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

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\+ **ITA 5/2015**

CIT ..... Appellant

Through: Mr.P. Roy Chaudhuri, Senior Standing counsel with Mr. Ajit Sharma, Junior Standing counsel.

versus

MAITHON POWER LTD ..... Respondent

Through: Ms. Shashi M Kapila, Advocate with Mr.R.R. Maurya, Mr. Pravesh Sharma and Mr.Sanjay Kumar, Advocates

CORAM:
HON'BLE DR. JUSTICE S. MURALIDHAR
HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R

% 21.07.2015

1.This appeal under Section 260A of the Income Tax Act, 1961 ('Act) is directed against the order dated 9th May 2014 passed by the Income Tax Appellate Tribunal ('ITAT') dismissing the Revenue's appeal i.e. ITA No.2644/Del/2013 for the Assessment Year ('AY') 2009-10.

2. In the present appeal the Court has by its order dated 20th April 2015 framed the following question of law for consideration:

"Whether the ITAT has rightly upheld the decision of CIT (A) allowing relief to the Assessee Company by holding that refund of excise duty amounting to Rs.12,46,29,000/- claimed by the Assessee Company from DGFT is not income under Section 5 read with Section 28(iii)(b) of the Act in the hands of Assessee Company?"

3. At the outset question Mr. P. Roy Chaudhuri, learned Senior Standing counsel for the Revenue clarifies that the relevant provision is Section 28 (iiic) of the Act. The above question will stand corrected accordingly.

4. The background facts are that the Assessee is a joint venture of the Tata Power Company Ltd. and Damodar Valley Corporation with 74% and 26% shareholding respectively. The Assessee company was incorporated on 26th July 2000 with the principal object of operating and maintaining the electric power generating stations based on conventional/non-conventional resources. The Assessee in the relevant AY 2009-10 was in the process of setting up a thermal power generation plant at Maithon, Jharkhand. It applied to the Ministry of Power, Government of India for grant of mega power status which was under examination during the AY 2009-10. The project was at the stage of construction and installation of power plants, pending the grant of mega power status. The Assessee was required to pay

excise and customs duty on goods and materials wherever applicable. Accordingly, the Assessee paid excise duty of Rs.2606.45 lakhs to its vendors. It lodged a claim for Rs.1246.29 lakhs with the DGFT under para 8.2(g) of the Foreign Trade Policy as 'deemed export benefits'. The DGFT by a letter dated 24th February 2009 admitted the claim of the Assessee to the extent of Rs.1059.35 lakhs but had not yet reimbursed the said amount to the Assessee in the AY in question. It is stated that, being a part of the equipment cost, the excise duty has been accounted for as part of the project cost and the amount refunded will be reduced from the project cost.

5. At this stage, it requires to be noticed that the Assessee initially claimed depreciation on the equipment in its return. The Assessing Officer (AO) disallowed the deduction on the ground that the Assessee was "claiming double deduction of depreciation" wherein the capitalized project cost includes depreciation as per company law as well as depreciation under the Act. This disallowance was challenged by the Assessee before the CIT (A) in Grounds 5 and 6. However, in the written submissions filed before the CIT (A), the Assessee clarified that in AY 2009-10, it had transferred the depreciation to capital work in progress and inadvertently reflected it as unabsorbed depreciation in the return filed by it. On its own, while filing the

return for the subsequent AY 2010-11, the Assessee had reversed the above claim for depreciation and brought forward nil amount of depreciation to AY 2010-11. In other words, it was clarified by the Assessee that no benefit of depreciation was claimed for AY 2009-10. This was accepted by CIT (A) and grounds 5 and 6 of the appeal of the Assessee as regards the claim of depreciation were disposed of as not pressed.

6. The AO treated the excise duty drawback claimed by the Assessee as income of the Assessee in the year of the claim itself. The AO referred to Section 28(iii) (b) which deals with cash assistance to exporters. Mr. P. Roy Chaudhuri, learned counsel for the Revenue sought to clarify that this was perhaps a typographical error and the AO might have intended to refer to Section 28(iiic) which refers to "any duty of customs or excise repaid or repayable as drawback to any person against exports under the Customs and Central Excise Duties Drawback Rules, 1971".

7. The factual position as regards the actual dates of commencement of commercial operation of the two units of the thermal power plant were 1st September 2011 and 24th July 2012 respectively. The CIT (A) accepted this fact and this was affirmed by the ITAT as well. This factual position has not

been challenged by the Revenue. It is therefore, not in dispute that the project was not operational during the AY in question i.e 2009-10.

8. Consequently, the finding of the CIT (A) that the business of the Assessee had yet not been set up during the AY 2009-10 and that all the costs incurred by it would have to be taken as capital work in progress cannot be faulted. Where there is a refund of excise duty it would go to reduce the project cost/capital work in progress since it is relatable only to the capital assets. Even for the purpose of Section 28 (iiic) of the Act, the excise duty repaid to the Assessee as drawback would have to relate to the business income of the Assessee in order to be chargeable to tax under the head of 'profits and gains of business'. In the present case, however, it relates to the cost of acquisition of a capital asset which forms part of the overall project cost incurred in the pre-commissioning phase of the project. The duty drawback would therefore to that extent reduce the project cost and therefore cannot, in the AY in question, be treated as business income.

9. The legal position in this regard is well-settled. In ***Challapalli Sugars Ltd. v. CIT [1975] 98 ITR 167 (SC),*** the Supreme Court explained that the "accepted accountancy rule for determining the cost of fixed assets is to include all expenditure necessary to bring such assets into existence and to

put them in working condition". In the facts of that case it was held that the interest incurred before the commencement of production on money borrowed by a newly started company which was in the process of constructing and erecting its plant "can be capitalised and added to the cost of the fixed assets which have been created as a result of such expenditure".

10. In ***CIT v. Bokaro Steel Ltd [1999] 236 ITR 315***, the Supreme Court was considering the nature of the amounts received by the Assessee from its contractors, engaged for the construction of its steel plant, under three heads: (i) as rent for housing the workers and staff, (ii) hire charges for plant and machinery made available to the contractors and (iii) interest from advances made to the contactors. The Court found that the arrangements between the Assessee and its contractors pertaining to the above three receipts were "intrinsically connected with the construction of its steel plant." The receipts had been adjusted against the charges payable to the contractors and had, gone to reduce the cost of construction. Therefore they were "rightly held as capital receipts and not income of the assessee from any independent source".

11. The Court in ***CIT v. Bokaro Steel Ltd*** (*supra*) approved the decision of this Court in ***ACIT v. Indian Drugs & Pharmaceuticals Ltd [1983] 141***

ITR 134 (Del). In that case, receipts from sale of tender forms and supply of water and electricity from the contractors at the stage when the construction of the factory was in progress and the production had not yet commenced were held to be "directly related to the capital structure of the business" and therefore of "capital nature".

12. The above legal position has been further reiterated in ***CIT v. Karnataka Power Corporation [2001] 247 ITR 268 (SC),*** and ***CIT v. Ponni Sugars & Chemicals Ltd. [2008] 306 ITR 392 (SC).*** In ***Ponni Sugars*** (*supra*), the Court was considering the nature of the subsidy received by a cooperative society from the Government for the running of a sugar mill. The Court applied the 'purpose test'. It held that the character of the receipt of subsidy in the hands of the Assessee under the scheme had to be determined with respect to the purpose for which the subsidy was granted. If the object of the assistance under the subsidy scheme was to "enable the assessee to set up a new unit or to expand the existing unit then the receipt of the subsidy would be capital account". It was clarified that "the form or the mechanism through which the subsidy is given are irrelevant".

13. In view of the aforementioned settled legal position, the Court concurs with the views expressed by the CIT (A) and the ITAT that any refund or

drawback would go to ultimately reduce the cost of the project and had therefore to be treated as a capital receipt.

14. Consequently, the question of law is answered in affirmative i.e. against the Revenue and in favour of the Assessee.

15. The appeal is dismissed but with no order as to costs.

S. MURALIDHAR, J

VIBHU BAKHRU, J

JULY 21, 2015
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