

CASE NO.:
Appeal (civil) 5950-5952 of 2007

PETITIONER:
Commissioner of Income Tax, Madras

RESPONDENT:
M/s Lucas T.V.S. Ltd. Padi Chennai

DATE OF JUDGMENT: 14/12/2007

BENCH:
Dr. ARIJIT PASAYAT & P. SATHASIVAM

JUDGMENT:
J U D G M E N T
(Arising out of SLP (C) Nos.24479-24481 of 2005)
Dr. ARIJIT PASAYAT, J.

1. Leave granted.

2. Challenge in these appeals is to the order passed by a Division Bench of the Madras High Court dismissing the Tax Case Appeals as according to the High Court the case at hand is covered against the revenue in view of the order passed earlier by the High Court in Southern Asbestos Cement Ltd. v. Commissioner of Income Tax (259 I.T.R. 631).

3. These appeals relate to assessment years 1989-90, 1991-92 and 1992-93. The core issue is the allowability of investment allowance under Section 32A of the Income Tax Act, 1961 (in short the \021Act\022). The assessing officer was of the view that it is only to be allowed in one assessment year and not several assessment years. The Tribunal and the High Court appear to have proceeded on the basis that in view of Section 43A(1) of the Act the allowance was to be granted in different assessment years.

4. Sections 32A and 43A(1) of the Act read as under:

Section 32A- INVESTMENT ALLOWANCE.

(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 sub-section 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 \026

(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.

(2) The ship or aircraft or machinery or plant referred to in sub-section (1) shall be the following, namely :-

(a) A new ship or new aircraft acquired after the 31st day of March, 1976, by an assessee engaged in the business of operation of ships or aircraft;

(b) Any new machinery or plant installed after the 31st day of March, 1976 -

(i) For the purposes of business of generation or distribution of electricity or any other form of power; or

(ii) 454 in a small-scale industrial undertaking for the purposes of business of manufacture or production of any article or thing; or

(iii) In any other industrial undertaking for the purposes of business of construction, manufacture or production of any article or thing, not being an article or thing specified in the list in the Eleventh Schedule :

Provided that nothing contained in clauses

(a) and (b) shall apply in relation to, -

(i) A new ship or new aircraft acquired, or

(ii) Any new machinery or plant installed, after the 31st day of March, 1987 but before the 1st day of April, 1988, unless such ship or aircraft is acquired or such machinery or plant is installed in the circumstances specified in clause (a) of sub-section (8B) and the assessee

furnishes evidence to the satisfaction of the Assessing Officer as specified in that clause;

(c) Any new machinery or plant installed after the 31st day of March, 1983, but before the 1st day of April, 1987, for the purposes of business of repairs to ocean-going vessels or other powered craft if the business is carried on by an Indian company and the business so carried on is for the time being approved for the purposes of this clause by the Central Government.

Explanation : For the purposes of this sub-section and sub-sections (2B), (2C) and (4), - (1)(a) "new ship" or "new aircraft" includes a ship or aircraft which before the date of acquisition by the assessee was used by any other person, if it was not at any time previous to the date of such acquisition owned by any person resident in India;

(b) "New machinery or plant" includes machinery or plant which before its installation by the assessee was used outside India by any other person, if the following conditions are fulfilled, namely :-

(i) Such machinery or plant was not, at any time previous to the date of such installation by the assessee, used in India;

(ii) Such machinery or plant is imported into India from any country outside India; and
(iii) No deduction on account of depreciation in respect of such machinery or plant has been allowed or is allowable under the provisions of the Indian Income-tax Act, 1922 (11 of 1922), or this Act in computing the total income of any person for any period prior to the date of the installation of the machinery or plant by the assessee,

(2) An industrial undertaking shall be deemed to be a small-scale industrial undertaking, if the aggregate value of the machinery and plant (other than tools, jigs, dies and moulds) installed, as on the last day of the previous year, for the purposes of the business of the undertaking does not exceed, -

(i) In a case where the previous year ends before the 1st day of August, 1980, ten lakh rupees;

(ii) In a case where the previous year ends after the 31st day of July, 1980, but before the 18th day of March, 1985, twenty lakh rupees; and

(iii) In a case where the previous year ends after the 17th day of March, 1985, thirty-five lakh rupees, and for this purpose the value of any machinery or plant shall be, -

(a) In the case of any machinery or plant owned by the assessee, the actual cost thereof to the assessee; and

(b) In the case of any machinery or plant hired by the assessee, the actual cost thereof as in the case of the owner of such machinery or plant.

(2A) The deduction under sub-section (1) shall not be denied in respect of any machinery or plant installed and used mainly for the

purposes of business of construction, manufacture or production of any article or thing, not being an article or thing specified in the list in the Eleventh Schedule, by reason only that such machinery or plant is also used for the purposes of business of construction, manufacture or production of any article or thing specified in the said list.

(2B) Where any new machinery or plant is installed after the 30th day of June, 1977 but before the 1st day of April, 1987, for the purposes of business of manufacture or production of any article or thing and such article or thing -

(a) Is manufactured or produced by using any technology (including any process) or other know-how developed in, or

(b) Is an article or thing invented in, a laboratory owned or financed by the Government, or a laboratory owned by a public sector company or a University or by an institution recognised in this behalf by the prescribed authority 463, the provisions of sub-section (1) shall have effect in relation to such machinery or plant as if for the words "twenty-five per cent.", the words "thirty-five per cent" had been substituted, if the following conditions are fulfilled, namely :-

(i) The right to use such technology (including any process) or other know-how or to manufacture or produce such article or thing has been acquired from the owner of such laboratory or any person deriving title from such owner;

(ii) The assessee furnishes, along with the return of income for the assessment year for which the deduction is claimed, a certificate from the prescribed authority to the effect that such article or thing is manufactured or produced by using such technology (including any process) or other know-how developed in such laboratory or is an article or thing invented in such laboratory; and

(iii) The machinery or plant is not used for the purpose of business of manufacture or production of any article or thing specified in the list in the Eleventh Schedule.

Explanation : For the purposes of this sub-section, -

(a) "Laboratory financed by the Government" means a laboratory owned by any body [including a society registered under the Societies Registration Act, 1860 (21 of 1860)] and financed wholly or mainly by the Government;

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(c) "University" means a University established or incorporated by or under a Central, State or Provincial Act and includes an institution declared under section 3 of the University Grants Commission Act, 1956 (3 of 1956), to be a University for the purposes of that Act.

(2C) Where any new machinery or plant, being machinery or plant which would assist in control of pollution or protection of

environment and which has been notified 466 in this behalf by the Central Government in the Official Gazette, is installed after the 31st day of May, 1983 but before the 1st day of April, 1987, in any industrial undertaking referred to in sub-clause (i) or sub-clause (ii) or sub-clause (iii) of clause (b) of sub-section (2), the provisions of sub-section (1) shall have effect in relation to such machinery or plant as if for the words "twenty-five per cent", the words "thirty-five per cent" had been substituted.

(3) Where the total income of the assessee assessable for the assessment year relevant to the previous year in which the ship or aircraft was acquired or the machinery or plant was installed, or, as the case may be, the immediately succeeding previous year [the total income for this purpose being computed after deduction of the allowance under section 33 and section 33A, but without making any deduction under sub-section (1) of this section or any deduction under Chapter VI-A is nil or is less than the full amount of the investment allowance, -

(i) The sum to be allowed by way of investment allowance for that assessment year under sub-section (1) shall be only such amount as is sufficient to reduce the said total income to nil; and

(ii) The amount of the investment allowance, to the extent to which it has not been allowed as aforesaid, shall be carried forward to the following assessment year, and the investment allowance to be allowed for the following assessment year shall be such amount as is sufficient to reduce the total income of the assessee assessable for that assessment year, computed in the manner aforesaid, to nil, and the balance of the investment allowance, if any, still outstanding shall be carried forward to the following assessment year and so on, so, however, that no portion of the investment allowance shall be carried forward for more than eight assessment years immediately succeeding the assessment year relevant to the previous year in which the ship or aircraft was acquired or the machinery or plant was installed or, as the case may be, the immediately succeeding previous year.

Explanation : Where for any assessment year, investment allowance is to be allowed in accordance with the provisions of this sub-section in respect of any ship or aircraft acquired or any machinery or plant installed in more than one previous year, and the total income of the assessee assessable for that assessment year [the total income for this purpose being computed after deduction of the allowance under section 33 and section 33A, but without making any deduction under sub-section (1) of this section or any deduction under Chapter VI-A] is less than the aggregate of the amounts due to be allowed in respect of the asset aforesaid for that assessment year, the following procedure shall be followed,

namely :-

(a) The allowance under clause (ii) shall be made before any allowance under clause (i) is made; and

(b) where an allowance has to be made under clause (ii) in respect of amounts carried forward from more than one assessment year, the amount carried forward from an earlier assessment year shall be allowed before any amount carried forward from a later assessment year.

(4) The deduction under sub-section (1) shall be allowed only if the following conditions are fulfilled, namely :-

(i) The particulars prescribed 468 in this behalf have been furnished by the assessee in respect of the ship or aircraft or machinery or plant;

(ii) An amount equal to seventy-five per cent of the investment allowance to be actually allowed is debited to the profit and loss account of any previous year in respect of which the deduction is to be allowed under sub-section (3) or any earlier previous year [being a previous year not earlier than the year in which the ship or aircraft was acquired or the machinery or plant was installed or the ship, aircraft, machinery or plant was first put to use] and credited to a reserve account (to be called the "Investment Allowance Reserve Account") to be utilised \026

(a) For the purposes of acquiring, before the expiry of a period of ten years next following the previous year in which the ship or aircraft was acquired or the machinery or plant was installed, a new ship or a new aircraft or new machinery or plant [other than machinery or plant of the nature referred to in clauses (a), (b) and (d) of the second proviso to sub-section (1)] for the purposes of the business of the undertaking; and

(b) Until the acquisition of a new ship or a new aircraft or new machinery or plant as aforesaid, for the purposes of the business of the undertaking other than for distribution by way of dividends or profits or for remittance outside India as profits or for the creation of any asset outside India :

Provided that this clause shall have effect in respect of a ship as if for the word "seventy-five", the word "fifty" had been substituted.

Explanation : Where the amount debited to the profit and loss account and credited to the Investment Allowance Reserve Account under this sub-section is not less than the amount required to be so credited on the basis of the amount of deduction in respect of investment allowance claimed in the return made by the assessee under section 139, but a higher deduction in respect of the investment allowance is admissible on the basis of the total income as proposed to be computed by the Assessing Officer under section 143, the Assessing Officer shall, by notice in writing in

this behalf, allow the assessee an opportunity to credit within the time specified in the notice or within such further time as the Assessing Officer may allow, a further amount to the Investment Allowance Reserve Account out of the profits and gains of the previous year in which such notice is served on the assessee or of the immediately preceding previous year, if the accounts for that year have not been made up; and, if the assessee credits any further amount to such account within the time aforesaid, the amount so credited shall be deemed to have been credited to the Investment Allowance Reserve Account of the previous year in which the deduction is admissible and such amount shall not be taken into account in determining the adequacy of the reserve required to be credited by the assessee in respect of the previous year in which such further credit is made :

Provided that such opportunity shall not be allowed by the Assessing Officer in a case where the difference in the total income as proposed to be computed by him and the total income as returned by the assessee arises out of the application of the proviso to sub-section (1) of section 145 or sub-section (2) of that section or the omission by the assessee to disclose his income fully and truly.

(5) Any allowance made under this section in respect of any ship, aircraft, machinery or plant shall be deemed to have been wrongly made for the purposes of this Act \026

(a) If the ship, aircraft, machinery or plant is sold or otherwise transferred by the assessee to any person at any time before the expiry of eight years from the end of the previous year in which it was acquired or installed; or
(b) If at any time before the expiry of ten years from the end of the previous year in which the ship or aircraft was acquired or the machinery or plant was installed, the assessee does not utilise the amount credited to the reserve account under sub-section (4) for the purposes of acquiring a new ship or a new aircraft or new machinery or plant [other than machinery or plant of the nature referred to in clauses (a), (b) and (d) of the second proviso to sub-section (1)] for the purposes of the business of the undertaking; or
(c) If at any time before the expiry of the ten years aforesaid, the assessee utilises the amount credited to the reserve account under sub-section (4) for distribution by way of dividends or profits or for remittance outside India as profits or for the creation of any asset outside India or for any other purpose which is not a purpose of the business of the undertaking, and the provisions of sub-section (4A) of section 155 shall apply accordingly :

Provided that nothing in clause (a) shall apply - (i) Where the ship, aircraft, machinery or plant is sold or otherwise transferred by the

assessee to the Government, a local authority, a corporation established by a Central, State or Provincial Act or a Government company as defined in section 617 of the Companies Act, 1956 or (1 of 1956); or

(ii) Where the sale or transfer of the ship, aircraft, machinery or plant is made in connection with the amalgamation or succession, referred to in sub-section (6) or sub-section (7).

(6) Where, in a scheme of amalgamation, the amalgamating company sells or otherwise transfers to the amalgamated company any ship, aircraft, machinery or plant, in respect of which investment allowance has been allowed to the amalgamating company under sub-section (1), - (a) The amalgamated company shall continue to fulfil the conditions mentioned in sub-section (4) in respect of the reserve created by the amalgamating company and in respect of the period within which such ship, aircraft, machinery or plant shall not be sold or otherwise transferred and in default of any of these conditions, the provisions of sub-section (4A) of section 155 shall apply to the amalgamated company as they would have applied to the amalgamating company had it committed the default; and

(b) The balance of investment allowance, if any, still outstanding to the amalgamating company in respect of such ship, aircraft, machinery or plant, shall be allowed to the amalgamated company in accordance with the provisions of sub-section (3), so, however, that the total period for which the balance of investment allowance shall be carried forward in the assessments of the amalgamating company and the amalgamated company shall not exceed the period of eight years specified in sub-section (3) and the amalgamated company shall be treated as the assessee in respect of such ship, aircraft, machinery or plant, for the purposes of this section.

(7) Where a firm is succeeded to by a company in the business carried on by it as a result of which the firm sells or otherwise transfers to the company any ship, aircraft, machinery or plant, the provisions of clauses (a) and (b) of sub-section (6) shall, so far as may be, apply to the firm and the company.

Explanation : The provisions of this sub-section shall apply only where - (i) All the property of the firm relating to the business immediately before the succession becomes the property of the company;

(ii) All the liabilities of the firm relating to the business immediately before the succession become the liabilities of the company; and

(iii) All the shareholders of the company were partners of the firm immediately before the succession.

(8) The Central Government, if it considers necessary or expedient so to do, may, by notification in the Official Gazette, direct that the deduction allowable under this section shall

not be allowed in respect of any ship or aircraft acquired or any machinery or plant installed after such date as may be specified 475 therein.

(8A) The Central Government, if it considers necessary or expedient so to do, may, by notification in the Official Gazette, omit any article or thing from the list of articles or things specified in the Eleventh Schedule.

(8B) Notwithstanding anything contained in sub-section (8) or the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. G.S.R. 870(E), dated the 12th June, 1986, issued thereunder, the provisions of this section shall apply in respect of, - (a)(i) A new ship or new aircraft acquired after the 31st day of March, 1987 but before the 1st day of April, 1988, if the assessee furnishes evidence to the satisfaction of the Assessing Officer that he had, before the 12th day of June, 1986, entered into a contract for the purchase of such ship or aircraft with the builder or manufacturer or owner thereof, as the case may be;

(ii) Any new machinery or plant installed after the 31st day of March, 1987 but before the 1st day of April, 1988, if the assessee furnishes evidence to the satisfaction of the Assessing Officer that before the 12th day of June, 1986, he had purchased such machinery or plant or had entered into a contract for the purchase of such machinery or plant with the manufacturer or owner of, or a dealer in, such machinery or plant, or had, where such machinery or plant has been manufactured in an undertaking owned by the assessee, taken steps for the manufacture of such machinery or plant :

Provided that nothing contained in sub-section (1) shall entitle the assessee to claim deduction in respect of a ship or aircraft or machinery or plant referred to in this clause in any previous year except the previous year relevant to the assessment year commencing on the 1st day of April, 1989;

(b) A new ship or new aircraft acquired or any new machinery or plant installed after the 31st day of March, 1988, but before such date as the Central Government, if it considers necessary or expedient so to do, may, by notification in the Official Gazette, specify 477a in this behalf.

(8C) Subject to the provisions of clause (ii) of sub-section (3), where a deduction has been allowed to an assessee under sub-section (1) in any assessment year, no deduction shall be allowed to the assessee under section 32AB in the said assessment year (hereinafter referred to as the initial assessment year) and a block of further period of four years beginning with the assessment year immediately succeeding the initial assessment year.

5. Learned counsel for the appellant submitted that Section

43A(1) relates to fluctuations of foreign exchange and its effect on the valuation of the assets. It has nothing to do with the question as to whether it is allowable in one year. Therefore, the decision relied upon by the High Court has no application.

6. Learned counsel for the respondent fairly accepted this position.

7. In that view of the matter, we set aside the impugned order of the High Court, remit the matter to it for fresh adjudication after formulating the question of law involved.

8. The appeals are allowed to the aforesaid extent. No costs.

JUDIS