IN THE INCOME TAX APPELLATE TRIBUNAL
*KOLKATA BENCH "**B**" KOLKATA*

Before **Shri N.V.Vasudevan, Judicial Member** and
Shri Waseem Ahmed, Accountant Member

ITA No.743/Kol/2014 Assessment Year :2008-09

Deputy Commissioner of Income Tax Circle-10, P-7, Chowringhee Square, 3rd Floor, Kolkata-700 069	**V/s.**	M/s Akzo Nobel Coatings India (P) Ltd. Geetanjali Apartments, 1ts Floor, 8B, Middleton row, Kolkata-71 [**PAN No.AAACC 5072 B**]
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Smt. Sarbari Mukhopadhyay, JCIT, SR-DR
प्रत्यर्थी की ओर से/By Respondent	Shri Chirag Lakhami, AR
सुनवाई की तारीख/Date of Hearing	22-05-2017
घोषणा की तारीख/Date of Pronouncement	02-06-2017

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

This appeal by the Revenue is directed against the order of Commissioner of Income Tax (Appeals)-XII, Kolkata dated 20.01.2014. Assessment was framed by ACIT, LTU, Bangalore u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 04.11.2011 for assessment year 2008-09.

Smt. Sarbari Mukhopadhyay, Ld. Departmental Representative represented on behalf of Revenue and Shri Chirag Lakhami Ld. Authorized Representative.

2. Revenue has raised per its grounds raised as under:-

> *"1. That is the facts and in law of the case the Ld. CIT(A) erred in allowing the depreciation amounting to Rs.13417836/-.*
> *2. That is the facts and in law of the case the Ld. CIT(A) erred in allowing the depreciation on the cost of the machinery purchased from sister concern which was not ultimately paid by the assessee-company due to waiver of claim by the sister concern (seller)."*

3. Briefly stated facts are that assessee is a private limited company and is a manufacturer and trader of polymer based industrial paints and sealant products. The assessee has filed its return of income declaring business income of ₹36,67,72,500/- and income from other sources of ₹14.59 lakh aggregating gross total income of ₹36,82,31,500/- only. The aforesaid gross income of the assessee was set off by the amount of unabsorbed depreciation pertaining to the earlier years which was brought forward to the year under consideration to the extent of ₹20,47,17,870/-. The Assessing Officer during the course of assessment proceedings observed that the assessee has imported certain machineries from its parent company (in the financial years 1997-98 to 1996-97) based in United Kingdom aggregating to ₹13,48,09,000/- only. Accordingly, the assessee was claiming the depreciation in its books of account on such machineries. These machineries were acquired on credit and liability was accordingly booked in its books of account. However, the assessee failed to obtain permission from the Reserve Bank of India (RBI) for remitting the payment to the parent company in connection with the aforesaid machineries supplied by it. Thus, the assessee failed to make the payment to its parent company. Finally, the parent company waived off the amount which was due from the assessee on account of machinery supplied. Therefore, the assessee has transferred the amount of loan in connection with the machines for ₹13.48 crores to capital reserve in the financial year 2000-01. However, the AO observed that the cost of machines have been met by the parent company of the assessee and therefore it is not entitled for the depreciation on the amount waived off for ₹ 13.48 crores. Accordingly, the AO worked out the amount of depreciation pertaining to the impugned machinery to the tune

of Rs.1,34,17,836/- and disallowed the same by adding to the total income of assessee.

4. Aggrieved, assessee preferred an appeal before Ld. CIT(A). The Assessee before Ld. CIT(A) submitted that the instant issue in the earlier years 2001-02 to 2007-08 has been decided in favour of assessee in **ITA No.751 to 755 & 1131/Bang/2010** dated 14.09.2012. The Ld. CIT(A) after considering the submission of the assessee has deleted the addition made by the AO by observing as under:-

> *"5.2.4 During the course of the hearing the AR of the appellant drawn my attention towards the decision of the Hon'ble Bangalore Tribunal in appellant's own case for AY 2001-02 to AY 2007-08 wherein the Hon'ble Tribunal has duly accepted the view of the company and has held that the amount received by the company would be treated as Capital Receipt and the same could not be adjusted from the block of assets for the purpose of computing income-tax depreciation. Subsequently, the Hon'ble Dispute Resolution Panel, Kolkata Bench in the appellant's own case for AY 22009-10 has duly allowed the appellant's claim of depreciation. While doing so, the Hon'ble Bench has duly relied upon the captioned order of the Bangalore Tribunal.*
> *5.2.5 After carefully considering the arguments of the appellant as well as the judicial decisions relied upon by it and respectfully following the decision of the Hon'ble Tribunal on the issue decided in favour of the appellant company, disallowance of depreciation of Rs.1,34,17,836/- made by the AO is deleted. Thus, this ground of appeal is allowed."*

The Revenue, being aggrieved, is in appeal before us on the following grounds:-

> *"1. That is the facts and in law of the case the Ld. CIT(A) erred in allowing the depreciation amounting to Rs.13417836/-.*
> *2. That is the facts and in law of the case the Ld. CIT(A) erred in allowing the depreciation on the cost of the machinery purchased from sister concern which was not ultimately paid by the assessee-company due to waiver of claim by the sister concern (seller)."*

5. Before us Ld. DR submitted that in the instant case, the cost of machinery has been directly met by the parent company of the assessee and therefore amount waived off by the parent company should be reduced from the written down value of the assessee. Ld. DR in regard to assessee's claim has relied in the judgment of Hon'ble Delhi High Court in the case of *Steel Authority of India Vs. CIT* in ITA No. 37/2010, 38/2010, 41/2010 and 29/2011

dated 30.03.2012. The relevant operative portion of the judgment is reproduced below:-

> *"12. We are unable to accept the contention of the assessee that the case is not covered by the main provisions of Section 43(1) because of the treatment given by the assessee in its books of account. We have earlier noticed that in the books of account, the assessee had actually reduced the cost/WDV of the assets by the amount of the loans waived by the Government of India. In the returns, however, the depreciation was claimed without reducing the loans from the cost/WDV of the assets. It is true that the manner in which entries are made in the books of account is not conclusive of the question, which has to be resolved on a true interpretation of the provisions of law. However, the real nature of a transactions can be understood by reference to the contemporaneous act of the parties, which would throw considerable light on their true intention and their understanding of the transactions. It is therefore not impermissible to look into the entries made in the books of account, in the absence of any other evidence they show that the assessee understood the receipt of the loans from the Government as having been given towards meeting a part of the cost of the assets. The waiver cannot, therefore, have a different effect on such intention. The intention of the parties, as reflected by the accounts of the assessee, appears to be that the loans had been granted towards a part of the cost of the assets. It is also to be noted that the assessee is a Government of India undertaking and the loans have been given by the Government of India from the SDF. It is apparent to us that even when the loans were granted, they were granted towards cost of the assets. The assessee's case is, therefore, caught within the mischief of Section 43(1) itself and in this view of the matte it may not be necessary to examine the impact of Explanation 10 to the Section inserted with effect from 1.4.1999. For the same reason it is also not necessary to refer to the other judgments cited on behalf of the assessee."*

Ld. DR vehemently relied in the aforesaid judgment of Hon'ble Delhi High Court and on the order of AO.

On the other hand, Ld. AR before us submitted that the issue has already been covered by the order of ITAT Bangalore Bench in assessee's own case as discussed above. Ld. AR also submitted that the Hon'ble ITAT decided the issue in favour of assessee after having reliance in the judgment of Hon'ble Supreme Court in the case of *CIT vs. Tata Iron & Steel Co.* reported in 231 ITR 285 (SC). The Ld. AR relied on the order of Ld. CIT(A).

6. We have heard rival contentions of the parties and perused the material available on record. The issue raised before us revolve to the amount of disallowance made by the AO on account of depreciation on the amount of

loan waived off by the machine supplier. From the record, it is admitted fact that assessee failed to make the payment against the purchase of machineries due to the reason of not getting permission from RBI. It is important to note that for remittance of any amount to a country outside India, there is need to have the permission from the RBI. In the case before us it is undisputed fact that assessee failed to make the payment for the reason of not getting approval from the RBI. Therefore, the assessee had no option but to transfer the loan liability to its reserve account. Thus, from the facts it can be concluded that the cost of the machineries had never been met out by the machine supplier either directly or indirectly as evident from the peculiar facts and circumstances of the instant case.

6.1 The case law relied upon by the Ld. DR is distinguishable in terms of the fact that case the assessee has given effect to the amount of loan waived off by the Govt. of India by adjusting with the written down value of the asset whereas in the case before us no such adjustment was made in the books of account of the assessee. Thus the adjustment in the books of account for the waived off amount reflects the intention of the assessee as observed by the Hon'ble Delhi High Court in the case of *Steel Authority of India Vs. CIT (Supra).* Although, it is an admitted fact that the accounting entries are not decisive to change the character of any transactions. The assessee in the present case has not made any such accounting entries. We also find that the ITAT Bengalore in assessee's own case has decided the issue in favour of assessee in ITA No. 751 to 755 & 1131/Bang/2010 dated 14.09.2012. The relevant extract of the order reads as under :

> *"18, Prior to the introduction of new concept of block of assets with effect from 01.04,1988, depreciation used to be claimed separately on each asset. The Legislature found that this was a cumbersome procedure leading to various difficulties. This necessitated introduction of the concept of block assets and allowability of depreciation on such a block. The rationale behind such a provision is contained in Circular No.469 dated 23,09,1986 issued by the Central Board of Direct Taxes (CBDT), After referring to the Budget Speech of the Finance Minister wherein reference was made to the proposal to introduce a system of allowing depreciation in respect of block of assets instead of the present system of depreciation on individual assets at paragraph 6.3, the Board stated as follows:*

> "*As mentioned by the Economic Administration Reforms Commission (Report No12, para 20), the existing system in this regard requires the calculation of depreciation in respect of each capital asset separately and not in respect of block of assets. This requires elaborate book-keeping and the process of checking the Assessing Officer is time consuming. The greater differentiation in rate, according to the date of purchase, the type of asset, the intensity of use, etc., the more disaggregate has to be the record keeping. Moreover, the practice of granting the terminal allowance as per section 32(1)(iii) or taxing the balancing charge as per section 41(2) of the Income-tax Act, necessitate the keeping of records of depreciation already availed of by each asset eligible for depreciation. In order to simplify the existing cumbersome provisions, the Amending Act has introduced a system of allowing depreciation on block of assets. This will mean the calculation of lump-sum amount of depreciation for the entire block of depreciable assets in each of the four classes of assets namely, building, machinery, plant and machinery."*

19. The rationale and purpose for which the concept of block asset was introduced, as reflected in the CBDT's Circular dated 23.09.1988 is that once the various assets are clubbed together and become 'block asset' within the meaning of s. 2(11), it becomes one asset. Every time, a new asset is acquired, it is to be thrown into the common hotchpotch, i.e., block asset on meeting the "requirement of depreciation being allowable at the same rate. Individual assets lose their identity and become an inseparable part of block asset in so far as calculation of depreciation is concerned. The merger of various assets into the block asset can be altered only when the eventuality contained in clause (c) of s. 43(6) takes place, viz., when a particular asset is sold, discarded or destroyed in the previous year (other than the previous year in which first brought in use). Even in that event, the amount by which the moneys payable in respect of that particular building, machinery, etc. together with the amount of scrap value is to be deducted from total written down value of the 'block asset'. It is thus clear from the aforesaid provisions that the only way by which the written down value on which depreciation is to be allowed as per the provisions of Sec.32(1) (ii) can be altered is as per the situation referred to in Sec.43(6)(c)(i) A and B. Neither was there purchase of the relevant assets during the previous year nor was there sale, discarding or demolishing or destruction of those assets during the previous year. Thus the recourse by the revenue to those provisions on the facts and circumstances of the present case, in our view, cannot be sustained.
20. We shall examine the Issue from the provisions of Sec. 43(1) of the Act and Explanation 10 thereto also. Section 43(1) of the Act is reproduced hereunder:-
*"(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:"*

By the Finance (2) Act, 1998, Explanation 10 to Section 43(1) was inserted with effect from 1.4.1999. It reads as under:

"Explanation 10 - Where a portion of the cost of an asset acquired by the assessee has been met directly or indirectly the Central Government or a State Government or any authority established under any law or by any other person, in the form of a subsidy or grant or reimbursement (by whatever name called), so much of the cost as is relatable to such subsidy or grant or reimbursement shall not be included in the actual cost of the asset to the assessee:
Provided that were such subsidy or grant or reimbursement is of such nature that it cannot be directly relatable to the asset acquired, so much of the amount which bears to the total subsidy or reimbursement or grant the same proportion as such asset bears to all the assets in respect of or with reference to which the subsidy or grant or reimbursement is so received, shall not be included in the actual cost of the asset to assessee."

21. The aforesaid Explanation was explained by the Board in Circular NO.772 dated 23.12.1998 [reported in (1999) 235 ITR (St.)35]. The relevant part of the Circular is reproduced below:
"22.2 Explanation 1 () provides that where a portion of the cost of an asset acquired by the assessee has been net directly or indirectly by the Central Government or a State Government or any authority established under any law or by any other person, in the form of a subsidy or grant or reimbursement (by whatever name called), then so much of the cost as is relatable to such subsidy or grant or reimbursement shall not be included in the actual cost of the asset to the assessee. Cost incurred/payable by the assessee alone could be the basis for any tax allowance. This Explanation further provides that where such subsidy or grant or reimbursement is of such nature that it cannot be directly relatable to the asset acquired, so much of the amount which bears to the total subsidy or reimbursement or grant the same proportion as such asset bears to all the assets in respect of or with reference to which the subsidy or grant or reimbursement so received, shall not be included in the actual cost of the asset to the assessee. The amendment made through Explanation 10 will take effect from 1st April, 1999, and will, accordingly, apply in relation to the assessment year 1999-2000 and subsequent years."

22. Even the aforesaid provisions of Expln. 10 will apply only when there is a subsidy or grant or reimbursement. In the present case there was no such subsidy or grant or reimbursement. There was only a waiver of the amounts due for purchase of machinery which cannot fall within the scope of any of the aforesaid expressions used in Expln.10. Even otherwise Sec43(1) is applicable only in the year of purchase of machinery and in the present case the purchase of the machinery in question was not in AY 01-02. Therefore the actual cost which has already been recognized in the books in the AY prior to AY 01-02 cannot be disturbed in AY 01-02. In this regard there is a lacuna in the law and it is for the legislature to provide appropriate safeguards in this regard. It is true that the Assessee on the one hand gets the waiver of monies payable on purchase of machinery and claims such receipt as not taxable because it is capital receipt. On the other hand the Assessee claims depreciation on the value of the machinery for it did not incur any cost. Thus the assessee stand to benefit both ways. As per the law as it prevails as on date, we are of the view that the revenue is without any remedy. The only,

way that the revenue can remedy the situation is that it has to reopen the assessment for the year in which the asset was acquired and fall back on the provisions of Sec.43(1) of the Act which says that actual cost means the actual cost of the assets to the assessee. Even this can be done only when after the waiver of the loan which was used to acquire machinery. By that time if the assessments for that AYs gets barred by time, the revenue is without any remedy. Even the provisions of Sec. 155 do not provide for any remedy to the revenue in this regard.

23. The AO has made a reference to the provisions of section 43(6)(b) of the Act. In our opinion, these provisions were not applicable to the present case. The applicable provisions to the present case are section 43(b)(c) of the Act. It is also noticed that the Hon'ble Supreme Court in the case of CIT v. Tata Iron & Steel Co. Ltd. (supra) has taken a view that repayment of loan borrowed by an assessee for the purpose of acquiring asset has no relevance to the cost of assets on which depreciation has to be allowed. Similar view was also expressed by the Hon'ble Kerala High Court in the case of CIT v. Cochin Co. Pvt. Ltd. (184 ITR 230) (Ker) , as already stated, as follows:-

"WDV as at the beginning of the preceding year as well as the depreciation actually allowed in that year have reached finality and cannot be changed in the assessment year under appeal. They could have been changed only if the assessment of that or earlier years could be re-opened. Such an action was barred by limitation.

Further, as per section 43(6)(c)(ii) & (i), the only adjustments permitted in the WDV of the block with reference to the year in which depreciation is to be allowed are (a) addition actual cost of asset acquired during the year and (b) reduction of monies

24.---------

25. On the merits of the addition made by the AO in all the assessment years, we are of the view that the disallowance of depreciation cannot be sustained. The CIT(A), in our view, ought to have deleted the disallowance of depreciation in full. We hold accordingly and allow the relevant grounds of appeal of the assessee."

Respectfully following the same, we find no reasons to interfere with the findings arrived by the Ld. CIT(A). Under the circumstances, this issue of Revenue's appeal is dismissed.

7. **In the result, Revenue's appeal stands dismissed.**

Order pronounced in the open court 02/06/2017

Sd/-	Sd/-
(न्यायिक सदस्य)	(लेखा सदस्य)
(N.V.Vasudevan)	(Waseem Ahmed)
(Judicial Member)	(Accountant Member)

Kolkata,
*Dkp, Sr.P.S
दिनांकः- 02/06/2017 **कोलकाता** ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-DCIT, Circle-10, P-7, Chowringhee Square, 3rd Fl, Kolkata-69
2. प्रत्यर्थी/Respondent-M/s Akzo Nobel Coatings India (P) Ltd. Geetanjali Apartments, 1st Floor, 8B, Middleton Row, Kolkata-71
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कोलकाता** / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

Sr. Private Secretary, Head of Office/DDO
आयकर अपीलीय अधिकरण,
कोलकाता ।