IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri Sanjay Arora, Accountant Member and
Ms.Kavitha Rajagopal, Judicial Member

ITA No.72/Coch/2021 : Asst.Year 2014-2015

Apollo Tyres Limited 3rd Floor, Areekal Mansion Manorama Junction, Panampilly Nagar, Ernakulam – 682 036 [PAN:AAACA6990Q]	vs.	The Principal Commissioner of Income-tax, Kochi-1
(Appellant)		(Respondent)

Appellant by:	Sri.Joseph Markose, Advocate
Respondent by:	Sri.Sanjit Kumar Das, CIT-DR

Date of Hearing:	15.02.2024
Date of Pronouncement:	10.05.2024

O R D E R

Per: Sanjay Arora, AM

This is an Appeal by the Assessee directed against the Order under section 263 of the Income-tax Act, 1961 [the Act] dated 29.03.2021 by the Principal Commissioner of Income-tax, Cochin-1 [Pr.CIT] in respect of the assessee's assessment u/s.143(3) read with section 144C of the Act dated 23.10.2018 for assessment year (AY) 2014-2015.

2. The brief facts of the case are that an examination of the assessee's record by the Pr.CIT, the revisionary authority under the Act, post it's assessment, led him to observe as under:

(a) the tax audit report (TAR) in Form 3CD in respect of the assessee's claim for deduction u/s.32AC reports the value of plant and machinery acquired and installed during the prescribed time period at Rs.47.18 crore, which is less than the qualifying amount of Rs.100 crore u/s.32AC;

(b) the purchase invoices for assets (for value in excess of Rs.3 crore) on record, on which deduction u/s.32AC had been claimed, were found to pertain to the period prior to 01.04.2013, at Rs.226.51 crore. Deducting this amount from Rs.314.57 crore, on which deduction u/s.32AC is to be claimed, reduces the new assets acquired and installed during the relevant year to Rs.88.06 crore, i.e., below Rs.100 crore.

The Assessing Officer (AO) had completely failed to notice these aspects of the assessee's case in framing the assessment. The assessment was accordingly set aside by him for a *de novo* consideration of the claim for deduction u/s.32AC.

3. The assessee, *in revisionary proceedings*, explained that it was only on the installation and successful test check of the plant and machinery, could the assessee be in law said to have acquired plant and machinery. There was, thus, no scope for excluding the assets purchased during the preceding year, but under installation prior to 01.04.2013, in computing the deduction exigible u/s. 32AC.That apart, the law stands subsequently amended, extending the period of installation up to 31.03.2017, so that the provision is to be interpreted liberally. The short point, however, in the view of the ld. Pr.CIT, was that there had been no application of mind in the matter by the AO, who had made the assessment assuming incorrect facts, without making any inquiry whatsoever. There had been as a result an incorrect application of law (paras 6.1 and 6.2 of the impugned order). The assessment was thus erroneous and prejudicial to the interest of the Revenue and, accordingly, set aside for a *de novo* examination and adjudication per a speaking order in accordance with law.

4. Before us, Sri. Markose, the ld. counsel for the assessee, would take us through the assessee's reply dated 12.12.2017. Per the same, after reproducing the provision of sec.32AC, it stands clarified that the deduction had been rightly claimed at Rs.47.18 crore, i.e., at 15% of the addition to fixed assets, which is as per Col.9 of the TAR, also enclosing item-wise break-up thereof per Annexure-5 thereto. Reference was also made by him to the assessee's reply dated 25.03.2021, whereby the assessee clarifies that Rs.226.51 crore excluded by the Pr.CIT includes Rs.30.18 crore in

respect of building, so that the plant and machinery (purchased) and installed during the year was in fact at Rs.118.24 crore, i.e., in excess of Rs.100 crore. That the Hon'ble High Courts have held that the condition of acquisition and installation, which is to be cumulatively met, may not be in the same year, so that the deduction would be exigible in the year in which it is so.

5. We have heard the parties, and perused the material on record.

5.1 We begin by visiting, even if briefly the law in the matter; it being trite and well-settled. Non-application of mind is one of the four infirmities which, as explained in *Malabar Industries Ltd. v. CIT* [2000] 243 ITR 83 (SC), upholding the order by the Hon'ble jurisdictional High Court, renders an order as erroneous and prejudicial to the interests of the Revenue; the other three being:

- wrong assumption of facts;
- incorrect application of law; and
- omission to observe the principles of natural justice,

prescribing thus a four-way test for an order being liable for revision. The law in the matter is well-settled per a series of decisions by Hon'ble Apex Court, as indeed by the Hon'ble jurisdictional High Court, viz. *Raja & Co. v. CIT* [2011] 335 ITR 381 (Ker), furnishing the legal basis for revision and, in fact, stands since co-opted on the statute by way of *Explanation 2(a)* to s. 263(1) by Finance Act, 2015, w.e.f. 01.06.2015. As explained in *Gee Vee Enterprises v. Addl. CIT* [1975] 99 ITR 375 (Del), again with reference to judicial precedents, that the order of the AO becomes erroneous on a failure to make enquiry where the circumstances call for it. This is not because there is anything wrong in the order if all the facts stated therein are assumed to be correct. However, the AO is not only an adjudicator but also an investigator and, therefore, cannot remain passive in the face of a return which is apparently in order but calls for further enquiry. It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an enquiry. In *CIT v. Toyota Motor Corporation*[2008] 306 ITR 49 (Del), since

confirmed in the decision reported at [2008] 306 ITR 52 (SC), it was explained that the Tribunal could not have substituted it's own reasons which were required to be recorded by the AO, and ought to have remanded the matter to the latter.

5.2 Section 32AC of the Act, applicability of which was up for consideration, reads as under:

> **Investment in new plant or machinery.**
>
> **32AC.** (1) Where an assessee, being a company, engaged in the business of manufacture or production of any article or thing, acquires and installs new asset after the 31st day of March, 2013 but before the 1st day of April, 2015 and the aggregate amount of actual cost of such new assets exceeds one hundred crore rupees, then, there shall be allowed a deduction,—
>
> (*a*) for the assessment year commencing on the 1st day of April, 2014, of a sum equal to fifteen per cent of the actual cost of new assets acquired and installed after the 31st day of March, 2013 but before the 1st day of April, 2014, if the aggregate amount of actual cost of such new assets exceeds one hundred crore rupees; and
>
> (*b*) for the assessment year commencing on the 1st day of April, 2015, of a sum equal to fifteen per cent of the actual cost of new assets acquired and installed after the 31st day of March, 2013 but before the 1st day of April, 2015, as reduced by the amount of deduction allowed, if any, under clause (*a*).
>
> (1A) Where an assessee, being a company, engaged in the business of manufacture or production of any article or thing, acquires and installs new assets and the amount of actual cost of such new assets acquired during any previous year exceeds twenty-five crore rupees and such assets are installed on or before the 31st day of March, 2017, then, there shall be allowed a deduction of a sum equal to fifteen per cent of the actual cost of such new assets for the assessment year relevant to that previous year:
>
> **Provided** that where the installation of the new assets are in a year other than the year of acquisition, the deduction under this sub-section shall be allowed in the *year in which the new assets are installed*:
>
> **Provided further** that no deduction under this sub-section shall be allowed for the assessment year commencing on the 1st day of April, 2015 to the assessee, which is eligible to claim deduction under sub-section (1) for the said assessment year.
>
> (1B) No deduction under sub-section (1A) shall be allowed for any assessment year commencing on or after the 1st day of April, 2018.
>
> (2) If any new asset acquired and installed by the assessee is sold or otherwise transferred, except in connection with the amalgamation or demerger, within a period of five years *from the date of its installation*, the amount of deduction

> allowed under sub-section (1) or sub-section (1A) in respect of such new asset shall be deemed to be the income of the assessee chargeable under the head "Profits and gains of business or profession" of the previous year in which such new asset is sold or otherwise transferred, in addition to taxability of gains, arising on account of transfer of such new asset.
>
> (3) Where the new asset is sold or otherwise transferred in connection with the amalgamation or demerger within a period of five years *from the date of its installation*, the provisions of sub-section (2) shall apply to the amalgamated company or the resulting company, as the case may be, as they would have applied to the amalgamating company or the demerged company.
>
> (4) For the purposes of this section, "new asset" means any new plant or machinery (other than ship or aircraft) but does not include—
>
> (*i*) any plant or machinery which *before its installation* by the assessee was used either within or outside India by any other person;
>
> (*ii*) any plant or machinery installed in any office premises or any residential accommodation, including accommodation in the nature of a guest house;
>
> (*iii*) any office appliances including computers or computer software;
>
> (*iv*) any vehicle; or
>
> (*v*) any plant or machinery, the whole of the actual cost of which is allowed as deduction (whether by way of depreciation or otherwise) in computing the income chargeable under the head "Profits and gains of business or profession" of any previous year. (emphasis, ours)

5.3 The issue before us is if there has been an inquiry by the AO in the matter; which would necessarily be with reference to the facts and circumstances of the case and, where so, did the assessee adequately answer it, for it to contend that inspite the AO's order being silent in the matter, he must be deemed to have been, applying his mind thereto, be satisfied therewith. This is as, though preferable, the order of the AO may not be explicit, recording a satisfaction *qua* each of the several aspects of a particular deduction. The onus in such a case though, inasmuch as the AO's order is a non-speaking order, i.e., to show all the relevant aspects stand explained or are borne out by the record, leading to the inference of their consideration by the assessing authority passing the order sought to be now revised, is on the assessee.

5.4 The AO, we firstly observe, did not inquire the assessee about it's eligibility to deduction u/s.32AC. We say so as the first inquiry letter, despite affording

opportunity to the assessee to place it on record, was not, so that taking cue from the assessee's reply dated 12.12.2017 thereto, as Sri.Markose would submit before us, the said inquiry was with reference to the working of the deduction claimed. There is thus a presumption, *without inquiry*, by the AO about the assessee's eligibility to the claim. This, surely pertinent, becomes all the more so in view of the auditor's report determining the value of the 'new assets' acquired and installed during the year, i.e., as required by the provision, at Rs.42.34 crore. The next question to follow, i.e., on the assessee furnishing the working, explaining the *difference*, not sought, is the quantification of the deduction, toward which the AO's inquiry, as inferred, was directed, calling for the purchase invoices. This is as there is apparently a difference between the amount on which deduction is claimed (Rs.314.58 crore) and that exigible per the audit report (Rs.42.34 crore), i.e.,Rs.272.24 crore. It is only where the assessee's working explains this difference, which itself is in fact incomplete inasmuch as the purchase invoices called for were only for items in excess of Rs.3 crore each, could it be said to be adequate, meeting both the qualification test (Rs.100 crore) and the quantification test (Rs.314.58 crore), that arise in the matter, and are required to be met. And, further, ought to have been inquired into and called for and verified in view of the audit report. The assessee's reply dated 12.12.2017 (copy on record), which reads as under; does not answer the same:

> *"3. Working of deduction claimed u/s 32AC of Rs.471,865,123*
>
> *In this regard, we would like to mention the provisions of section 32AC of the Act, which reads as under –*
>
> *"(1) Where an assessee, being a company, engaged in the business of manufacture or production of any article or thing, acquires and installs new asset after the 31st day of March, 2013 but before the 1st day of April, 2015 and the aggregate amount of actual cost of such new assets exceeds one hundred crore rupees, then, there shall be allowed a deduction.*
>
> *(a) for the assessment year commencing on the 1st day of April, 2014, of a sum equal to fifteen percent of the actual cost of new assets acquired and installed after the 31st day of March, 2013 but before the 1st day of April, 2014,*

if the aggregate amount of actual cost of such new assets exceeds one hundred crore rupees; and

(b) ....."

During the year under consideration the company claimed the deduction u/s 32AC of the Act @ 15% amounting to Rs.471,865,123 in relation to new assets acquired by the company during FY 2013-14. The deduction claimed is as per clause 19 of the Tax Audit Report. The addition of Fixed assets is part of Tax Audit Report. We are again enclosing the item-wise break up of fixed assets acquired during the FY 2013-14 as Annexure 5, for your kind perusal.

Your goodself would appreciate that the assessee company has not claimed the deduction u/s.32AC on the amount of pre-operative expenses considering that the expenses has been claimed u/s 37 as revenue expenditure. If your goodself is not allowing the claim as revenue expenditure as submitted in our submission dated 3rd November, then the claim of deduction u/s.32AC amounting to Rs.1,53,67,348 (15% of 102,448,989/- shall be given in addition to normal depreciation."

5.5 There was no follow-up inquiry in the matter inasmuch as the reply dated 12.12.2017 is admittedly the only reply explaining the said difference by the assessee. There is accordingly no finding by the AO on either aspect of the matter, only which would exhibit due application of mind in the matter; the non-inquiry, rather, exhibiting just the opposite.

5.6 Sri.Markose would during hearing argue that only where the plant and machinery stands installed could it be regarded as 'acquired', and which explains the assessee's exclusion of the addition of plant and machinery during the financial year 2012-13, i.e., under the installation as on 31.03.2013, as an addition for that year and, *per contra*, regarding it as acquired during the current year, i.e., on its installation. Whatever be the merits of the argument, which has both factual and legal aspects to it, the same ought to have been, on inquiry, made before the AO, and not before either the revisionary authority or before us in further appeal. It's furnishing before us, inasmuch as it addresses the fundamental issue arising in the instant case, itself defeats the assessee's case, proving non-application of mind, i.e., that of the Revenue.

5.7 There has been thus no enquiry on the pertinent issues by the AO during the assessment proceedings, much less responded to, on which the AO is therefore required to apply his mind, either accepting or rejecting the assessee's claim upon due verification and enquiry, i.e., as deemed proper under the given facts and circumstances, including the law in the matter, passing a speaking order.

5.8 The ld. Pr.CIT, accordingly, set aside the matter for a *de novo* consideration. He has, further, in our view, rightly not expressed any view in the matter (refer para 6.2 of his order). His stating that there has been an incorrect application of law by the AO is in our view consequential to his finding of an incorrect presumption of facts by the AO as well as non-application of mind, inasmuch as the law could only be applied on proper determination of facts. Further, the same therefore could have been avoided. At best, the assessee citing the decisions, as in the case of *IDMC Ltd*. [2017] 78 taxamann.com 285, which is in the context of sec.32(1)(iia), the language of which is different, a direction to the AO to examine if the ratio of the said decision is applicable to the facts of the case, with specific reference to the assessee's plea. Subject to these observations, we do not find much merit in the assessee's case challenging revision, even as we emphasize it to be an open set aside.

5.9 We may before parting state that a preliminary rule of interpretation is that due weight and meaning is to given to each word, while, going by the assessee's reading, acquisition encompasses installation, rendering the word 'installation' superfluous. That apart, the provision, as per s. 32AC(2), specifying time limitation w.r.t. the date of installation, treats the two as different incidents, only on the completion of both of which are the qualifying conditions for the claim satisfied. The assessee admits to the two being separate incidents; it's argument yet is of the former subsuming the latter. The question that therefore arises, is, firstly, if the argument is legally maintainable and, two, even so, whether it is so, or the other way round, i.e., the latter subsuming

the former. Needless to add, the assessee is, in the set aside proceedings, at liberty to assume any other argument on the merits as well, and not confined to that before us.

6. In the result, the assessee's appeal is dismissed.

Order pronounced on May 10, 2024 under Rule 34 of The Income Tax (Appellate Tribunal) Rules, 1963

Sd/-	Sd/-
(Kavitha Rajagopal)	(Sanjay Arora)
Judicial Member	Accountant Member

Cochin, Dated: May 10, 2024
Devadas*

Copy to:

1. The Appellant
2. The Respondent
3. The Pr. CIT concerned
4. The Sr. DR, ITAT, Cochin
5. Guard File

By Order

Assistant Registrar
ITAT, Cochin