

IN THE HIGH COURT OF MADHYA PRADESH

ITR No.192/1997

COMMISSIONER OF INCOME TAX, JABALPUR

Vs

M/s VINDHYA TELELINKS LTD

Krishn Kumar Lahoti and Smt Sushma Shrivastava

Dated: February 22, 2011

JUDGEMENT

The Income Tax Appellate Tribunal, Jabalpur Bench, Jabalpur in R.A.No.82/Jbp/1997 by order dated 29.9.1997 has referred following question for the opinion of this Court under Section 256 of the Income Tax Act:-

“Whether on the facts and in the circumstances of the case, the ITAT was justified in holding that the amount of Rs.15,55,875/- paid as advance for purchase of machinery during the year under consideration is the amount utilized for the purchase of machinery within the meaning of Sec.32AB of the Income Tax Act?”

Learned counsel appearing for the revenue submitted that admittedly in the assessment year 1989-90, machinery in question was not acquired by the assessee, so the assessee was not entitled for investment allowance by deposit with the manufacturer. He has placed reliance to provisions of Section 32AB of the Income Tax Act, 1961 and submitted that until and unless such machinery is acquired or installed in the premises of the assessee, such investment was not admissible by way of allowance.

Per contra, Shri Shrivastava, learned senior counsel appearing on behalf of assessee submitted that earlier provision was for investment allowance after purchase of machinery and making investment for the purchase of machinery, but after 1985-86, a new provision Section 32AB was introduced in the statute book with effect from 1.4.1987 which provides that if an assessee for the purchase of machinery deposits the amount by way of earnest money or as an advance for the purchase of machinery, such amount shall be treated as an investment deposit and assessee is entitled for deduction of the said amount. He has placed reliance to judgments of a Division Bench of Bombay High Court in Commissioner of Income Tax Vs. Antifriction Bearings Corporation Ltd. (2000) 246 ITR 295 Bombay and also to Commissioner of Income Tax Vs. Tribeni Tissues Ltd. (2002) 258 ITR 393 Calcutta, Commissioner of Income Tax, Lucknow Vs. U.P. Asbestos Ltd (2008) 174 TAXMAN 45 (All.) and Circulars of C.B.D.T. dated 9.7.1986 and Circular bearing No.495 dated 22.9.1987 in support of his contention. It was also submitted that the Commissioner of Income Tax and the Income Tax Appellate Tribunal both have concurrently found that the

assessee was entitled for such deduction and aforesaid question may be answered in favour of the assessee.

To appreciate the rival contentions of the parties, it would be appropriate if the factual position is stated.

The respondent is a public limited company and was engaged in the manufacturing and sale of jelly filled telephone cables. In the relevant year, the assessee had claimed deduction of Rs.1,61,62,646/- under Section 32AB of the Income Tax Act on the ground that it had utilised aforesaid sum for purchase of machinery and claimed deduction. The details of the investment are given in the reference order. The assessing officer found that a some of Rs.15,55,875/- was paid by the assessee as an advance towards purchase of plant and machinery but the amount of advance cannot be said to be an amount utilised for the purchase of plant and machinery and accordingly disallowed the aforesaid amount.

On an appeal, the CIT (Appeal) directed the assessing officer to include such amount as an amount utilised for the purchase of plant and machinery. The Department thereafter preferred an appeal to the Income Tax Appellate Tribunal who also found that the advance paid for purchase of machinery during the assessment year was in fact part payment against price of the machinery and therefore, it was an amount utilised for the purchase of machinery. The Income Tax Appellate Tribunal upheld the order of CIT (Appeal) and dismissed the appeal. Thereafter, the department filed an application before the Tribunal under Section 256 of the Income Tax Act for referring aforesaid question for the opinion of this Court. The Income Tax Appellate Tribunal has referred the question to this Court accordingly.

To appreciate the rival contentions of the parties, it would be appropriate if the relevant provisions are referred. Section 32AB(1) of the Income Tax Act reads as under: -

Investment deposit account

32AB (1) Subject to the other provisions of this section where an assessee, whose total income includes income chargeable to tax under the head "Profits and gains of business or profession", has, out of such income-

(a) deposited any amount in any account (hereafter in this section referred to as deposit account) maintained by him with the Development Bank before the expiry of six months from the end of the previous year or before furnishing the return of his income, which ever is earlier; or

(b) utilised any amount during the previous year for the purchase of any new ship, new aircraft, new machinery or plant, without depositing any amount in the deposit account, under Clause (a), in accordance with, and for the purposes specified in, a scheme (hereafter in this section referred to as the scheme) to be framed by the Central Government, or if the assessee is carrying on the business of growing and manufacturing tea in India, to be approved in this behalf by the Tea Board, the assessee shall be allowed a deduction {(such deduction being allowed before the loss, if any, brought forward from earlier years is set off under section 72)}-

(i) a sum equal to the amount, or the aggregate of the amounts, so deposited and any amount so utilised; or

(ii) a sum equal to twenty per cent of the profits of business or profession as computed in the accounts of the assessee audited in accordance with sub-section (5) whichever is less:

Provided that where such assessee is a firm, or any association of persons or any body of individuals, the deduction under this section shall not be allowed in the computation of the income of any partner, or as the case may, any member of such firm, association of persons or body of individuals.

Provided further that no such deduction shall be allowed in relation to the assessment year commencing on the 1st day of April, 1991, or any subsequent assessment year.

The aforesaid provision specifically provides that where an assessee has, out of such income utilised any amount during the previous year for the purchase of any new machinery or plant, without depositing any amount in the deposit account, under Clause (a) in accordance with, and for the purposes specified in, a scheme to be framed by the Central Government, the assessee shall be allowed a deduction of a sum equal to the amount so deposited and any amount so utilised. The provision was inserted in the statute book by the Finance Act, 1986 w.e.f. 1.4.1987. Earlier provision was section 32A which was inserted in the statute book w.e.f. 1.4.1976 by the Finance Act, 1976. For ready reference Section 32A(1) of the Income Tax Act may be referred which reads as under: -

Investment allowance

32A(1) In respect of a ship or an aircraft or machinery or plant specified in sub-section (2), which is owned by the assessee and is wholly used for the purposes of the business carried on by him, there shall, in accordance with and subject to the provisions of this section, be allowed a deduction, in respect of the previous year in which the ship or aircraft was acquired or the machinery or plant was installed or, if the ship, aircraft, machinery or plant is first put to use in the immediately succeeding previous year, then, in respect of that previous year, of a sum by way of investment allowance equal to twenty-five per cent of the actual cost of the ship, aircraft, machinery or plant to the assessee;

Provided that in respect of a ship or an aircraft or machinery or plant specified in sub-section (8B), this subsection shall have effect as if for the words "twenty five per cent", the words "twenty per cent" had been substituted;

Provided further that no deduction shall be allowed under this section in respect of-

(a) any machinery or plant installed in any office premises or any residential accommodation, including any accommodation in the nature of a guest house;

(b) any office appliances or road transport vehicles;

(c) any ship, machinery or plant in respect of which the deduction by way of development rebate is allowable under section 33; and

(d) any machinery or plant, the whole of the actual cost of which is allowed as a 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 one previous year.

Explanation- For the purposes of this sub-section, "*actual cost*" means the actual cost of the ship, aircraft, machinery or plant to the assessee as reduced by that part of such cost which has been met out of the amount released to the assessee under sub-section (6) of section 32AB.

We have read both the provisions, it is apparent that Section 32A provides investment allowance in respect of machinery which was acquired or installed or put to use in the immediately succeeding previous year and the assessee was entitled by way of investment allowance equal to 25% of the actual cost of machinery. The aforesaid provision presupposes purchase of the machinery, its installment and use by the assessee. It does not provide any deduction if amount is paid by way of investment or some amount is paid as earnest money to the manufacturer. Before 1.4.1987 such amount was liable to be taxed and the assessee was not entitled for any allowance. But after 1.4.1987, when the Parliament inserts Section 32AB in the Income Tax Act, it meets out the contingency where the assessee deposits any amount for the purchase of any new machinery, then the assessee was allowed deduction of the amount. The language used in Section 32AB is very specific which provides that such amount must have been utilised for the purchase of any new machinery. When the statute itself provides such, which is entirely different from the provision as contained in Section 32A, natural inference is that the intention of the Legislature was to meet out such situation when such amount was not invested for the purchase of plant but it was deposited with the manufacturer for the purchase of new machinery.

A Division Bench of Bombay High Court has considered the scope of Section 32AB, and his Lordship Shri S.H.Kapadia as the then was considering the scope of Section 32AB, held thus:-

"If the assessee has placed an order for purchase and has given an advance to the supplier then the amount has been utilised for the purchase of the machinery. The delivery of the machinery may be taken in a subsequent year. If we accept the Department's contention then the scheme of section 32AB will fail. The advance is required to have a nexus with the income of the current year."

The similar view has been taken by the Calcutta High Court in Tribeni Tissues Ltd.(supra) in which the the Division Bench of Calcutta High Court has held that the assessee should utilise amount for purchase of new machinery in accounting year, not necessary that the machinery or plant should be installed in the accounting year. The Division Bench of Allahabad High Court, relying on the judgment of Bombay High Court in Antifriction Bearing Corporation Ltd (supra) and quoting the aforesaid judgment in para 8 of the judgment, held that the amount given in advance for the purchase of plant and machinery amounts to utilization in the year advance was given for the purpose of clause (b) of section 32AB.

The C.B.D.T Circulars which are relied on by the learned counsel for assessee also support his contention. In Circular dated 9.7.1986, the C.B.D.T. considering the amendment in the Finance Act, 1986 directed as under:-

(c) The acquisition of a ship or an aircraft or installation of plant and machinery, as the case may be, during the previous year is a condition precedent for availing of the benefit of the existing investment allowance, whereas the deduction under the new provisions can be availed of even before the ship or aircraft is acquired or the plant or machinery has been installed by making a deposit with the designated Development Bank.

(d) The investment allowance is allowed at 25 per cent of the actual cost of the plant, machinery, ship or aircraft to the assessee. As against this, under the new scheme, the entire cost of the ship or aircraft or plant or machinery will qualify for deduction, if the same is up to 20 per cent of the profits of the eligible business or profession.

The aforesaid Circular further provides that:-

17.4 The other salient features of the scheme of the investment deposit account are as under:

(a) Under section 32AB(1), it has been provided that deposits with the Development Bank or the purchase of a new ship, new aircraft, new machinery or plant should be out of income chargeable to tax under the head "Profits and gains of business or profession". However, for arriving at the book profit, a uniform system of accounting is yet to be enforced even in the organised sector. Hence, the term "profit of eligible business or profession" has been defined as per section 32AB(3) in order to ensure uniformity in determining the profits qualifying for deduction, as also to reduce uncertainty about the interpretation of this term. In terms of section 32AB(3)(a), it has been provided that the profits of eligible business or profession for the purposes of deduction under these provisions will mean, in a case where separate accounts in respect of such business or profession are maintained, an amount arrived at after deducting an amount equal to the depreciation computed in accordance with the provision of section 32(1) of the Income-tax Act from the amount of profits computed in accordance with the requirements of Parts II and III of the Sixth Schedule to the Companies Act, 1956, as increased by an amount equal to the depreciation, if any, debited in the audited profit and loss account. This implies that the profit has to be computed, taking into account only depreciation for the current year, as admissible under the Income-tax Act. Further, Part II of the Sixth Schedule to the Companies Act lays down the requirements as to profit and loss account. These requirements, as per the provisions of section 32AB(3) of the Income-tax Act, will be applicable in the cases of corporate as well as non-corporate assessees.

In Circular dated 22.9.1987, in para 20.1, the C.B.D.T. directed thus:-

"20.1 The Finance Act, 1986, introduced section 32AB relating to investment deposit account. The provisions apply in relation to the assessment year 1987-88 and subsequent years. Under these provisions, an assessee is entitled to a deduction of an amount up to 20 per cent of the profits of 'eligible business or profession', if the said amount is either deposited with the Development Bank within the period up to six months from the end of the previous year or before furnishing the return,

whichever is earlier, or is utilised during the previous year for the purchase of a new ship, new aircraft, or new machinery or plant."

In view of the aforesaid discussion, the contention of learned counsel for the revenue has no substance and accordingly, aforesaid question referred by the ITAT is answered thus: -

"The ITAT was justified in holding that the amount of Rs.15,55,875/- paid as advance for purchase of machinery during the year under consideration was the amount utilized for the purchase of machinery within the meaning of Section 32AB of the Income Tax Act."

The ITAT be informed accordingly.