THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 597 of 2003
WITH
INCOME TAX APPEAL NO. 595 of 2003
WITH
INCOME TAX APPEAL NO. 594 of 2003
WITH
INCOME TAX APPEAL NO. 596 of 2003
WITH
INCOME TAX APPEAL NO. 598 of 2003

M/s.Tolani Shipping Co. Ltd.]
Bakhtawar Building,]
Nariman Point,]
Mumbai 400 021.]... Appellant

Versus

The DCIT Spl. Rge. 12,]
Mumbai]..Respondent

WITH
INCOME TAX APPEAL NO. 593 of 2003

M/s.Tolani Shipping Co. Ltd.]
Bakhtawar Building,]
Nariman Point,]
Mumbai 400 021.]... Appellant

Versus

The DCIT Spl. Rge. 31,]
Mumbai, Aayakar Bhavan,]
M.K. Marg, Mumbai-20.]..Respondent

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Mr.Nitesh Joshi i/b Mr.Atul K. Jasani, Advocate for appellant.

Mr.Suresh Kumar, Advocate for respondent.

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CORAM : DHIRAJ SINGH THAKUR &
KAMAL KHATA, JJ.

DATE : 20th JANUARY, 2023

O R D E R

PER DHIRAJ SINGH THAKUR, J.

1. The present set of appeals under section 260A of the Income Tax Act, 1960 (hereinafter referred to as 'the Act') have been preferred against a common order, dated 19th January 2003 passed by the Income Tax Appellate Tribunal, Mumbai ('Tribunal') for the assessment years 1985-86, 1987-88 & 1988-89, 1989-90 & 1990-91 and 1992-93, respectively.

2. Counsel for the parties state that since the appeals involve common questions of law and facts and since they arise from a common order, dated 19th January 2003 passed by the Tribunal, Income Tax Appeal No.597 of 2003 be taken up for purposes of narration of relevant facts.

3. In Income Tax Appeal No.597 of 2003, the following substantial question of law has been framed for our consideration :

> Whether the increase in loan liability of the assessee due to fluctuation in foreign exchange rates in the subsequent years was part of actual cost of the ship by name M/s. M.V. Prabhu Parvati acquired on 1.6.1984 from the foreign country and the assessee was entitled to invest allowance on the additional cost in the year of acquisition?

4. Briefly stated the material facts are as under :

4.1 The appellant-company is engaged in the business of shipping. The appellant acquired a ship by name M.V. Prabhu Parvati on 1st June 1984 and put it to use in the previous year relevant to the assessment year 1985-86. The acquisition of the ship was on 'the deferred payment basis' for which a loan had been taken. The cost of the ship was Rs.21,06,32,873/-. However, on account of fluctuation in the foreign exchange currency rates, the actual cost of the ship came to Rs.21,06,32,873 + Rs.14,67,18200/-, i.e, Rs.32,73,51,075/-.

4.2 Return of income was filed by the appellant for the relevant year. Section 32A of the Act, as it existed then, *inter-alia* allowed deduction @ 25% of the actual cost of the ship owned by the assessee and wholly used for the purposes of the business carried on

Sub-section (3) of section 32A further permitted the assessee to carry forward such a claim for a period not more than eight years assessment years immediately succeeding the assessment year, relevant to the previous year.

4.3 In so far as the claim of deduction in respect of investment allowance calculated at 25% in regard to Rs.21,06,32,875 is concerned, the same is not in dispute. However, what is in dispute is the investment allowance additionally claimed with regard to the additional cost which arose on account of fluctuation in the foreign currency exchange rate of Rs.14,67,18,200/-.

5. The department's claim was that there is no provision under which additional investment allowance could be permitted on account of fluctuation in the foreign exchange rates, for any of the assessment years which were the subject matter of the appeal before the Tribunal. The Tribunal, by placing reliance upon the

judgment of this Court in ***Khatau Makanji Spinning and Weaving Co. Ltd. Vs. Commissioner of Income-Tax*** [1] held that the appellant was not entitled to claim additional investment allowance on account of fluctuation in foreign exchange currency rates. Since the Tribunal placed reliance upon ***Khatau Makanji***'s case, it would be relevant to reproduce the question of law as it was before the Court and the view expressed on the same :

> "…………..So far as the third question is concerned, learned counsel for the assessee submits that this question is not covered and the assessee is entitled to investment allowance under section 32A in respect of additional costs of the imported assets which has taken place because of the fluctuation in the rate of exchange in the year subsequent to the year of acquisition.
>
> We have heard learned counsel for the assessee. We have perused section 32A. We do not find anything there which may support the above contention of learned counsel for the assessee. We, therefore, answer the third question in the affirmative, i.e, in favour of the Revenue and against the assessee.

6. Counsel for the appellant Mr.Joshi submitted that the view expressed in the case of ***Khatau Makanji*** (Supra) has already been held to be a judgment *per incuriam,* in ***Associated Bearing Co. Ltd. Vs. Commissioner of Income-tax*** [2].

> "…………..The decision of the Bombay High

1 [1996] (Bom.) 222 ITR 472
2 [2006] 286 itr 341 (Bom.)

Court in *Khatau Makanji Spg. And wag. Co. Ltd. Vs. CIT [1996] 222 ITR 472* referred to by the Revenue can be distinguished since there was no consideration of the issues arising and the said judgment sets out no reason whatsoever for arriving at its conclusion. Further, the latest decision of the Supreme Court in *CIT Vs. Shri Ambika Mills Ltd. [1993] 201 ITR (St.) 63*, wherein the Supreme Court approved the Gujarat High Court's view on the merits of that case supersedes the decision of the Bombay High Court in *Khatau Makanji's* case [1996] 222 ITR 472. The said decision in *Khatau Makanji's* case [1996] 222 ITR 472 (Bom.) being a judgment per incuriam, *CIT Vs. Modu Timblo (Individual) [1994] 206 ITR 647 (Bom.)*, and passed sub silentio and being inconsistent with the earlier decisions of this Court and of the Supreme Court is erroneous and cannot be used by the Revenue to deprive the assessee of the benefit of investment allowance on the increased loan liability consequent upon the depreciation of the Indian currency in the foreign exchange market……"

7. This view was later followed in ***Commissioner of Income-tax-2 Vs. Tata Chemicals Ltd.*** [3]

8. It is not out of place to mention that as per section 43A of the Act as it stood during the relevant assessment year up to the assessment year 2003-03, the adjustment on account of foreign currency rate fluctuation was to be

3 [2016] 75 taxmann.com 228 (Bombay)

made in the year in which the foreign exchange fluctuation took place. However, by virtue of Finance Act, 2002, with effect from assessment year 2003-04, such adjustment is to be made in the year in which the liability in foreign exchange is discharged. In ***Commissioner of Income-Tax Vs. Gujarat State Fertilizers Co. Ltd.*** [4]**,** it was held :

> "............On a plain reading of section 43A of the Act, one thing is certain, and that is, the increase or reduction in the liability has to take place only in the year of fluctuation and it does not relate back to the year of acquisition/installation/first user. One will therefore have to proceed on the footing that the actual cost figure which was quantified earlier than the previous year in which the fluctuation took place, shall have to be modified in the year of fluctuation. It is well-settled that when the asset was purchased at a price, liability was to be discharged in instalments, it cannot be stated that the liability did not exist or accrue till the instalments became due and payable. It is this liability which changes on account of fluctuation in the rate of exchange........"

9. In view of the fact that the Supreme Court in *CIT Vs. Shri Ambika Mills Ltd.* (Supra) has already approved the view expressed by the Gujarat High Court on the

4 2003 ITR Vol. 259, 526

issue, investment allowance on the increased amount consequent to foreign exchange fluctuation is allowable.

10. For the aforementioned reasons and in the backdrop of the provisions of section 32A read with section 43A, and in view of the judgments referred hereinabove, we answer the questions of law in favour of the appellant and against the revenue. We hold that in terms of section 43A, the increase or reduction in the liability has to take place only in the year of fluctuation and it does not relate back to the year of acquisition of the asset.

11. The appeals are disposed of in aforementioned terms.

[KAMAL KHATA, J.] **[DHIRAJ SINGH THAKUR, J.]**