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BERGER PAINTS INDIA LTD.

v.

COMMISSIONER OF INCOME TAX, CALCUTTA

FEBRUARY 17, 2004

B

[K.G. BALAKRISHNAN AND B.N. SRIKRISHNA, JJ.]

Income Tax Act, 1961:

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Section 43 B—Deduction allowed to assessee—Interpretation of—Principle laid down by Gujarat High Court in Lakhnopal National Ltd's case followed in judgments of Madras High Court and Bombay High Court and in the decision of Special Bench of the Income Tax Appellate Tribunal, none of which was challenged—Held, if the Revenue has not challenged the correctness of the law laid down by the High Court and has accepted it in case of one assessee, then it is not open to the Revenue to challenge its correctness in the case of other assessees, without just cause—It cannot be said that judgment of Gujarat High Court was distinguishable as being one rendered in connection with a provisional assessment under Section 141-A and not in a regular assessment.

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Section 261—Certificate to appeal—High Court departing from the uniform view taken by other High Courts—Held, in view of this, a certificate to appeal ought to have been granted—Practice and Procedure.

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During assessment proceedings for the assessment year 1984-85, assessee claimed that under Section 43 B of the Income Tax Act, 1961, it was entitled to deduction of the entire amount actually paid on account of customs and excise duty during the relevant previous year. On similar basis, assessee claimed a deduction of the actual amount of customs and excise duty included in the value of the closing stock for the previous year pertaining to the assessment years 1986-87 and 1987-88 and offered for tax the amount of customs and excise duty included in the value of the opening stock.

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The Inspecting Assistant Commissioner of Income Tax allowed the assessee's claim in the proceedings for the assessment year 1984-85. The Commissioner of Income Tax initiated proceedings under Section 263 of

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the Act on the ground that the Assessing Officer had wrongly allowed the claim for deduction of the amount towards customs and excise duty paid during the previous year but credited to the Profit and Loss Account in closing stock of goods under the provisions of Section 43B. The assessee relied upon the judgment of the Gujarat High Court in *Lakhanpal National Ltd.'s* case in support of its claim. The Commissioner of Income Tax took the view that the Gujarat High Court's decision was distinguishable on facts and therefore, made an order under Section 263 of the Act disallowing the claim of the assessee. The Tribunal confirmed the order of the Commissioner of Income Tax. On an application made under Section 256(1) of the Act at the instance of the assessee, the Tribunal referred a question of law for the opinion of the High Court as to whether the Tribunal was right in law in rejecting the assessee's claim for deduction. The High Court answered the reference in favour of the Revenue and against the assessee.

For the assessment years 1986-87 and 1987-88, the Tribunal upheld the claim of the assessee and allowed deduction claimed under Section 43 B of the Act, as Central Excise and Customs duty, which had been included in the value of the closing stock. At the instance of the Revenue, two references were made to the High Court as to whether the Tribunal was justified in allowing the deduction as aforesaid. The High Court answered both the references in favour of the Revenue and against the assessee. Hence, the present appeals.

Allowing the appeals, the Court

HELD: 1.1. It is an established principle that if the Revenue has not challenged the correctness of the law laid down by the High Court and has accepted it in the case of one assessee, then it is not open to the Revenue to challenge its correctness in the case of other assessees, without just cause. [508-G-H]

Union of India v. Kammudini Narayan Dalal, 249 ITR 219 SC; *CIT v. Narendra Doshi*, 254 ITR 606 SC and *CIT v. Shivsagar Estate*, 257 ITR 59 SC relied on.

1.2. The decision in *Lakhanpai National Ltd.'s* case which clearly laid down the interpretation of Section 43 B was followed by the judgments of the Madras High Court and Bombay High Court and was again followed by the decision of Special Bench of the Income Tax Appellate Tribunal,

A none of which have been challenged. There is no just cause as would justify departure from the established principle. The Revenue could not have been allowed to challenge the principle laid down in *Lakhanpal National Ltd.'s* case which was followed by the Inspecting Assistant Commissioner in the case of the assessee in the three assessment years in question. The Commissioner, the Income Tax Appellate Tribunal and the Calcutta High Court erred in permitting the Revenue to raise a contention contrary to what was laid down by the Gujarat High Court in *Lakhanpal National Ltd.'s* case. Thus, the question referred for the assessment years 1984-85, 1986-87 and 1987-88 are answered in favour of the assessee and against the Revenue. [509-E-G; 510-B-D]

C *Lakhanpal National Ltd.'s v. ITO*, (1986) 162 ITR 240 Guj approved.

CIT v. Bharat Petroleum Corporation Ltd, (2001) 252 ITR 43 Bom, *Chemicals and Plastics India Ltd. v. CIT*, (2003) 260 ITR 193 Mad and *Indian Communication Network Pvt. Ltd. v. IAC*, (1994) 206 ITR 96 SB-AT, referred to.

Berger Paints India Ltd. v. CIT, (1993) 44 ITD 573 (ITAT, Cal.) and *Hindustan Computers Ltd. v. ITO*, (1987) 21 ITD 524 (ITAT, Del), cited.

E 1.3. The Revenue has attempted to distinguish the judgment of the Gujarat High Court in *Lakhanpal National Ltd.'s* case on the facile ground that the judgment of the Gujarat High Court was one rendered in connection with a provisional assessment under Section 141 A and not in a regular assessment. This distinction is hardly acceptable. A reading of the Gujarat High Court's judgment shows it is not based merely on the adjustments permissible under Section 141 A, but proceeds on an analysis of Section 43 B and makes a finding that the entire amount of excise duty/customs duty paid by the assessee in a particular accounting year was an allowable deduction in respect of that year irrespective of the amount of excise duty/customs duty which was included in the valuation of the assessee's closing stock at the end of the accounting year. [509-B-D]

G 2. In view of the fact that other High Courts had taken a particular view, if the Calcutta High Court desired to depart from the uniform view taken by them, in fairness to the assessee, a certificate to appeal under Section 261 of the Act ought to have been granted. [510-E]

H CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 1081-1083

of 2004.

From the Judgment and Order dated 6.2.2002 of the Calcutta High Court in I.T.R. Nos. 137, 122/95 A.S.C.I., No.1/2002 in I.T.R. No. 213 of 1993.

S. Ganesh, S. Sukumaran, Ms. Divya Nair and K. Rajeev for the Appellant.

Ranbir Chandra and B.V. Balam Das for the Respondents.

The Judgment of the Court was delivered by

SRIKRISHNA, J. Leave granted.

The assessee is a company engaged in the manufacture and sale of paints, varnishes and other allied products. During the previous year ending on 31st December 1983 pertaining to the assessment year 1984-85, the petitioner in its returns had disclosed a sum of Rs. 1,33,31,370 as income. During this period, the appellant-assessee had incurred expenditure on account of customs and excise duty aggregating to Rs.5,85,87,181 which was duly debited to the Profit and Loss Account of the petitioner for the relevant previous year and was also fully paid during the relevant previous year. In addition there to the petitioner had also credited to the Profit and Loss Account of the relevant previous year an amount of Rs. 98,25,833 relating to the customs and excise duty on the closing stock of inventory by including the said sum in the valuation of such closing stock. During the assessment proceedings for the assessment year 1984-85, the appellant-assessee claimed that under Section 43B of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') that it was entitled to deduction of the entire sum of Rs. 5,85,87,181/ being the duties actually paid during the relevant previous year.

On similar basis, the appellant-assessee had claimed a deduction of an amount of Rs. 1,22,54,261 being the actual customs and excise duty included in the value of the closing stock for the previous year pertaining to the assessment year 1986-87 and offered for tax a sum of Rs. 98,25,833 being customs and excise duty including in the value of the opening stock. Similarly, for the assessment year 1986-87, the petitioner claimed a deduction of Rs. 24,28,428 {Rs. 1,22,54,261 - Rs. 98,25,833}. The assessee claimed a deduction of Rs. 77,81,739 Rs. 2,00,36,000 - Rs. 1,22,54,261} on similar basis for the assessment year 1987-88.

A In the assessment proceedings of the assessment year 1984-85, the
Inspecting Assistant Commissioner of Income Tax allowed the appellant-
assessee's claim that it was entitled to deduct the entire sum of Rs. 5,85,87,181.
B being the duties actually paid during the relevant year previous to the
assessment year 1984-85. The Commissioner of Income Tax initiated
proceedings under Section 263 of the Act on the ground that the Assessing
Officer had wrongly allowed the claim for deduction of an amount of
Rs.98,25,833 towards customs and excise duty paid during the previous year
but credited to the Profit and Loss Account in closing stock of goods under
the provisions of Section 43B. The assessee relied upon the judgment of the
Gujarat High Court in *Lakhanpal National Ltd. v. ITO*, [1986] 162 ITR 240
C (Guj.) [hereinafter referred to as "*Lakhanpal National Ltd.'s case*"] in support
of its claim. The Commissioner of Income Tax took the view that the Gujarat
High Court's decision was distinguishable on facts and, therefore, made an
order under Section 263 of the Act disallowing the claim of the assessee. On
appeal to the Tribunal the Tribunal held that the Gujarat High Court's judgment
D in *Lakhanpal National Ltd's case* was distinguishable and confirmed the
order of the Commissioner of Income Tax. On an application made under
Section 256(1) of the Act at the instance of the appellant-assessee, the Tribunal
inter alia referred the following question of law for the opinion of the High
Court:-

E "Whether, on the facts and in circumstances of the case, the Tribunal
was right in law in rejecting the assessee's claim for deduction of the
excise and customs duties of Rs. 98,25,833 paid in the year of account
and debited in the Profit & Loss Account, on the ground the crediting
of the Profit & Loss Account by the value of the closing stock, which
F included the aforesaid duties, did not have the effect of wiping out
the debit to the Profit & Loss Account?"

The High Court by its judgment dated 24th September, 2001 in ITR
No. 213 of 1993 answered the question referred in favour of the Revenue and
against the assessee.

G For the assessment year 1986-87, the Tribunal upheld the claim of the
assessee and allowed a deduction amounting to Rs. 77,81,948 claimed under
Section 43B of the Act being Central Excise and Customs duty, which had
been included in the value of the closing stock. At the instance of the Revenue,
the following question of law was referred to the High Court for the assessment
H year 1986-87:-

“Whether, on the facts and in the circumstances of the case and under Explanation 2 to section 43B coming into force with effect from 1.4.84, the Tribunal was justified in directing to allow the amount of Rs. 77,81,948 u/s. 43B of the I.T. Act, being Central Excise and Customs duty which had been included in the value of closing stock.?”

For the assessment year 1987-88, the Tribunal allowed a similar claim and a reference came to be made to the High Court in the following terms:-

“Whether, on the facts and in the circumstances of the case, the Tribunal is justified in law in directing the I.T.O. to allow the sum of Rs. 24,28,428 being Central Excise and Customs duty under Section 43B of the Act on the ground that the said amount has been included in the value of closing stock.?”

The High Court by its judgment dated 6th February, 2002 disposed off both the references. The questions referred in both the references were answered in favour of the Revenue and against the assessee. An application made for certificate to appeal to this court under Section 261 of the Act was rejected by the Calcutta High Court by observing “*we are unable ourselves to burden an already over burdened Hon'ble Supreme Court*”. Being aggrieved, the assessee impugns both judgments of the Calcutta High Court pertaining to the three assessment years, by these appeals.

There is no doubt that the judgment of the Gujarat High Court in *Lakhanpal National Ltd.'s* case is completely in favour of the assessee as it accepts the contention of the assessee *in toto*. It is not in dispute that the decision in *Lakhanpal National Ltd.'s* case was not challenged by the department before this court and thus has been accepted by the department. The interpretation placed on Section 43B in *Lakhanpal National Ltd.'s* case was directly followed by the judgment of the Bombay High Court in *CIT v. Bharat Petroleum Corporation Ltd.*, [2001] 252 ITR 43 (Bom.) and by the Madras High Court in *Chemicals and Plastics India Ltd. v. CIT*, [2003] 260 ITR 193 (Mad.). These two judgments also appear to have been accepted by the Revenue and have not been challenged before this court at all. This fact asserted before us by the petitioner-assessee had not been disputed in the counter affidavit of the Department.

In addition to these three High Court judgments, it appears that, noticing the conflicting views taken by the Tribunals, a Special Bench of the Income Tax Appellate Tribunal was constituted to resolve the issue. In *Indian*

A *Communication Network Pvt. Ltd. v. IAC*, [1994] 206 ITR 96 (SB-AT), the Special Bench of the Tribunal considered all the conflicting judgments and judgment in *Lakhanpal National Ltd.'s* case (supra) as also its own order in the case of the appellant-assessee reported in *Berger Paints India Ltd. v. CIT*, [1993] 44 ITD 573 (ITAT, Cal.). After noticing all the conflicting views, and the attempt made by the Tribunal in *Hindustan Computers Ltd. v. ITO*, [1987] 21 ITD 524 (ITAT, Del.), to distinguish the observations made in *Lakhanpal National Ltd.'s* case, the Special Bench of the Tribunal made the following observations at 206 ITR 96 at p. 114:-

C “We would like to make it absolutely clear that the removal of the amount in question from the figure of closing stock is not tantamount to a ‘tinkering’ of the closing stock but allowing to the assessee the effective deduction to which it is entitled under Section 43B. We would also like to emphasise that in the subsequent assessment year, the assessee’s opening stock would stand reduced by a corresponding figure since it cannot avail of a “double deduction.”

D It was further observed by the Special Bench at p.114 that:-

E “Before we part with this ground, we cannot help feeling that the litigation between the parties could have been avoided since it was quite immaterial, whether full deduction was allowed in one year or partly in one year and partly in the next, since the assessee is a company and rate of the tax is uniform. The gain to one and the loss to the other is illusory since what is deferred in one year, would have to be discharged in the next. In that sense, nobody has won and nobody has lost.”

F It is specially asserted in the written submissions of the appellant-assessee that this decision of the Special Bench of the Income Tax Appellate Tribunal in *Indian Communication Network Pvt. Ltd.'s* case (supra) has also not been challenged. This fact is also not disputed by the Revenue.

G In view of the judgments of this Court in *Union of India v. Kammudini Narayan Dalal*, 249 ITR 219 (SC); *CIT v. Narendra Doshi*, 254 ITR 606 (SC) and *CIT v. Shivsagar Estate*, 257 ITR 59 (SC), the principle established is that if the Revenue has not challenged the correctness of the law laid down by the High Court and has accepted it in the case of one assessee, then it is not open to the Revenue to challenge its correctness in the case of other assessees, without just cause.

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The judgment of the Gujarat High Court in *Lakhanpal National Ltd.'s* case was relied upon and followed by the Bombay High Court in *CIT v. Bharat Petroleum Corporation Ltd.* (supra) as well as by the Madras High Court in *Chemicals and Plastics India Ltd. v. CIT* (supra). The Special Bench of the Tribunal also relied upon the judgment of the Gujarat High Court in *Lakhanpal National Ltd.'s* case. The Revenue has attempted to distinguish the judgment of the Gujarat High Court on the facile ground that the judgment of the Gujarat High Court was one rendered in connection with a provisional assessment under Section 141A and not in a regular assessment. In our view, this distinction is hardly acceptable. In any event a reading of the Gujarat High Court's judgment shows that the judgment is not based merely on the adjustments permissible under Section 141A, as is contended by the Revenue, but that the judgment proceeds on an analysis of Section 43B and makes a finding that the entire amount of excise duty/customs duty paid by the assessee in a particular accounting year was an allowable deduction in respect of that year irrespective of the amount of excise duty/customs duty which was included in the valuation of the assessee's closing stock at the end of the accounting year. After coming to this conclusion, the Gujarat High Court then proceeded to consider the impact of Section 141A and granted appropriate relief thereunder. It is not possible for us to accept the contention of the Revenue that the judgment of the Gujarat High Court in *Lakhanpal National Ltd.'s* case is distinguishable on the ground put forward.

The decision in *Lakhanpal National Ltd.'s* case which clearly laid down the interpretation of Section 43B was followed by the judgments of the Madras High Court and Bombay High Court and was again followed by the decision of Special Bench of the Income Tax Appellant Tribunal, none of which have been challenged. In these circumstances, the principle laid down in *Union of India v. Kammudini Narayan Dalal*, (supra), *CIT v. Narendra Doshi* (supra) and *CIT v. Shivsagar Estate* (supra) clearly applies. We see no 'just cause' as would justify departure from the principle. Hence in our view, the Revenue could not have been allowed to challenge the principle laid down in *Lakhanpal National Ltd.'s* case, which was followed by the Inspecting Assistant Commissioner in the case of the assessee in the three assessment years in question. We are, therefore, of the view that the Commissioner, the Income Tax Appellate Tribunal and the Calcutta High Court erred in permitting the Revenue to raise a contention contrary to what was laid down by the Gujarat High Court in *Lakhanpal National Ltd.'s* case. This decision has been subsequently followed by the decisions of the Bombay High Court in *CIT v. Bharat Petroleum Corporation Ltd.* (supra) and the Madras High

- A Court in *Chemicals and Plastics India Ltd. v. CIT* (supra) as well as the decision of the Special Bench in *Indian Communication Network Pvt. Ltd. v. IAC* (supra), which have all remained unchallenged.

Hence, the following Order:-

- B *Assessment Year 1984-85*

We set aside the judgment of the Calcutta High Court in ITR No. 213 of 1993 and answer the question referred against the Revenue and in favour of the assessee.

- C *Assessment Year 1986-87*

We set aside the judgment of the Calcutta High Court in ITR No. 122 of 1995 and answer the question referred in favour of the assessee and against the Revenue.

- D *Assessment Year 1987-88*

We set aside the judgment of the Calcutta High Court in ITR No. 137 of 1995 and answer the question referred in favour of the assessee and against the Revenue.

- E In view of the fact that other High Courts had taken a particular view, if the Calcutta High Court desired to depart from the uniform view taken by them, in fairness to the assessee, a certificate to appeal under Section 261 of the Act ought to have been granted.

Appeal is accordingly allowed with no orders as to costs.

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M.P.

Appeal allowed.