IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 19.01.2011

ITA No.39/1999

COMMISSIONER OF INCOME TAX, DELHI-2 ..... APPELLANT

Vs

M/s. KELVINATOR OF INDIA LTD. ..... RESPONDENT

Advocates who appeared in this case:
For the Appellant : Mr. Sanjeev Sabharwal, Advocate
For the Respondent : Ms. Kavita Jha, Mr. Amit Sachdeva & Mr. Somnath Shukla, Advocates

CORAM :-
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR JUSTICE RAJIV SHAKDHER

1. Whether the Reporters of local papers may be allowed to see the judgment ?

2. To be referred to Reporters or not ?

3. Whether the judgment should be reported in the Digest ?

SANJAY KISHAN KAUL, J (ORAL)

1. The respondent filed returns for the Assessment Year 1989-90 which were assessed by the Assessing Officer vide order dated 26.03.1992. The assessment order records that "other income" have been shown by the assessee in Schedule 'K' to the balance sheet of the respondent company. The question, *inter alia*, which was examined was arising from the deposit made by the respondent under section 32 AB of the

Income Tax Act, 1961 (hereinafter, referred to as the 'Act') as applicable in the relevant assessment year.

2. The Assessing Officer computed the profit under the head "profits and gains of business" at Rs.10,79,18,247/- and allowed a deduction at Rs.2,15,83,649/- being 20% of the amount under section 32 AB of the said Act and thus, determined the taxable income at Rs.7,51,53,465/-.

3. This order of the Assessing Officer dated 26.03.1992 was challenged before the Commissioner of Income Tax (Appeal) [hereinafter, referred to as "CIT(A)"] by the assessee raising the issue regarding short deduction under section 32 AB of the said Act. In the appeal, the respondent/assessee was granted relief and in terms thereof, the deduction was recomputed against profit and gains of business as arrived at under Schedule 'VI' of Companies Act, 1956 (in short, 'Companies Act') for the purpose of section 32 AB of the said Act. This resulted in the deduction being enhanced to Rs.3,95,85,158/-. As a necessary corollary, the taxable income was reduced.

4. The CIT while making a scrutiny of the assessment record, found that the enhancement in the said deduction had been accorded in favour of the respondent/assessee by inclusion in the profits and gains from business "other income" amounting to Rs.4,14,06,000/- (as mentioned in Schedule 'K' of its balance sheet). In the opinion of the CIT, the approach adopted was both erroneous and prejudicial to the interest of revenue. Consequently, a show cause notice was issued to the

respondent/assessee dated 21.02.1994 under section 263 of the Act in respect of the same.

5. The respondent/assessee filed a response to the show cause notice. After hearing the respondent/assessee, the CIT passed an order on 25.03.1994 in terms whereof, the benefit of deduction under section 32 AB of the said Act was allowed at 20% on profit of business of the respondent after excluding "other income".

6. The assessee aggrieved by this order, preferred an appeal before the Tribunal and succeeded in terms of the order dated 05.01.1999. The department thereafter, carried the matter further in the present appeal and the question of law was framed by the order dated 07.09.2000. For the sake of convenience, the question of law so framed is extracted hereinbelow:

> "*Whether on the facts and in circumstances of the case, the Income-tax Tribunal was justified in holding that the CIT had no jurisdiction to exercise power under Section 263 of the Income-tax Act?"*.

7. At the inception itself, the question which arises is whether in the facts of the case, section 263 of the said Act could have been invoked. It is common case of both the parties that the scope of application of section 263 of the said Act is governed by the principles set out in ***Malabar Industrial Company Ltd. Vs. CIT 2000 243 ITR Page 83*** as reaffirmed in ***CIT Vs. Max India Limited 2007 295 ITR 282***. It has been held that the phrase "prejudicial to interest of revenue" used in section 263 of the said Act has to

be read in the conjunction with an “erroneous order” passed by the Assessing Officer. Thus, it is not, as if in every case where there is loss of revenue, as a consequence of order passed by the Assessing Officer, can it be treated as prejudicial to interest of revenue. Consequently, if the Assessing Officer has adopted one of the courses permissible in law, which resulted in loss of revenue or where two views are possible and the Assessing Officer has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the revenue unless the view taken by the Assessing Officer is unsustainable in law.

8. If the aforesaid parameters are applied in respect of factual matrix of the present case, it is found that the view which was prevalent at the appropriate point in time was that of the Tribunal at Delhi taken in the case of the ***Assistant Commissioner of Income Tax Vs. Northern India Theatres Pvt. Ltd.*** and in ***Indian Transformers Ltd. Vs. TTJ 52 TTJ 654***. In terms of these judgments, the income of the assessee, shown in its balance sheet under the head “other income” had not to be excluded for purposes of determining the permissible deduction under section 32 AB of the Act. The notice was issued by the CIT under section 263 of the said Act on 21.02.1994 when, the aforesaid legal position was admittedly enuring for the benefit of the assessee. Therefore, on the date the CIT issued the show cause notice, the legal position which obtained supported the view taken by CIT (A) in its order dated 07.08.1992. In these circumstances, the

issuance of show cause notice to the respondent/assessee was uncalled for.

8. The question of law is thus answered in favour of the respondent/assessee and the appeal is accordingly dismissed.

SANJAY KISHAN KAUL, J.

JANUARY 19, 2011 RAJIV SHAKDHER, J.
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