



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 16TH DAY OF JUNE 2016

PRESENT

THE HON'BLE MR.JUSTICE JAYANT PATEL

AND

THE HON'BLE MR.JUSTICE B.SREENIVASE GOWDA

ITA No.836/2009

BETWEEN:

1. THE COMMISSIONER OF INCOME-TAX
C.R.BUILDING, QUEENS ROAD
BANGALORE
 2. THE ASSISTANT COMMISSIONER
OF INCOME TAX
C.R.BUILDING, QUEENS ROAD,
BANGALORE
- ...APPELLANTS

(BY SRI.K.V.ARAVIND, ADVOCATE)

AND:

M/S. NCR CORPORATION INDIA PVT LTD
NITON BUILDING, 3RD FLOOR,
NO.11, PALACE ROAD
BANGALORE – 560 042.

...RESPONDENT

(BY SRI.VANI.H, ADVOCATE)

THIS ITA IS FILED U/S.260-A OF I.T.ACT, 1961 ARISING OUT OF ORDER DATED 24-07-2009 PASSED IN ITA NO.455/BNG/2009, FOR THE ASSESSMENT YEAR 2004-2005, PRAYING THAT THIS HON'BLE COURT MAY BE PLEASED TO FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED THEREIN AND ALLOW THE APPEAL AND SET ASIDE THE ORDER PASSED BY THE ITAT BANGALORE IN ITA NO.455/BNG/2009, DATED 24-07-2009, CONFIRM THE ORDER OF THE APPELLATE COMMISSIONER CONFIRMING THE ORDER PASSED BY THE ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE-12(2),BANGALORE IN THE INTEREST OF JUSTICE AND EQUITY.

THIS APPEAL COMING ON FOR HEARING THIS DAY, **JAYANT PATEL J.**, DELIVERED THE FOLLOWING:

JUDGMENT

The present appeal has been admitted vide order dated 10.6.2010 on the following substantial questions of law:

“1. Whether the Tribunal was correct in holding that the Commissioner was not justified in passing the order U/s 263 of the Act on the ground that the order of assessment was not erroneous and prejudicial to the interest of the revenue as Assessing Officer has followed one of the permissible views in allowing the deduction of excise duty but without considering the fact that assessee has claimed such deduction twice?

2. Whether the Tribunal was correct in holding that the excise duty included in the valuation of closing stock of unsold finished goods as per the provisions of section 145A of the Act shall be reduced from the income computed under the head ‘profits and gains or business or profession’ without noticing the fact that such excise duty was debited to the profit and loss account and claimed as an expenditure?

2. The relevant facts are that, the respondent filed the return of income as on 1.11.2004 declaring the total income of Rs.48,60,54,400/-. The scrutiny was made under Section 143(2) of the Income Tax Act (hereinafter referred to as 'Act'). The Assessing Officer, after considering the material on record allowed the deduction under Section 43-B of the Act of Rs.82,35,034/- towards Excise duty pertaining to closing stock. The assessment order was passed on 29.12.2006 under Section 143(3) of the Act.

3. The matter was taken up in purported exercise of power under Section 263 of the Act by the Commissioner on the alleged ground that in view of the deduction of excise duty of Rs.82,35,034/-, the total income is reduced and there is short levy of tax of Rs.29,54,319/-. After considering the submissions made on behalf of the assessee, the Commissioner vide

order dated 27.1.2009 did not accept the submission made on behalf of the assessee and the relevant discussion is at paragraphs 5, 6 and 7 of the order which read as under:

“5. Now I will deal with the assessee’s contention that the facts of the case under consideration are similar to the facts of Berger Paints India Ltd. Case. The Assessee’s contention is incorrect. In berger Paints India Ltd case, the assessee had incurred expenditure on account of customs and excise duty aggregating to Rs.5,85,87,181/- which was duly debited to the P & L account of the assessee for the relevant previous year and was also fully paid during the relevant previous year. The assessee had also credited to the P & L account of the relevant previous year an amount of Rs.98,25,833/- relatable to the customs and excise duty on the closing stock on inventory by including the said sum in the valuation of closing stock. The assessee had claimed that u/s 43B of the I.T.Act, 1961 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. The

following question of law was referred for the opinion of the High Court:

“Whether , on the facts and in the 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 and loss account, on the ground that the crediting of the profit and loss account by the value of the closing stock, which included the aforesaid duties, did not have the effect of wiping out the debit to the profit and loss account?”

The High Court answered the question in favour of the Revenue and against the assessee. The Hon’ble Supreme Court answered the question referred against the revenue and in favour of the assessee. In the present case, the excise duty and educational cess amounting to Rs.82,35,034/- has not been paid during the relevant previous year. Out of the above, a sum of Rs.81,15,923/- has claimed to have been paid during the period 01.04.2004 to 20.07.2004 i.e. after the expiry of the previous year under consideration. This amount

of Rs.81,15,923/- is also not covered by the proviso to section 43B as the evidence of the payment is not furnished by the assessee along with the return of income for A.Y. 2004-05. It may further be noted that the assessee had included the sum of Rs.82,35,034/- in the opening stock for the previous year relevant to A.Y. 2005-06. Only when it was pointed out during the course of proceedings u/s 263 that the assessee is claiming deduction for the sum of Rs.82,35,034/- in both the assessment years, the assessee has filed letter before the A.O. requesting for exclusion of excise duty of Rs.82,35,034/- from the opening stock as on 01.04.2004 (during the course of scrutiny assessment for A.Y. 2005-2006).

Further, the assessee has not quantified the amount of excise duty included in the valuation of opening stock of finished goods and has not offered the same for taxation in the assessment year 2004-05. In view of the above discussion, I hold that in the assessment year 2004-05 the assessee is not entitled for deduction of excise duty amounting to Rs.82,35,034/- from the net profit as per P&L account for the purposes of computation of profits and gains from business and profession.

6. The assessment order dated 29.12.2006 passed u/s 143(3) of the I.T.Act, 1961 for A.Y. 2004-05 by the ACIT, C-12(2), Bangalore is therefore erroneous and prejudicial to the interest of revenue within the meaning of section 263 of the I.T.Act, 1961 in as much as the total income has been short computed by a sum of Rs.82,35,034/- resulting in short levy of tax of Rs.29,54,319/-. A Sum of Rs.82,35,034/- is liable to be added to the income originally assessed u/s 43 B of the I.T. Act, 1961.

7. The assessment order for A.Y. 2004-05 dated 29.12.2006 is modified with a direction to the AO is directed to recomputed the income of the assessee by adding a sum of Rs.82,35,034/- to the total income assessed vide order u/s 143(3) dated 29.12.2006.”

4. The matter was further carried in an appeal before the Tribunal and the Tribunal, after hearing both sides observed at paragraphs 7 to 10 as under:

7. We have heard both the parties. Now it is a settled law that provisions of section 263 cannot be invoked unless the twin

conditions of erroneous as well as prejudicial to the interest of revenue are satisfied. An order cannot be erroneous if the AO has adopted one of the views, which is permissible in law. The order is erroneous if the view adopted by the AO is not permissible in law.

8. The Special Bench in the case of *DCIT v Glaxo Smithkline Consumer Healthcare Ltd.* 299 ITR 1 has held as under after applying the decision of the Hon'ble Apex Court in the case of *CIT v New Horizon Sugar Mills (P) Ltd.* 269 ITR 397-

“It is not necessary that the assessee must prove incurring of a specific liability under any statute referred to in the different clauses of section 43B. It must be an expenditure connected and related to the assessee's business deductible under section 28 of the Act. It should not be a prohibited item totally unrelated to the

business of the assessee. The expression “a deduction otherwise allowable” only means statutory liabilities mentioned in section 43B. The expression “ a deduction otherwise allowable” reflects deduction on account of general liability fastened to the assessee’s business on account of duties, taxes, cess or fees by whatever name called arising in the course of the carrying on of the business. The expression does not mean any specific liability which is require to be incurred”.

9. *The Mumbai Tribunal in the case of Hawkins Cookers Ltd. v ITO 2008-TIOL-480-ITAT-Mumbai held that Modvat payment is made only when the assessee exercises his option to set off the balance against excise tax liability. If there is statute compulsion u/s 145A to give adjustment of closing stock it has to be presumed that the assessee has set off against*

Modvat account. However, no double taxation is to be given in adjustment in opening stock and closing stock. In the instant case, the assessee has already filed a letter for the subsequent year that the sum of Rs.82,35,034/- should be reduced from the opening stock. Moreover, the assessee has paid excise duty before the due date and the excise duty so paid is allowable u/s 43B of the IT Act.

10. The Hon'ble Bombay High Court in the case of CIT v Mahalakshmi Glass 2009-TIOL-233-HC-Mumbai has held that if adjustment is to be made in the closing stock then the adjustment is also required to be made in the opening stock. IT is now well settled law that if the AO makes an adjustment in the valuation of the closing stock then the adjustment is also required to be made in the opening stock. However, such adjustment is not necessary in case the assessee changes the method of valuation of the stock during a year and consistently follows the changed method in subsequent year. The learned CIT has directed

the AO to make the addition only on account of adjustment of the closing stock and such a direction is not in accordance with the provisions of law. Since the Cenvat credit is treated as excise duty paid u/s 43B of the IT Act, therefore, the view adopted by the AO is one of the permissible views and the learned CIT was not justified in directing the AO to add a sum of Rs.82,35,034/- u/s 43B of the IT Act. The direction given by the learned CIT is vacated and the order of the CIT is cancelled.”

5. Accordingly, the Tribunal found that the assessee has paid the excise duty before due date and the excise duty so paid is allowable under Section 43-B of the Act. The Tribunal also relied upon the decision of Bombay High Court in case of CIT vs. Mahalaxmi Glass reported in 2009-TIOL-233-HC-Mumbai for giving adjustment to the closing and opening stock of the subsequent year and found that the view taken by AO at the time of assessment is permissible view and

therefore CIT was not justified in directing the AO to add a sum of Rs.82,35,034/- under Section 43B of the Act. Resultantly the direction given by the CIT was cancelled and the appeal was allowed.

6. Under the circumstances, the Revenue has preferred the present appeal by raising the aforesaid two substantial questions of law.

7. Before we embark upon the facts in the present case, we find it appropriate to refer to the legal position on the subject.

Section 43B of the Act reads as under:

“Certain deductions to be only on actual payment.:

43B. Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of—

[(a) any sum payable by the assessee by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force, or]

(b) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees, [or]

[(c) any sum referred to in clause (ii) of sub-section (1) of section 36,] [or]

[(d) any sum payable by the assessee as interest on any loan or borrowing from any public financial institution [or a State financial corporation or a State industrial investment corporation], in accordance with the terms and conditions of the agreement governing such loan or borrowing [, or]

[(e) any sum payable by the assessee as interest on any [loan or advances] from a scheduled bank in accordance with the terms and conditions of the agreement governing such loan [or advances],][or]

[(f) any sum payable by the assessee as an employer in lieu of any leave at the credit of his employee,]

shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in section 28 of that previous year in which such sum is actually paid by him :

[Provided that nothing contained in this section shall apply in relation to any sum [***] which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of

such payment is furnished by the assessee along with such return.[***]]

Explanation[1].—For the removal of doubts, it is hereby declared that where a deduction in respect of any sum referred to in clause (a) or clause (b) of this section is allowed in computing the income referred to in section 28 of the previous year (being a previous year relevant to the assessment year commencing on the 1st day of April, 1983, or any earlier assessment year) in which the liability to pay such sum was incurred by the assessee, the assessee shall not be entitled to any deduction under this section in respect of such sum in computing the income of the previous year in which the sum is actually paid by him.]

[Explanation 2.—For the purposes of clause (a), as in force at all material times, “any sum payable” means a sum for which the assessee incurred liability in the previous year even though such sum might not have been payable within that year under the relevant law.]

[Explanation 3].—For the removal of doubts it is hereby declared that where a deduction in respect of any sum referred to in clause (c) [or clause (d)] of this section is allowed in computing the income referred to in section 28 of the previous year (being a previous year relevant to the assessment year commencing on the 1st day of April, 1988, or any earlier assessment year) in which the liability to pay such sum was incurred by the assessee, the assessee shall not be entitled to any deduction under this section in respect of such sum in computing the income of the previous year in which the sum is actually paid by him.]

[Explanation 3A.—For the removal of doubts, it is hereby declared that where a deduction in respect of any sum referred to in clause (e) of this section is allowed in computing the income referred to in section 28 of the previous year (being a previous year relevant to the assessment year commencing on the 1st day of April, 1996, or any earlier assessment year) in which the liability to pay such sum was incurred by the assessee, the assessee shall not be entitled to any deduction under this section in respect of such sum in computing the income of the previous year in which the sum is actually paid by him.]

[Explanation 3B.—For the removal of doubts, it is hereby declared that where a deduction in respect of any sum referred to in clause (f) of this section is allowed in computing the income, referred to in section 28, of the previous year (being a previous year relevant to the assessment year commencing on the 1st day of April, 2001, or any earlier assessment year) in which the liability to pay such sum was incurred by the assessee, the assessee shall not be entitled to any deduction under this section in respect of such sum in computing the income of the previous year in which the sum is actually paid by him.]

[Explanation 3C.—For the removal of doubts, it is hereby declared that a deduction of any sum, being interest payable under clause (d) of this section, shall be allowed if such interest has been actually paid and any interest referred to in that clause which has been converted into a loan or borrowing shall not be deemed to have been actually paid.]

[Explanation 3D.—For the removal of doubts, it is hereby declared that a deduction of any sum, being

interest payable under clause (e) of this section, shall be allowed if such interest has been actually paid and any interest referred to in that clause which has been converted into a loan or advance shall not be deemed to have been actually paid.]

[Explanation 4.—For the purposes of this section,—
(a) “public financial institutions” shall have the meaning assigned to it in section 4A of the Companies Act, 1956 (1 of 1956);

[(aa)“scheduled bank” shall have the meaning assigned to it in the Explanation to clause (iii) of sub-section (5) of section 11;]

(b) “State financial corporation” means a financial corporation established under section 3 or section 3A or an institution notified under section 46 of the State Financial Corporations Act, 1951 (63 of 1951);

(c) “State industrial investment corporation” means a Government company within the meaning of section 617 of the Companies Act, 1956 (1 of 1956), engaged in the business of providing long-term finance for industrial projects and [eligible for deduction under clause (viii) of sub-section (1) of section 36].]

Section 145A of the Act reads as under:

“Method of accounting in certain cases:

145A:- Notwithstanding anything to the contrary contained in section 145,-

(a) the valuation of purchase and sale of goods and inventory for the purposes of determining the income chargeable under the head “Profits and gains of business or profession” shall be-

(i) in accordance with the method of accounting regularly employed by the assessee; and

(ii) further adjusted to include the amount of any tax, duty, cess or fee (by whatever name called) actually paid or incurred by the assessee to bring the goods to the place of its location and condition as on the date of valuation.

Explanation.-For the purposes of this section, any tax, duty, cess or fee (by whatever name called) under any law for the time being in force, shall include all such payment notwithstanding any right arising as a consequence to such payment;

(b) interest received by an assessee on compensation or on enhanced compensation, as the case may be, shall be deemed to be the income of the year in which it is received.]”

8. In the case of Lakhanpal National Ltd., vs. Income Tax Officer, Baroda 1986 162 ITR 240, the High

Court of Gujarat had an occasion to consider the question for admissibility of the deduction under Section 43-B of the Act. After considering Section 43-B of the Act, it was observed at Paragraphs – 14 to 17 as under:

14. On a perusal of the language of section 43B, it is clear that it opens with a non-obstante clause which means that it controls the operation of other provisions of the Act and irrespective of the other provisions, section 43B will have overriding effect. Keeping in mind, if we examine the language of the section, it clearly brings out the intention of the Legislature that the deduction in respect of any tax or duty under any law would be an allowable deduction in computing the income under section 28 of that previous year in which such sum is actually paid by the assessee. The intention is made more specific by providing that it would be so irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by the assessee. This clearly makes out that even if the mercantile method accounting is employed and the liability to pay might have accrued which would give the assessee a right to obtain

deduction, in view of the specific language of the section, the assessee would not be entitled to get deduction merely on accrual of the liability to pay the tax or duty, but would be so entitled to get deduction only on actual payment of tax or duty. The Legislature has also taken care by providing an Explanation that the assessee shall not be entitled to any deduction under section 43B of the Act in respect of such sum in computing the income of the previous year in which such sum is clearly paid by him in case a deduction in respect of any such sum was allowable in the previous year. It is, therefore, clear that the assessee shall not be entitled to get the benefit twice, i.e., at the time when the liability arises and also at the time when the actual payment is made. In view of the specific language of the section that deduction of the amount as mentioned in clauses(a) and (b) of section 43B would be allowed in the previous year in which such sum is paid, there is no scope for any doubt that such sum can be allowed by way of deduction while computing the income in the previous in which such sum is actually paid by the assessee.

15. There is no dispute on the point that the amount of import duty and excise duty are allowable deduction. What is dispute on behalf of the respondent is that the amount of customs and excise duty on the value of the closing stock of the petitioner-assessee should not be permitted in the assessment

year 1984-85 (accounting year ending on December 31, 1983), though actually paid in the year 1983, because the assessment of the closing stock of the year 1983 will be in the subsequent previous year which would be in 1984 and the relevant assessment year would be 1985-86. It is true that at the time of making the assessment for the assessment year 1985-86, the respondent will have to be careful in seeing that the petitioner does not claim further deduction for the sum for which deduction is already given. In this case, it is not the contention of the respondent that any sum payable under clause(a) of section 43B of the Act was at any time claimed by way of deduction in any previous year prior to 1983. In fact, the raw material were imported and the goods were manufactured in the year 1983, and they were cleared also in the year 1983. Therefore, their liability accrued in the year 1983, and they also paid the sum in the year 1983. In that view of the matter, the Explanation to section 43B of the Act is also not attracted in the present case.

16. Mr. J. P. Shah, the learned advocate appearing for the petitioner, has invited our attention to the computation of the total income for the assessment year 1985-86 which is annexed to the petition as annexure-L, wherein it has been pointed out that the amount of excise duty of Rs. 29,94,439 paid on the closing stock (in the year 1983) on finished goods laying at

various depots was added to the net profit as per the profit and loss account. Similarly, the amount of Rs. 1,24,94,085 is also added. This further assures that the petitioner-assessee does not intend claiming double benefit for the same amount. The argument of Mr. S. N. Shelat that section 43B of the Act does not enlarge the scope of deduction is correct in as much as it speaks about the deduction otherwise allowable under this Act, but argument is not that the sum which is paid by way of import duty or liability to pay excise duty is not the sum given under the permissible deductions. Under the mercantile method of accounting, as stated earlier, the moment the liability is incurred, it would be an admissible deduction. What section 43B of the Act states is that irrespective of the fact that the liability is already incurred, that would be an admissible deduction only when the actual amount in that regard is paid. Therefore, it is clear that in the year 1983, when the goods including the raw material were imported and the finished goods lying at various depots were manufactured in the year 1983 (including the one under the closing stock), the liability to pay import duty and excise duty on the said goods was incurred by the petitioner-assessee. When that is so, it is also clear that the deduction of the said excise duty and import duty even on the closing stock was allowable in the accounting year 1983, but because of the

specific language of section 43B of the Act which has an overriding effect, it could not have been claimed by way of deduction unless payment thereof was made and here, in this case, it is not the case of the respondent that the payment of the said duty is not made and, therefore, it is not allowable. Therefore, the submission of Mr. Shelat commercial principles are claimed as deductions merely because they are paid, cannot be accepted.

17. The last facet of Mr. Shelat's argument is that the expenditure on paying import and excise duty in respect of the closing stock does not pertain to the goods sold in the year. This argument runs counter to the mercantile method of accounting as well as to the specific language of section 43B of the Act. It is not disputed that the said goods in the closing stock were either imported or manufactured in the accounting year 1983 and as per the principles of the mercantile method of accounting, the expenditure incurred by way of import duty as well as excise duty would be a permissible deduction in the year 1983, and particularly when the payment thereof is made under Section 43B of the Act. Under the circumstances, we do not find any merit in any of the contentions raised by Mr. Shelat, and for the same reasons we accept the contentions raised by Mr. J. P. Shah, appearing for the petitioner-assessee.

9. The aforesaid shows that the deduction from the excise duty paid on the closing stock was found permissible under Section 43B of the Act . We may also record that one of the contentions in the above referred decision of the Gujarat High Court as to the Revenue was that, if such a deduction is allowed, it may result into double deduction which has not been found favour in the above referred decision.

10. We may at this stage usefully refer to the decision of the Apex Court in case of Berger Paints India Ltd., vs. Commissioner of Income Tax, Calcutta reported at (2004) 12 SCC 42 wherein, once again the question came up for consideration before the Apex Court for permissibility of deduction under Section 43B and the above referred decision of the High Court of Gujarat in case of *Lakhanpal* was pressed into service as against the view taken by High Court of Calcutta.

11. The Apex Court, after considering the various decisions of the different High Courts expressly observed at paragraph.13 *inter alia*, relevant of which reads as under:

“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 141 A. 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."

12. The Revenue has attempted to distinguish the Judgment of Gujarat High Court on the futile ground that the Judgment of Gujarat High Court was one rendered in connection with a provisional assessment order under Section 141A and not in a regular assessment. In our view, this distinction is hardly acceptable. In any event, a reading of Gujarat High Court Judgment shows that the Judgment is not based merely on the permissible ground under Section 141A as contended by the Revenue but the Judgment

proceeds on the analysis under Section 43B and hence, a finding that entire amount of excise duty/custom 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 the 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 Gujarat High Court in Lakhanpal case supra is distinguishable on the ground put forward.

12. Thereafter, it was observed at paragraph.14 which *inter alia* reads as under:

“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 Dalai*, (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 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.

13. We are therefore of the view that CIT, the Tribunal and the Calcutta High Court erred in permitting the Revenue to raise the contention contrary to what was laid by the Gujarat High Court in Lakhanpal Nationals Ltd., case.

14. Thereafter, the Judgment of Calcutta High Court was set aside and based on the decision of High Court of Gujarat decision in Lakhanpal case supra, the question was answered in favour of the assessee against the Revenue.

15. We do not see that after the above referred decision of the Apex Court in case of Berger Paints supra, we need to refer the decision of the Calcutta High

Court upon which reliance has been placed by the learned counsel for the Revenue.

16. If the controversy is considered as it is, one can say that the subject was covered by the decision of the Apex Court in case of Berger Paints referred supra. However, the learned counsel appearing for the appellant-Revenue attempted to make two distinguishable circumstances for contending that the matter is not covered by the decision of the Apex Court in case of Berger Paints India Ltd., His attempt was two fold, one was on the ground that, the actual payment of the central excise duty was not made by the assessee before the end of accounting year i.e. 31st March and the another was that, Section 145A at the relevant point of time was not on the statute book when the Apex Court rendered the decision in case of Berger Paints India Ltd., Therefore, he submitted that in view of these

two peculiar circumstances, this Court may not hold that the matter is covered by the decision of the Apex Court in case of Berger Paints India Ltd.,

17. The second limb of submission that the payment was not made prior to 31st March in the present case but in the case before the Apex Court and before the Gujarat High Court in case of Lakhanpal Nationals, the payment was already made prior to 31st March of the respective year, would not detain us further because in the impugned order passed by the Tribunal, such a contention was raised and has rendered a finding of fact the relevant of which i.e. para.9 reads as under:

“Moreover, the assessee has paid excise duty before the due date and the excise duty so paid is allowable under Section 43B of the IT Act.”

18. In view of the aforesaid finding of the Tribunal for the payment already made before the outer limit is covered by proviso to Section 43B of the Act. Hence, it would be allowable deduction under Section 43B of the Act which has been so found by the Tribunal. Under the circumstances, the said submission cannot be accepted of the Revenue.

19. The first limb of argument that Section 145A was not on the statute book at the relevant point of time and therefore this Court may take a different view by not holding that the matter is covered by the decision of the Apex Court in case of Berger Paints referred supra may require consideration of the effect of Section 43B vis-à-vis Section 145A and to find out as to whether by insertion of Section 145A on the statute book, the effect of the allowable deduction under Section 43B is diluted or nullified or not. The language of Section 43B begins

with the word “Notwithstanding anything contained in any other provisions of this Act” meaning thereby a non-abstente clause to have an overriding effect over any other provisions of the Act.

20. Further, if language used under Section 145A is considered, the language is “Notwithstanding anything to the contrary contained in Section 145” meaning thereby by diluting the effect of Section 145, the additional provision is made under Section 145A. We are not required to examine the confrontation of the situation under Section 145 vis-à-vis Section 145A and therefore, we need address ourselves in the present matter as to what is the scope and ambit of Section 145 and Section 145A. But, even if the contention of the Revenue is considered for the sake of examination for providing a particular or peculiar method for accounting under Section 145 as well as under Section 145A, then

also as per language used of non-abstente clause over any other provisions of the Act under Section 43B, it cannot be accepted that by virtue of Section 145A, the Parliament has diluted or nullified the effect of provisions of Section 43B providing for certain deductions.

21. Under the circumstances, we find that the distinction as sought to be canvassed to come out from the law already settled by the Apex Court in case of Berger Paints referred supra is without any substance and cannot be accepted.

22. In view of the aforesaid observations and discussion, the resultant situation would be that the deduction so claimed and made permissible by the Tribunal in the impugned order is covered by the above referred decision of Gujarat High Court in case of Lakhanpal case read with the further decision of the

Apex Court in case of Berger Paints Ltd., supra. Hence, on the aspects of allowable deduction, the matter was already covered by in any case the decision of the Apex Court in case of Berger Paints India Ltd., (supra). The said legal position was prevailing at the time when the assessing officer allowed the deduction. Hence, it could not be said that the view taken by the assessing officer was erroneous in law. In any case, the treatment is to be given in the opening stock of the subsequent accounting year when the deduction is made under Section 43B of the Act, hence it could also not be said as prejudicial to the interest of Revenue.

23. Under the circumstances, we find that the view taken by the Tribunal holding that the Commissioner was not justified in passing the order under Section 263 of the Act cannot be said as illegal but, can rather be said to be in conformity with the law

laid down by the Apex Court in case of Berger Paints India Ltd., (supra).

24. So far as second question is concerned, in our view, as we have already dealt with in the discussion referred to hereinabove, while considering the provisions of Section 145A read with the above referred two decisions namely of Gujarat High Court in case of Lakhanpal referred supra and in the case of Berger Paints India Ltd., (supra), we do not find that the view taken by the Tribunal can be said as illegal.

25. In view of the above observation and discussion, we do not find that the impugned order passed by the Tribunal calls for any interference. Hence, both the questions are answered in affirmative in favour of the assessee and against the Revenue.

Appeal shall stand disposed of accordingly.

Considering the facts and circumstances, no order
as to costs.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

Sk/-