$~16.

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

\+ **INCOME TAX APPEAL NO. 702/2007**

Date of decision: 29th July, 2013

ESTER INDUSTRIES LIMITED

..... Appellant

Through Mr. R. Santhanam, Advocate.

versus

COMMISSIONER OF INCOME TAX DELHI IV

..... Respondent

Through Mr. Sanjeev Sabharwal, Sr. Standing Counsel.

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

SANJIV KHANNA, J. (ORAL):

Having heard learned counsel for the parties, we frame the following substantial question of law:

> "(1) Whether the Assessing Officer could have made prima facie adjustment and held that minimum alternative tax under Section 115JA was payable by the assessee and compute and calculate the same under Section 143(1)(a) of the Income Tax Act, 1961?
>
> (2) Whether the Income Tax Appellate Tribunal was right in holding that the Commissioner of Income Tax (Appeals) exceeded his jurisdiction under Section 154 of

the Income Tax Act, 1961 by modifying his earlier order?"

2. The assessee is a company and for the Assessment Year 1998-99 had filed return of income declaring "nil" income along with a note claiming that minimum alternate tax provisions under Section 115JA of the Act were not applicable. The Assessing Officer by intimation dated 18th May, 1999 under Section 143(1)(a) of the Income Tax Act, 1961 computed the taxable income under minimum alternative tax, i.e., Section 115JA at Rs.8,46,300/-. He calculated income tax payable, levied interest under Sections 234A and 234B and also additional tax @ 20%. He observed that the appellant did not offer for taxation, 30% of the book profits under Section 115JA, which was applicable and, therefore, prima facie adjustment was in accordance with the provisions of Section 143(1)(a) of the Act.

3. The appellant filed first appeal but vide order dated 4th March, 2002 it was dismissed. This order by the first appellate authority in paragraph 4 has referred to an earlier order passed by the same authority for the Assessment Year 1997-98, in which the appellant had succeeded on the same issue/question.

4. The appellant-assessee thereupon filed an application under Section 154 of the Act dated 6th May, 2002 relying upon the order passed by the CIT (Appeals) in the earlier assessment year, i.e.,

Assessment Year 1997-98. This application was allowed by the CIT(Appeals) vide order dated 18th June, 2002.

5. Revenue preferred appeal before the tribunal and has succeeded with the tribunal holding that the CIT(Appeals) had exceeded his jurisdiction under Section 154 of the Act. The question whether adjustment under Section 143(1)(a) in relation to MAT can be made was a debatable issue and, therefore, the CIT(Appeals) could not have rectified the so-called mistake, which amounts to change of opinion on a debatable matter.

6. Learned counsel for the appellant has submitted and referred to question No. 2 framed by us and has submitted that rectification was permissible as the CIT(Appeals) had passed an order contrary to and had not followed the order of the predecessor relating to Assessment Year 1997-98. As we perceive, we need not examine this issue in the present appeal and leave this question open. Prima facie, the submission is rather wide. As we feel the appellant is entitled to succeed on question No. 1 and we are inclined to dispose of the appeal on this basis. We are not inclined to pass an order of remand as the appeal relates to Assessment Year 1998-99 and the appeal has remained pending for long. The appellant has stated at the Bar that regular assessment order under Section 143(3) dated 18th December, 2000 has been passed in which income of the assessee has been

computed under Section 115JA at Rs.8,46,300/-. This order has been accepted and tax on the said amount, it is stated, stands paid.

7. On the question of prima facie adjustments, the issue is covered in favour of the appellant-assessee and against the respondent in view of the decision in ***SRF Charitable Trust versus Union of India & Others***, (1992) 193 ITR 95 (Del.). This judgment was followed in assessee's own case in the decision dated 14th May, 2012 reported in (2012) 349 ITR 324 (Del.). The adjustment allowed in the present case would not be covered within the four corners and limited scope of Section 142(1)(a). The assessee, as noticed above, had specifically claimed that he was not liable to pay minimum alternative tax under Section 115JA. The contention may be wrong or incorrect but it has to be dealt with and examined. Further computation has to be made under Section 115JA of the Act, which is not possible without examining and considering several aspects. In ***SRF Charitable Trust*** (supra) it was observed that where it was evident from the return as filed along with the document in support that a claim of the assessee was inadmissible, then adjustment under the said provision was justified. However, in cases of lack of proof in support of the claim, adjustment was not permissible and the Assessing Officer should issue notice under Section 143(2) of the Act. In the present case, on the question of what and how the adjustment was to be made was disputed

and several aspects were required to be examined. This was not possible by merely examining the return or the documents enclosed with the return itself. Computation under minimum alternative tax is cumbersome and at that time, involved several debatable issues. The assessee himself had not done any computation under Section 115JA.

8. In these circumstances, the question No. 1 is answered in negative, i.e., in favour of the appellant-assessee and against the Revenue. As recorded above, the appellant has already paid tax under Section 115JA pursuant to the regular assessment under Section 143(3) dated 18th December, 2000, which has become final. This order does not mean that we have disturbed the said assessment or the amount due and payable under the regular assessment. The appeal is disposed of.

SANJIV KHANNA, J.

SANJEEV SACHDEVA, J.

JULY 29, 2013
VKR