

CALCUTTA HIGH COURT

Entury Enka Ltd

Vs.

Assistant Commissioner of Income Tax

(Pinaki Chandra Ghose, J)

16.01.2009

JUDGEMENT

Pinaki Chandra Ghose, J.

(1.) THIS appeal is admitted by the Court on the following substantial questions of law : "Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the appellant was not entitled to depreciation of Rs. 43,71,472 and the investment allowance of Rs. 27,01,145 on the increased cost of the plant and machinery resulting from increase in the liability to repay the foreign currency loans increased for purchase of such plant and machinery –

(2.) IN this matter the assessment year involved is 1988 -89. The learned Tribunal held that under s. 43A of the said Act the claim of investment allowance is not allowable. Mr. Khaitan, appearing in support of this appeal drew our attention to s. 43A which is quoted hereunder : "43A.(1) Notwithstanding anything contained in any other provisions of this Act, where an assessee has acquired any asset from a country outside India for the purposes of his business or profession and, in consequence of a change in the rate of exchange at any time after the acquisition of such assets, there is an increase or reduction in the liability of the assessee as expressed in Indian currency for making payment towards the whole or a part of the cost of the asset or for repayment of the whole or a part of the moneys borrowed by him from any person, directly or indirectly, in any foreign currency specifically for the purpose of acquiring the asset (being in either case the liability existing immediately before the date on which the change in the rate of exchange takes effect), the amount by which the liability aforesaid is so increased or reduced during the previous year shall be added to, or, as the case may be, deducted from the actual cost of the asset as defined in cl. (1) of s. 43 or the amount of expenditure of a capital nature referred to [in cl. (iv) of sub -s. (1) of s. 35 or in s. 35A] or in cl. (ix) of sub -s. (1) of s. 36, or, in the case of a capital asset (not being a capital asset referred to in s. 50), the cost of acquisition thereof for the purposes of s. 48, and the amount arrived at after such addition or deduction shall be taken to be the actual cost of the asset or the amount of expenditure of a

capital nature or, as the case may be, the cost of acquisition of the capital asset as aforesaid". The said section was in operation with regard to assessment year involved in this case. Mr. Khaitan, further submitted before us that there is a decision of this High Court which is CIT vs. Century Enka Ltd. (1992) 196 ITR 447 (Cal) where the Court held that where a machinery is purchased from a foreign country on a deferred payment basis or by obtaining a loan repayable in foreign currency, any additional amount payable due to periodical fluctuation in the currency rate in respect of foreign currency forms part of the actual cost for allowing investment allowance. Sec. 43A(2) of the IT Act, 1961, only excludes the provisions of s. 43A(1). Thus where the contract itself stipulates repayment in foreign currency, the actual cost of the assets must be computed on the value of the foreign currency. Therefore, the amount so paid for repayment, that is to say, any cost due to change in the value of foreign currency which actually goes in repaying the debt, must form part of 'actual cost' as contemplated by s. 43(1). In the said decision CIT vs. Century Enka Ltd. (supra) the Court held that : "..... In devaluation, there is a reduction in the value of a currency or of a standard monetary unit whereas in the case of fluctuation, there is no such reduction in the value of a currency or of a standard monetary unit; there is only fluctuation in the rate of exchange in day -to -day transactions. The day -to -day fluctuation in the rate of foreign exchange will not have any bearing on the liability as such. The crucial day is the date of repayment of the loan obtained for the purpose of acquisition of any capital asset. If a capital asset has been acquired by obtaining a loan or by deferred payment of the purchase price, and if, on the date of repayment of the loan or payment of any instalment of purchase price, any additional liability is imposed because of fluctuation in the rate of exchange, the assessee will be entitled to capitalise such liability. It is common knowledge that the rate of exchange fluctuates every day depending on the conditions prevailing in the international monetary market but such fluctuation in conversion cannot be taken into account unless, at the time of actual payment of the liability in foreign currency, there has been, in fact, an additional liability. It is, therefore, necessary to ascertain in every case whether the assessee incurred any additional liability on the date of repayment or not. Only if any additional liability is incurred on the date of repayment due to change in the rate of conversion, such liability will be added to the cost of the capital asset and benefit of depreciation and investment allowance will be allowed on such added cost...."Consequently, the Court after taking into account the facts of the said case came to the conclusion that the assessee would be entitled to investment allowance on such sum as may be found to represent any additional liability on the date of actual payment of the loan arising due to fluctuation in the rate of conversion and the ITO shall allow the assessee an opportunity of creating reserve in respect of such additional sums eligible for investment allowance.

(3.) SUBSEQUENT to the order so passed by the Calcutta High Court it appears that the legislator found it is necessary to reads as follows : "43A. Notwithstanding anything contained in any other provision of this Act, where an assessee has acquired any asset in any previous year from a country outside India for the purposes of his business or profession and, in consequence of a change in the rate of exchange during any previous year after the acquisition of such asset, there is an increase or reduction in the liability of the assessee as expressed in Indian currency (as

compared to the liability existing at the time of acquisition of the asset) at the time of making payment - - (a) towards the whole or a part of the cost of the asset; or (b) towards repayment of the whole or a part of the moneys borrowed by him from any person, directly or indirectly, in any foreign currency specifically for the purpose of acquiring the asset along with interest, if any, the amount by which the liability as aforesaid is so increased or reduced during such previous year and which is taken into account at the time of making the payment, irrespective of the method of accounting adopted by the assessee, shall be added to, or, as the case may be, deducted from - - (i) the actual cost of the asset as defined in cl. (1) of s. 43; or (ii) the amount of expenditure of a capital nature referred to in cl. (iv) of sub -s. (1) of s. 35; or (iii) the amount of expenditure of a capital nature referred to in s. 35A; or (iv) the amount of expenditure of a capital nature referred to in cl. (ix) of sub -s. (1) of s. 36; or (v) the cost of acquisition of a capital asset (nor being a capital asset referred to in s. 50) for the purposes of s. 48, and the amount arrived at after such addition or deduction shall be taken to be the actual cost of the asset or the amount of expenditure of a capital nature or, as the case may be, the cost of acquisition of the capital asset as aforesaid." In our considered opinion the same has been amended in the light of the situation as felt by the Division Bench of this High Court in Century Enka Ltd. (supra). ;