 to section 32 of the Act was inserted by the Finance Act w.e.f. 01/04/2002 (i.e. from Assessment year

2002-03) from which year the assessee had started claiming depreciation. Considering the totality of facts, we are in agreement with the finding of the Ld. Commissioner of Income Tax (Appeal) that it is not open for the Assessing Officer to assume the allowance of depreciation for earlier years, when such depreciation was not actually allowed in those years, because, the situation could have been different, if he would have reopened the assessment of those earlier years. Without amending the assessments of those years, the assumed written down value could not be considered to work out the depreciation of the current year. The Hon'ble Madras High Court in CIT vs Sree Senhavalli Textiles (P.) Ltd. (2003) 253 ITR 77 (Mad.), Hon'ble Kerala High Court in CIT vs Kerala Electric Lamp Works Ltd. (2003) 261 ITR 721 (Ker.), the Hon'ble J & K. High Court in CIT vs Agya Wanti 248 ITR 641 (J & K). It is noted that the Department has relied upon the decision in K. K. Doshi (245 ITR 849)(Bom.), which has been reversed by Hon'ble Apex Court in (2008) 297 ITR 38(SC), wherein, the main point was that as to whether the amendment to section 80HHC of the Income Tax Act, 1961, brought about by the Finance (No. 2)

Act, 1991, w.e.f. 1st April, 1992, is prospective in nature or is retrospective. This Court in the case of P.R. Prabhakar vs. CIT (2006) 204 CTR (SC) 27 : (2006) 284 ITR 548 (SC), relying upon Circular No. 621, dt. 19th Dec., 1991 [(1992) 101 CTR (St) 1] issued by the CBDT, has held that the amendment in question is prospective in nature and the same is binding on the Revenue. In view of Circular No. 621, dt. 19th Dec., 1991 issued by the CBDT and the aforesaid judgment of this Court, the appeals were accepted and the orders passed by the Hon'ble High Court of Bombay were set aside leaving the parties to bear their own costs, thus, we affirm the stand of the Ld. Commissioner of Income Tax (Appeal) and dismiss the impugned ground, raised by the Revenue.

9. The next ground pertains to exchange rate fluctuation loss claimed by the assessee. The crux of argument on behalf of the Revenue is that the Ld. Commissioner of Income Tax (Appeal) erred in allowing the exchange rate fluctuation loss, suffered by the assessee as the assessee had borrowed from various banks to meet out its capital requirement. On the other hand, the counsel for

the assessee defended the conclusion arrived at in the impugned order by claiming that the impugned issue is covered by the decision in CIT vs Woodward Governor India Pvt. Ltd. (2009) 312 ITR 254 (SC).

9.1. We have considered the rival submissions and perused the material available on record. Briefly, the claim was in respect of exchange rate fluctuation loss in respect of loan borrowed by the assessee from various banks to meet out its working capital requirement. The stand of the ld. Assessing Officer/ Ld. DR is that the exchange fluctuation loss cannot be considered as a revenue expenditure as the relevant effect as to given in the balance sheet by restating the loan amount outstanding. The assessee suffered a loss on account of fluctuation of foreign currency on the borrowed loans from various banks. The Ld. Commissioner of Income Tax (Appeal) has made relevant discussion from para 11 onwards and there is uncontroverted finding in para 11.2.2 that the assessee had been following the same method of accounting for foreign exchange difference by debiting /crediting the same to the profit & loss account. We find that the issue under hand is

covered in favour of the assessee by the decision of the Tribunal in ONGC vs DCIT 83 ITR 151 (Del.), affirmed in 162 taxman 60 (Del.) and also by the decision from Hon'ble Apex Court in Woodward Governor India Pvt. Ltd. (supra). The relevant portion from the decision from Hon'ble Apex Court is reproduced hereunder for ready reference:-

“13. As stated above, one of the main arguments advanced by the learned Additional Solicitor General on behalf of the Department before us was that the word "expenditure" in Section 37(1) connotes "what is paid out" and that which has gone irretrievably. In this connection, heavy reliance was placed on the judgment of this Court in the case of Indian Molasses Company (supra). Relying on the said judgment, it was sought to be argued that the increase in liability at any point of time prior to the date of payment cannot be said to have gone irretrievably as it can always come back. According to the learned counsel, in the case of increase in liability due to foreign exchange fluctuations, if there is a revaluation of the rupee vis-a-vis foreign exchange at or prior to the point of payment, then there would be no question of money having gone irretrievably and consequently, the requirement of "expenditure" is not met. Consequently, the additional liability arising on account of fluctuation in the rate of foreign exchange was merely a contingent/notional liability which does not crystallize till payment. In that case, the Supreme Court was considering the meaning of the expression "expenditure incurred" while dealing with the question as to whether there was a distinction between the actual liability in presenti and a liability de futuro. The word "expenditure" is not defined in the 1961 Act. The word "expenditure" is, therefore, required to be understood in the context in which it is used. Section 37 enjoins that any expenditure not being expenditure of the nature described in Sections 30 to 36 laid out or expended wholly and exclusively for the purposes of the business should be allowed in

computing the income chargeable under the head "profits and gains of business". In Sections 30 to 36, the expressions "expenses incurred" as well as "allowances and depreciation" has also been used. For example, depreciation and allowances are dealt with in Section

32. Therefore, Parliament has used the expression "any expenditure" in Section 37 to cover both. Therefore, the expression "expenditure" as used in Section 37 may, in the circumstances of a particular case, cover an amount which is really a "loss" even though the said amount has not gone out from the pocket of the assessee.

14. In the case of *M.P. Financial Corporation v. CIT* reported in 165 ITR 765 the Madhya Pradesh High Court has held that the expression "expenditure" as used in Section 37 may, in the circumstances of a particular case, cover an amount which is a "loss" even though the said amount has not gone out from the pocket of the assessee. This view of the Madhya Pradesh High Court has been approved by this Court in the case of *Madras Industrial Investment Corporation Ltd. v. CIT* reported in 225 ITR 802. According to the *Law and Practice of Income Tax* by Kanga and Palkhivala, Section 37(1) is a residuary section extending the allowance to items of business expenditure not covered by Sections 30 to 36. This Section, according to the learned Author, covers cases of business expenditure only, and not of business losses which are, however, deductible on ordinary principles of commercial accounting. (see page 617 of the eighth edition). It is this principle which attracts the provisions of Section 145. That section recognizes the rights of a trader to adopt either the cash system or the mercantile system of accounting. The quantum of allowances permitted to be deducted under diverse heads under Sections 30 to 43C from the income, profits and gains of a business would differ according to the system adopted. This is made clear by defining the word "paid" in Section 43(2), which is used in several Sections 30 to 43C, as meaning actually paid or incurred according to the method of accounting upon the basis on which profits or gains are computed under Section 28/29. That is why in deciding the question as to whether the word "expenditure"

in Section 37(1) includes the word "loss" one has to read Section 37(1) with Section 28, Section 29 and Section 145(1). One more principle needs to be kept in mind. Accounts regularly maintained in the course of business are to be taken as correct unless there are strong and sufficient reasons to indicate that they are unreliable. One more aspect needs to be highlighted. Under Section 28(i), one needs to decide the profits and gains of any business which is carried on by the assessee during the previous year. Therefore, one has to take into account stock-in-trade for determination of profits. The 1961 Act makes no provision with regard to valuation of stock. But the ordinary principle of commercial accounting requires that in the P&L account the value of the stock-in-trade at the beginning and at the end of the year should be entered at cost or market price, whichever is the lower. This is how business profits arising during the year needs to be computed. This is one more reason for reading Section 37(1) with Section 145. For valuing the closing stock at the end of a particular year, the value prevailing on the last date is relevant. This is because profits/loss is embedded in the closing stock. While anticipated loss is taken into account, anticipated profit in the shape of appreciated value of the closing stock is not brought into account, as no prudent trader would care to show increase profits before actual realization. This is the theory underlying the Rule that closing stock is to be valued at cost or market price, whichever is the lower. As profits for income-tax purposes are to be computed in accordance with ordinary principles of commercial accounting, unless, such principles stand superseded or modified by legislative enactments, unrealized profits in the shape of appreciated value of goods remaining unsold at the end of the accounting year and carried over to the following years account in a continuing business are not brought to the charge as a matter of practice, though, as stated above, loss due to fall in the price below cost is allowed even though such loss has not been realized actually. At this stage, we need to emphasise once again that the above system of commercial accounting can be superseded or modified by legislative enactment. This is where Section 145(2) comes into play. Under that section, the Central Government is empowered to notify from time to time the Accounting Standards to be followed by any

class of assessee or in respect of any class of income. Accordingly, under Section 209 of the Companies Act, mercantile system of accounting is made mandatory for companies. In other words, accounting standard which is continuously adopted by an assessee can be superseded or modified by Legislative intervention. However, but for such intervention or in cases falling under Section 145(3), the method of accounting undertaken by the assessee continuously is supreme. In the present batch of cases, there is no finding given by the AO on the correctness or completeness of the accounts of the assessee. Equally, there is no finding given by the AO stating that the assessee has not complied with the accounting standards.

15. For the reasons given hereinabove, we hold that, in the present case, the "loss" suffered by the assessee on account of the exchange difference as on the date of the balance sheet is an item of expenditure under Section 37(1) of the 1961 Act.

16. In the light of what is stated hereinabove, it is clear that profits and gains of the previous year are required to be computed in accordance with the relevant accounting standard. It is important to bear in mind that the basis on which stock-in-trade is valued is part of the method of accounting. It is well established, that, on general principles of commercial accounting, in the P&L account, the values of the stock-in-trade at the beginning and at the end of the accounting year should be entered at cost or market value, whichever is lower - the market value being ascertained as on the last date of the accounting year and not as on any intermediate date between the commencement and the closing of the year, failing which it would not be possible to ascertain the true and correct state of affairs. No gain or profit can arise until a balance is struck between the cost of acquisition and the proceeds of sale. The word "profit" implies a comparison between the state of business at two specific dates, usually separated by an interval of twelve months. Stock-in-trade is an asset. It is a trading asset. Therefore, the concept of profit and gains made by business during the year can only materialize when a comparison of the assets of the business at two different dates is taken into account. Section 145(1) enacts that

for the purpose of Section 28 and Section 56 alone, income, profits and gains must be computed in accordance with the method of accounting regularly employed by the assessee. In this case, we are concerned with Section 28. Therefore, Section 145(1) is attracted to the facts of the present case. Under the mercantile system of accounting, what is due is brought into credit before it is actually received; it brings into debit an expenditure for which a legal liability has been incurred before it is actually disbursed. (see judgment of this Court in the case of United Commercial Bank v. CIT reported in 240 ITR 355). Therefore, the accounting method followed by an assessee continuously for a given period of time needs to be presumed to be correct till the AO comes to the conclusion for reasons to be given that the system does not reflect true and correct profits. As stated, there is no finding given by the AO on the correctness of the accounting standard followed by the assessee(s) in this batch of Civil Appeals.

17. Having come to the conclusion that valuation is a part of the accounting system and having come to the conclusion that business losses are deductible under Section 37(1) on the basis of ordinary principles of commercial accounting and having come to the conclusion that the Central Government has made Accounting Standard-11 mandatory, we are now required to examine the said Accounting Standard ("AS").

18. AS-11 deals with giving of accounting treatment for the effects of changes in foreign exchange rates. AS-11 deals with effects of Exchange Differences. Under para 2, reporting currency is defined to mean the currency used in presenting the financial statements. Similarly, the words "monetary items" are defined to mean money held and assets and liabilities to be received or paid in fixed amounts, e.g., cash, receivables and payables. The word "paid" is defined under Section 43(2). This has been discussed earlier. Similarly, it is important to note that foreign currency notes, balance in bank accounts denominated in a foreign currency, and receivables/payables and loans denominated in a foreign currency as well as sundry creditors are all monetary items which have to be valued at the closing rate under AS-11. Under para 5, a transaction

in a foreign currency has to be recorded in the reporting currency by applying to the foreign currency amount the exchange rate between the reporting currency and the foreign currency at the date of the transaction. This is known as recording of transaction on Initial Recognition. Para 7 of AS-11 deals with reporting of the effects of changes in exchange rates subsequent to initial recognition. Para 7(a) inter alia states that on each balance sheet date monetary items, enumerated above, denominated in a foreign currency should be reported using the closing rate. In case of revenue items falling under Section 37(1), para 9 of AS-11 which deals with recognition of exchange differences, needs to be considered. Under that para, exchange differences arising on foreign currency transactions have to be recognized as income or as expense in the period in which they arise, except as stated in para 10 and para 11 which deals with exchange differences arising on repayment of liabilities incurred for the purpose of acquiring fixed assets, which topic falls under Section 43A of the 1961 Act. At this stage, we are concerned only with para 9 which deals with revenue items. Para 9 of AS-11 recognises exchange differences as income or expense. In cases where, e.g., the rate of dollar rises vis-à-vis the Indian rupee, there is an expense during that period. The important point to be noted is that AS-11 stipulates effect of changes in exchange rate vis-à-vis monetary items denominated in a foreign currency to be taken into account for giving accounting treatment on the balance sheet date. Therefore, an enterprise has to report the outstanding liability relating to import of raw materials using closing rate of exchange. Any difference, loss or gain, arising on conversion of the said liability at the closing rate, should be recognized in the P&L account for the reporting period.

19. A company imports raw material worth US \$ 250000 on 15.1.2002 when the exchange rate was Rs. 46 per US \$. The company records the transaction at that rate. The payment for the imports is made on 15.4.2002 when the exchange rate is Rs. 49 per US \$. However, on the balance sheet date, 31.3.2002, the rate of exchange is Rs. 50 per US \$. In such a case, in terms of AS-11, the effect of the exchange difference has to be taken into P&L account. Sundry creditors is a monetary item and hence such item has to be

valued at the closing rate, i.e. Rs. 50 at 31.3.2002, irrespective of the payment for the sale subsequently at a lower rate. The difference of Rs. 4 (50-46) per US \$ is to be shown as an exchange loss in the P&L account and is not to be adjusted against the cost of raw materials.

20. In the case of *Sutlej Cotton Mills Ltd. v. CIT* reported in 116 ITR 1 this Court has observed as under:

"The law may, therefore, now be taken to be well settled that where profit or loss arises to an assessee on account of appreciation or depreciation in the value of foreign currency held by it, on conversion into another currency, such profit or loss would ordinarily be a trading profit or loss if the foreign currency is held by the assessee on revenue account or as a trading asset or as a part of circulating capital embarked in the business. But, if on the other hand, the foreign currency is held as a capital asset or as fixed capital, such profit or loss would be of capital nature."

(emphasis supplied)

21. In conclusion, we may state that in order to find out if an expenditure is deductible the following have to be taken into account (i) whether the system of accounting followed by the assessee is mercantile system, which brings into debit the expenditure amount for which a legal liability has been incurred before it is actually disbursed and brings into credit what is due, immediately it becomes due and before it is actually received; (ii) whether the same system is followed by the assessee from the very beginning and if there was a change in the system, whether the change was bona fide; (iii) whether the assessee has given the same treatment to losses claimed to have accrued and to the gains that may accrue to it; (iv) whether the assessee has been consistent and definite in making entries in the account books in respect of losses and gains; (v) whether the method adopted by the assessee for making entries in the books both in respect of losses and gains is as per nationally accepted accounting standards; (vi) whether the system adopted by the assessee is fair and reasonable or is adopted only with a view to reducing the incidence of taxation.

Facts in M/s Honda Siel Power Products Ltd.

[Civil Appeal arising out of SLP(C) No. 7632/08]

- CAPITAL ACCOUNT CASE:

22. The main issue which arises for determination in this batch of civil appeals is: whether the assessee was entitled to adjust the actual cost of imported assets acquired in foreign currency on account of fluctuation in the rate of exchange at each balance sheet date pending actual payment of the varied liability. In this batch of civil appeals, we are concerned with increase in the existing liability on account of foreign exchange fluctuations on "capital account".

23. Before coming to the arguments, we quote hereinbelow Section 43A, as it stood prior to 1.4.2003:

"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 the 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."

24. We also quote hereinbelow Section 43A, as it stands in the Statute book after substitution by the Finance Act 2002 w.e.f. 1.4.2003:

"43A. Notwithstanding anything contained in any other provision of the Act, where an assessee has acquired any asset in any previous year from a country outside India for the purposes of his business or profession and, in consequence of a change in the rate of exchange during any previous year after the acquisition of such asset, there is an increase or reduction in the liability of the assessee as expressed in Indian currency (as compared to the liability existing at the time of acquisition of the asset) at the time of making payment."

(emphasis supplied)

25. We also quote hereinbelow provisions of Section 43(1):

"43. In sections 28 to 41 and in this section, unless the context otherwise requires -

(1) "actual cost" means the actual cost of the assets to the assessee, reduced by that portion of the cost thereof, if any, as has been met directly or indirectly by any other person or authority."

26. Shri Parag Tripathi, learned Additional Solicitor General appearing on behalf of the Department, submitted that in Section 43A (as it stood prior to Finance Act, 2002) the expression "for making payment" is in the context of increase or decrease of liability and the same hinges on "making the payment towards the whole or a part of ...". According to the learned counsel, the expression "towards the whole or a part of" makes it clear that Section 43A as it stood referred to whole or a part of the payment and therefore to the point of payment. According to the learned counsel, under the pre-amended Section 43A, the effect of increase or decrease of liability arose only at the point of payment because the point of accrual shifted to the point of payment. In this connection, learned counsel urged that the difference between accrual and payment of a liability is that normally the point of accrual and the point of payment

represent two different time milestones. However, according to the learned counsel, in the case of a contingent liability, like that of foreign exchange fluctuations, the point of accrual and the point of payment become the same.

According to the learned counsel, under the pre-amended dispensation of Section 43A, the effect of increase or decrease of liability could only arise at the point of payment, as the point of accrual shifts to the point of payment.

27. Learned counsel next contended that on a proper and true interpretation of the amendment to Section 43A, introduced by Finance Act, 2002, Section 43A is clarificatory. According to the learned counsel, the occasion for the clarificatory amendment arose in view of the judgments of the various High Courts, which interpreted the unamended provision as laying down the proposition that in case of increase or decrease of liability due to foreign exchange fluctuations, the same is to be recognized at the end of each financial year, irrespective of whether such "incremental liability" had accrued and had been paid or not. According to the learned counsel, Section 43A, as amended, recognizes the fact that in case of foreign exchange fluctuations, the accrual of liability is co-terminus with the payment of liability and therefore the amendment to Section 43A is clarificatory and not amendatory, notwithstanding the fact that the amendment operates w.e.f. 1.4.2003.

28. In reply, Shri Ajay Vohra, learned counsel appearing on behalf of the assessee, submitted that Section 43A (even prior to the amendment) was inserted to provide for adjustment in the actual cost of assets pursuant to change in foreign currency exchange rates. As a consequence of Section 43A (unamended), it became possible to adjust to increase/decrease in liability relating to acquisition of capital assets on account of exchange rate fluctuation, in the actual cost of the assets acquired in foreign currency and for depreciation to be allowed with reference to such increased/decreased cost. According to the learned counsel, the provisions of Section 43A (unamended) are *pari materia* with para

10 of AS-11 which inter alia provides for adjustment in the carrying cost of fixed assets acquired in foreign currency, due to foreign exchange fluctuation at each balance sheet date. In this connection, learned counsel has placed reliance on the judgment of this Court in the case of CIT v. Arvind Mills Ltd. reported in 193 ITR 255.

29. To answer the controversy, we need to analyse Section 43A (unamended). The period in question in the batch of Civil Appeals is prior to Finance Act, 2002, therefore, we are required to consider the scope of Section 43A (unamended).

30. Section 43A starts with a non obstante clause. Section 43A(1) overrides the other provisions only as regards cases falling under that sub-section. For instance, in a case where the asset is acquired, or the liability to pay in foreign exchange arises, after the change in the rate of exchange, the said sub-section has no application and the general principles of law must be applied in deciding whether the actual cost is increased or reduced as a result of such change. In other words, Section 43A(1) applies only where as a result of change in the rate of exchange there is an increase or reduction in the liability of the assessee in terms of the Indian rupee to pay the price of any asset payable in foreign exchange or to repay moneys borrowed in foreign currency specifically for the purpose of acquiring the asset. Section 43A(1), therefore, has no application unless the asset is acquired and the liability existed, before the change in the rate of exchange takes effect. In such a case, Section 43A contemplates recomputation of the cost of the assets for the purposes of depreciation [Sections 32 and 43(1)], and also as regards capital assets for scientific research [Section 35(1)(iv)] and also regarding patent rights or copyrights [Section 35A].

31. As held in Arvind Mills case (supra) increase or decrease in liability in the repayment of foreign loan should be taken into account to modify the figure of actual cost in the year in which the increase or decrease in liability arises on account of the fluctuation in the rate of exchange. Thus, the adjustments in the actual cost are to be made irrespective of the date of actual payment in foreign currency made by the assessee. This position also finds place in the

clarification issued by the Ministry of Finance dated 4.1.1967 which inter alia reads as under:

"2. The Government agrees that for the purposes of the calculation of depreciation allowance, the cost of capital assets imported before the date of devaluation should be written off to the extent of the full amount of the additional rupee liability incurred on account of devaluation and not what is actually paid from year to year. The proposed legal provision in the matter is intended to be framed on this basis."

(emphasis supplied)

32. One more aspect needs to be mentioned. Section 43(1) defines actual cost for the purpose of grant of depreciation etc. to mean "the actual cost of the assets to the assessee". Till the insertion of the unamended Section 43A there was no provision in the Income-tax Act for adjustment of the actual cost which was fixed once and for all, at the time of acquisition of the asset. Accordingly, no adjustment could be made in the actual cost of the assets for purposes of grant of depreciation for any increase/decrease of liability subsequently arising due to exchange fluctuation. Consequently, Section 43A was introduced in the Act by Finance Act, 1967 w.e.f. 1.4.1967 in the above terms to provide for adjustment in the actual cost of assets pursuant to change in the foreign currency exchange rates. As a consequence of the insertion of the said section, it became possible to adjust the increase/decrease in liability relating to acquisition of capital assets on account of exchange rate fluctuation, in the actual cost of the assets acquired in foreign currency and for, inter alia, depreciation to be allowed with reference to such increased/decreased cost. This position is also made clear by Circular No. 5-P dated 9.10.1967 issued by CBDT. One more point needs to be mentioned. Section 43A (unamended) corresponds to para 10 of AS-11 similarly providing for adjustment in the carrying cost of fixed assets acquired in foreign currency, due to foreign exchange fluctuation at each balance sheet date. The relevant para reads as follows:

"10. Exchange differences arising on repayment of liabilities incurred for the purpose of acquiring fixed assets, which carried in terms of historical cost, should be adjusted in the carrying amount

of the respective fixed assets. The carrying amount of such fixed assets should, to the extent not already so adjusted or otherwise accounted for, also be adjusted to account for any increase or decrease in the liability of the enterprise, as expressed in the reporting currency by applying the closing rate, for making payment towards the whole or a part of the cost of the assets or for repayment of the whole or a part of the monies borrowed by the enterprise from any person, directly or indirectly, in foreign currency specifically for the purpose of acquiring those assets."

33. As stated above, what triggers the adjustment in the actual cost of the assets, in terms of unamended Section 43A of the 1961 Act is the change in the rate of exchange subsequent to the acquisition of asset 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 43A 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 43A 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 43A were "for making payment" and not "on payment" which is now brought in by amendment to Section 43A vide Finance Act, 2002.

34. Lastly, we are of the view that amendment of Section 43A 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 43A adjustment to the actual cost took place on the happening of change in the rate of exchange whereas under the amended Section 43A 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 43A, "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 43A 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 43A vide Finance Act, 2002. Therefore, the amended section is amendatory and not clarificatory in nature.

Conclusion:

35. For reasons given hereinabove, we find no infirmity in the impugned judgments of the Delhi High Court and accordingly the Civil Appeals filed by the Department stand dismissed with no order as to costs.”

In view of the aforementioned detailed discussion, we affirm the stand of the Ld. Commissioner of Income Tax (Appeal) by holding that the loss arising on account of foreign exchange fluctuation rate in respect of loans on revenue account is allowable u/s 37(1) of the Act.

10. Now, we shall take ITA No.3275/Mum/2010, appeal of the assessee, wherein, first ground pertains to disallowing claim of the assessee made u/s 35E amounting to Rs.56,41,223/-. Without going into much deliberation, we note that this has been decided in preceding para of this order (in ITA No.5957/Mum/2009) Assessment year 2005-06. Following the same reasoning, this ground is decided in favour of the assessee.

11. Next ground pertains to claim of depreciation in respect of badminton court amounting to Rs.13,665/-. This ground was discussed in preceding para of this order (ITA No.5957/Mum/2009) for Assessment year 2005-06, therefore, decided in favour of the assessee.

12. Next ground pertains to disallowance in respect of reimbursement of school expenses amounting to Rs.22,75,669/- at Satna. Without going into much deliberation, we note that this has been decided in preceding para of this order (in ITA No.5957/Mum/2009) for Assessment year 2005-06. Following the same reasoning, this ground is decided in favour of the assessee.

13. The next ground pertains to restricting the claim for depreciation on UPS at the rate of 15% as against 60% treating the same as plant and machinery amounting to Rs.1,01,025/-.

13.1. Considering the totality of facts, we find that this issue is covered by the decision of the Tribunal in Macawber Engineering Systems (I)(P.)Ltd. vs ACIT (2012) 19 ITR (T) 302 and DCIT vs Datacraft India Ltd. (2010) 40 SOT 295

(Mumbai)(SB), thus, the Assessing Officer is directed to decide the issue in the light of the aforesaid decision and allow the assessee the depreciation on UPS at the rate of 60% in place of 15% restricted by the Revenue.

14. Ground no.4(b) has become infructuous, since, we have decided that the depreciation on UPS is to be allowed at the rate of 60%.

15. So far as, the additional ground with respect to the amount in the form of sales tax/VAT subsidy received from Government of Madhya Pradesh whether capital in nature is concerned, we are of the view that additional ground can be raised before this Tribunal, therefore, without commenting upon the merits of the additional ground, being, raised for the first time before this Tribunal, therefore, this additional ground is sent to the file of the Ld. Assessing Officer to examine the claim of the assessee and decide in accordance with law. Needless to mention here that the assessee be given opportunity of being heard to substantiate its claim, thus, the additional ground is allowed for statistical purposes only.

16. The appeal of the assessee is partly allowed for statistical purposes.

17. Now, we shall take up in ITA No.3859/Mum/2010, appeal of the Revenue, wherein, the first ground pertains to depreciation for earlier years without taking into consideration Explanation-5 below section 32(1)(ii) inserted by the Finance Act, 2001, and its applicability.

17.1. We find that this issue has already been decided in the appeal of the Revenue (ITA No.5751/Mum/2009) for Assessment year 2005-06. The same reasoning/finding/decision will be applicable to this ground also.

18. So far as, the claim of foreign exchange rate fluctuation loss with respect to loan borrowed for meeting its working capital requirements is concerned, this ground has already been decided in Departmental Appeal (ITA No.5751/Mum/2009) for Assessment year 2005-06, therefore, the same decision will be applicable to this ground also.

19. Now, we shall take up in ITA No.8503/Mum/2010, the appeal of the Revenue, wherein,

the first ground pertains to disallowance u/s 14A read with Rule 8D, following the decision in Godrej & Boyce Mfg. Pvt. Ltd. from Hon'ble Bombay High Court holding that provision of Rule-8D has no retrospective effect and will apply from Assessment year 2008-09 only.

19.1. We find that the assessee received dividend income of Rs.47,23,466/- and the Ld. Assessing Officer by applying Rule 8D of the rules made a disallowance of Rs.71,87,621/-. The Ld. Commissioner of Income Tax (Appeal) sent back the matter to the file of the Ld. Assessing Officer to make a reasonable disallowance by following the decision from Hon'ble jurisdictional High Court in Godrej & Boyce Mfg. Ltd. We find no infirmity in the direction of the Ld. Commissioner of Income Tax (Appeal) and the same is affirmed.

20. The next ground is with respect to claim of foreign exchange fluctuation loss in respect of loan borrowed by the assessee to meet out its working capital requirements. This issue has been decided in preceding para of this order (ITA

No.5751/Mum/2009) for Assessment year 2005-06. The same order will be applicable to the impugned ground also.

21. The last ground in the present appeal is with respect to allowance of depreciation, which was not actually allowed in earlier years. This ground has been decided in ITA No.5751/Mum/2009 for Assessment year 2005-06, therefore, the same reasoning/decision will be applicable to the impugned ground also.

22. Now, we shall take up appeal of the assessee in ITA No.8049/Mum/2010, wherein, first ground pertains to disallowance in respect of expenditure u/s 14A read with Rule-8D of the Rules is concerned, we find that the assessee received dividend income of Rs.47,23,466/-, whereas, the ld. Assessing Officer, applying Rule -8D of the rules, made disallowance of Rs.71,87,621/-. The Ld. Commissioner of Income Tax (Appeal) sent the matter back to the file of the ld. Assessing Officer to make a reasonable disallowance. Before us, the Ld. counsel for the assessee place reliance upon the decision in Godrej Agrovat (ITA No.934 of 2011). Respectfully following the decision from Hon'ble

jurisdictional High Court, we remand this issue to the file of the Ld. Assessing Officer with a direction to examine the claim/facts of the assessee and restrict the disallowance in accordance with law. Thus, this ground of the assessee is allowed for statistical purposes only.

23. The next ground pertains to disallowance of depreciation of Rs. 13,665/- with respect to badminton court. This issue has been decided in favour of the assessee in preceding para of this order (ITA No.5957/Mum/2009) for Assessment year 2005-06, thus, the same reasoning/decision will be applicable to the impugned issue.

24. Next ground pertains to disallowance in respect of reimbursement of school expenses of Rs.30,20,036/- at Satna. We find that this issue is identically decided in ITA No.5957/Mum/2009 for Assessment year 2005-06, thus, on the same reasoning, the decision arrived at therein will be applicable to this ground also.

25. The next ground pertains to disallowance of expenditure of mines development/expenditure u/s 35E of the Act amounting to Rs.56,41,223/-. We find that this

ground has been decided in preceding para of this order (ITA No.5957/Mum/2009) for Assessment year 2005-06, therefore, on the same reasoning, the decision arrived at therein will be applicable to the impugned ground.

26. The next ground pertains to depreciation on UPS amounting to Rs.1,06,423/-. We note that this issue has already been decided (ground no.4) in the appeal of the assessee in ITA No.3275/Mum/2010 for Assessment year 2006-07 allowing the depreciation at the rate of 60%, therefore, on the basis of same reasoning, the decision arrived at therein will be applicable to this ground also.

27. So far as, the additional ground for a sum of Rs.34,72,92,660/-, received by the assessee in the form of sales tax/VAT subsidy from the Government of Madhya Pradesh and its nature is concerned, this ground was not raised before the Revenue authorities. Considering the fact that this legal ground was raised for the first time before this Tribunal, therefore, this issue is remanded back to the file of the ld. Assessing Officer to examine the claim of the assessee and decide in accordance with law. The assessee be

given opportunity of being heard. Thus, this ground of the assessee is allowed for statistical purposes only.

Finally, the impugned appeals are disposed of in terms indicated hereinabove.

This order was pronounced in the open in the presence of ld. representatives from both sides at the conclusion of the hearing on 09/05/2016.

Sd/-

(Rajendra)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 16/05/2016

Sd/-

(Joginder Singh)

न्यायिक सदस्य / JUDICIAL MEMBER

Shekhar, P.S./नि.स.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai