

IN THE HIGH COURT OF ORISSA AT CUTTACK
ITA No. 133 of 2012

National Aluminium Company Ltd., Appellant
Bhubaneswar

Mr. A.U. Senapati, Advocate

-versus-

The Commissioner of Income Tax, ... Respondents
Bhubaneswar and another

Mr. T.K. Satapathy, Senior Standing Counsel

CORAM:
THE CHIEF JUSTICE
JUSTICE R.K. PATTANAİK

Order No.

ORDER
09.05.2022

Dr. S. Muralidhar, C.J.

12. 1. This appeal by the Assessee-Appellant is directed against the order dated 29th June, 2012 passed by the Income Tax Appellate Tribunal, Cuttack Bench, Cuttack (ITAT) in ITA No.91/CTK/2010 for the assessment year (AY) 2006-07.

2. While admitting this appeal on 9th February, 2022 the following substantial questions of law were framed for consideration:

“(i) Whether on the facts and in the circumstances of the case the learned ITAT was legally justified in dismissing the grounds of the appellant and upholding and affirming the decision of the Commissioner of Income Tax (Appeals) of the addition/disallowance of Rs.31,18,89,388/- u/s. 43B of the Act in respect of Electricity Duty deposited into designated bank Account as per direction of this Court ?

(ii) Whether the components/parts of a plan which were acquired prior to 31st March, 2005 but all such components/parts fitted into the plant after 31.03.2005 and installed after 31.03.2005, the Tribunal was justified in law in not allowing the additional depreciation under Section 32(1)(iia) of the Act ?”

Question (i)

3. The background facts are that the Assessee (NALCO) is a public limited company engaged in the business of mining, manufacturing, production, generation and dealing in Bauxite, Alumina, Aluminum and Power. It follows the mercantile system of accounting and its accounts are maintained on accrual system of accounting.

4. As part of its expansion project in the AY 2006-07 NALCO became eligible for “additional depreciation” under Section 32 (1) (iia) of the Income Tax Act (‘Act’). For AY 2006-07 it claimed additional depreciation of Rs.30,77,31,263/- in respect of the cost of “New Plant or machinery” acquired and installed as part of the expansion project after 31st March, 2005.

5. NALCO has also its own captive power plant (CPP) at Angul, Odisha with an installed capacity of 840 MW. Electricity duty is payable by NALCO to the Government of Odisha on the electricity generated in its CPP under the Odisha Electricity Act, 1961. With effect from 10th October, 2001, the Government of Odisha issued a notification raising the electricity payable from 12 paisa per unit to 20 paisa per unit. Aggrieved by the additional levy of electricity duty, NALCO filed OJC No.2682 of 2002 in this Court. By an

interim order dated 8th April, 2002 in Misc. Case No.2613 of 2002 in OJC No.2682 of 2002 this Court permitted NALCO to continue to pay electricity duty at 12 paisa per unit without prejudice to its rights and contentions. Further, NALCO was to deposit the differential of 8 paisa per unit in any Nationalized Bank in a fixed deposit. Accordingly, NALCO paid the differential 8 paisa per unit in a fixed deposit with the State Bank of India (SBI).

6. NALCO states that pursuant to the above interim order of the High Court it deposited a total sum of Rs.1,76,44,35,364/- from 10th October, 2001 to 31st March, 2006. Further, by orders dated 16th August, 2004 in Misc. Case No.5547 of 2002 and Misc. Case No.1232 of 2004 in OJC No.2682 of 2002, this Court directed NALCO to withdraw a sum of Rs.30 crores from the sum lying in Fixed Deposit with SBI and to deposit the said amount in the Treasury of the State Government by 3rd November, 2004. Three further similar orders were passed on 12th May 2005, 24th August, 2005 and 31st January, 2006 by which sums of Rs.50 crores, Rs.30 crores and Rs.20 crores respectively were released in favour of the State Government. As a result, a total sum of Rs.130 crores was transferred from the fixed deposits lying in the designated Bank account by NALCO to the State Government by 28th February, 2006.

7. For the returns filed for the AYs 2003-04 to 2006-07 NALCO claimed deduction under Section 43B of the Act towards electricity duty paid including the amounts deposited by it with SBI as per directions of this Court. Similar claims made by

NALCO for the AYs 2003-04 and 2004-05 under Section 43B of the Act were allowed by the Assessing Officer (AO). For the AY 2006-07 the deductions claimed under Section 43B of the Act were to the tune of Rs.46,19,60,940/-. The AO disallowed the above amount by treating it as a deposit in a designated bank account and not as payment of electricity duty. In the assessment order date 29th December, 2008 the AO also disallowed the claim of additional depreciation of Rs.30,77,31,263/- under Section 32 (1)(ia) of the Act on the ground that the conditions stipulated therein had not been met.

8. The Commissioner of Income Tax (Appeals) [CIT (A)], by order dated 31st December 2009, dismissed NALCO's appeal by sustaining the addition under Section 43B of the Act to an extent of Rs.31,18,89,388/- and fully sustaining the disallowance of additional depreciation.

9. Thereafter the Assessee went before the ITAT in appeal which by the impugned order dated 29th June, 2012 was dismissed.

10. This Court has heard the submissions of Mr. A.U. Senapati, learned counsel for the Appellant and Mr. T.K. Satapathy, learned Senior Standing Counsel for the Respondents.

11. Mr. Satapathy, learned Senior Standing Counsel sought to place reliance on the order dated 4th March, 2022 of this Court in I.T.A. No.20 of 2014 (*M/s. Indian Metal and Ferro Alloys Ltd. v. Commissioner of Income Tax*) to urge that a similar question in

that case as regards deduction under Section 43B of the Act was decided in favour of the Department and against the Assessee.

12. Countering the above submission, Mr. A.U. Senapati, learned counsel for the Appellant pointed out that the facts in ***Indian Metal and Ferro Alloys Ltd.*** (*supra*) are different inasmuch as in the said case this Court found that although the differential amount of electricity duty has been deposited in loan lien account, it was not actually paid to the Government but retained in that account. Mr. Senapati, learned counsel pointed out that in the present case, on the other hand, the amount deposited in the SBI account was, under order of this Court, in fact released to the State Government.

13. On the issue of electricity duty, there is merit in the contention of Mr. A.U. Senapati that the facts of the present case are different from the case of ***Indian Metal and Ferro Alloys Ltd.*** (*supra*). In that case the differential electricity duty paid in the loan lien account remained there and therefore, was inaccessible to the Government. In the present case, however, under the interim orders passed by this Court as much as nearly Rs.100 crores has been released to the State Government. In other words, the amount has not only been parted with by the Assessee but also has been received by the Government. Consequently, the deduction under Section 43B of the Act as claimed by the Assessee cannot be denied to it.

14. It requires to be mentioned here that against the order passed by this Court in OJC No.2682 of 2002 the State Government filed

an SLP before the Supreme Court of India. In the said SLP (C) No.6386 of 2011 an order was passed by the Supreme Court on 23rd March, 2015 recoding a settlement between the parties, pursuant to which full payments have in fact been made by NALCO to the State Government. In that view of the matter, question No.(i) is answered in favour of the Assessee and against the Department by holding that the AO, the CIT(A) and the ITAT were not justified in sustaining the addition/disallowance of Rs.31,18,89,388/- under Section 43B of the Act in respect of electricity duty deposited in the SBI Bank account under the direction of this Court.

15. On this issue, the matter is remanded to the AO for a fresh computation keeping in view the amounts already released by the Petitioner to the State Government.

Question (ii)

16. As regards, the second issue concerning additional depreciation, reliance is placed by Mr. Senapati on the decision of Gujarat High Court in *Principal Commissioner of Income Tax v. IDMC Ltd. (2017) 393 ITR 441 (Guj)*.

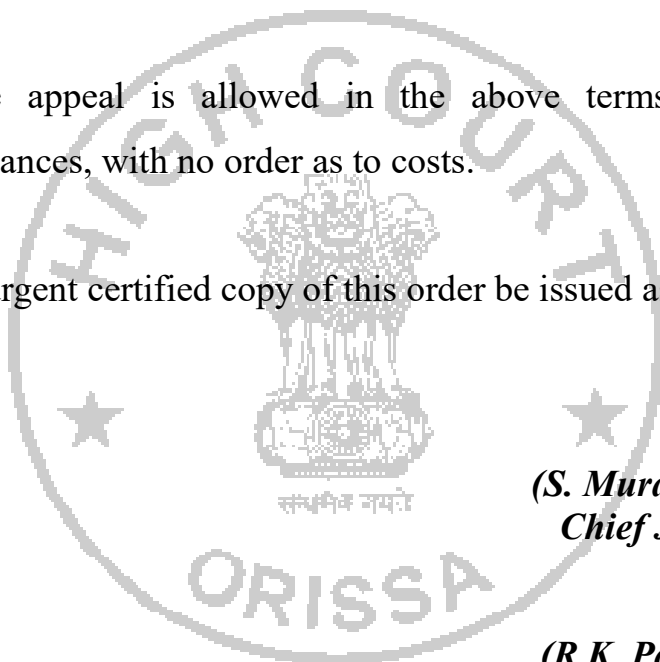
17. On this issue, the decision in *PCIT v. IDMC Ltd. (supra)* of the Gujarat High Court squarely applies. There it was held that machines that might have been acquired before 31st March, 2005 but installed after 31st March, 2005 would be eligible for grant of additional depreciation under Section 32(1)(iia) of the Act for the AY 2006-07. That decision of Gujarat High Court has been upheld

by the Supreme Court by dismissal in Diary No.28648 of 2017 (*Principal Commissioner of Income Tax v. M/s. IDMC Limited*) on 13th October, 2017.

18. Accordingly, in the present case question No.(ii) is answered in favour of the Assessee and against the Department by holding that the component/parts of a plant acquired prior to 31st March, 2005 but fitted to the plant thereafter would be eligible for additional depreciation under Section 32(1)(ia) of the Act.

19. The appeal is allowed in the above terms, but in the circumstances, with no order as to costs.

20. An urgent certified copy of this order be issued as per rules.



(S. Muralidhar)
Chief Justice

(R.K. Pattanaik)
Judge

S.K. Jena/Secy.