

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****TAX APPEAL NO. 901 of 2005****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE KS JHAVERI**

Sd/-

and

**HONOURABLE MR.JUSTICE G.R.UDHWANI**

Sd/-

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	No
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

ALPHA LAB....Appellant(s)

Versus

INCOME TAX OFFICER....Opponent(s)

Appearance:

MRS SWATI SOPARKAR, ADVOCATE for the Appellant(s) No. 1

MR KM PARIKH, ADVOCATE for the Opponent(s) No. 1

**CORAM: HONOURABLE MR.JUSTICE KS JHAVERI**

and

**HONOURABLE MR.JUSTICE G.R.UDHWANI****Date : 07/06/2016**

**ORAL JUDGMENT****(PER : HONOURABLE MR.JUSTICE KS JHAVERI)**

1. By way of this Appeal, the original assessee has challenged the judgment and order of the Tribunal whereby the appeal preferred by the present appellant was dismissed, confirming the order of CIT (Appeals) whereby the subsidiary which was received by the appellant which was taken was reduced from capital investment.

2. This Court on 30.11.2005 had admitted the matter wherein the following questions were framed for consideration :-

"[1] Whether, on the facts and circumstances of the case the Income Tax Appellate Tribunal was justified in law in holding that even in case of subsidy which was admittedly received in a year, earlier to the year under consideration, merely because the same is transferred to the capital account of the partners, the cost of assets could be reduced by the said amount while working out the depreciation

allowance?

[2] Whether, on the facts and in the circumstances of the case the Income Tax Appellate Tribunal was right in law in holding that the cost of assets could be reduced by the amount of subsidy which was received prior to insertion of Explanation 10 to Section 43(1) of the Income Tax Act, 1961?"

3. Learned Counsel for the appellant Mrs. Swati Soparkar has drawn our attention to the decision of this Court rendered in Tax Appeal No.255/2007 on 05.10.2015 whereby the first question was decided in favour of the assessee and the second question which was framed by this Court was also answered in favour of the assessee.

4. Learned Counsel for the respondent Mr. K.M. Parikh has taken us to the order of the CIT (Appeals) and contended that the view taken by the authorities is just and proper in view of the Explanation 10 to Section 43(1) of the Income Tax Act and the Tribunal while

considering the matter has observed as under :-

"From the above, it is evident that if the cost of an asset acquired by the assessee has been met by the government by way of subsidy then so much of the cost as is relatable to subsidy shall not be included in the actual cost of the assessee. It is not disputed by the assessee that cost of certain assets acquired by the assessee has been met by the subsidy resolved from government amounting to Rs.8,73,702/-. The Assessing Officer has reduced the subsidy relatable to each asset from the cost of each asset. The action of the Assessing Officer is in conformity with the provision of Explanation 10. The only contention of the assessee is that during the year under consideration the subsidy was not received and, therefore, the Assessing Officer was not justified in making the adjustment in this year. We are unable to accept the above submission. Depreciation has to be allowed on the basis of WDV. WDV means actual determination of actual is necessary. Section 43(1) defines "actual subsidy from the actual cost of an asset. Thus, for working out of the

depreciation, determination of actual cost was necessary. The Assessing Officer has rightly worked out the actual cost and then WDV of the assets. Therefore, we do not find any justification to interfere with the order of CIT(A) on this point who has upheld the working of the Assessing Officer. Accordingly, ground No.1 of the assessee's appeal is rejected.

5. We have heard learned Advocates for the respective parties and perused the records of the case. It is necessary to refer to Paragraphs 9 and 10 of Tax Appeal No.255/2007 wherein it is observed as under :-

“9. At this juncture, it may be noted that the expression actual cost envisages the actual cost of asset as reduced by any amount received directly or indirectly from any person or authority and Explanation 10 to section 43 (1) of the Act, clearly provides that where a portion of the cost of an asset acquired by the assessee had been met directly or indirectly by the Central Government or a State Government or any authority established under any law or by any person,

in the form of a subsidy, then, so much of the cost as is relatable to such subsidy, shall not be included in the actual cost of the asset to the assessee. A plain reading of section 43 (1) of the Act, shows that, ordinarily, when any subsidy is received qua an asset, it would not be included in the actual cost of the asset to the assessee. In other words, the cost of the asset in the hands of the assessee would stand reduced to the extent of subsidy received by the assessee for the purchase of such asset. However, in the present case, the assessee created total facility by constructing building and installing various machineries in 1993-94. Thus, the actual cost of the assets in respect of which subsidy has been granted, came to be determined at the relevant time. Thereafter, the assets entered the block of assets and lost their independent identity and the cost of such assets merged with the other assets in the block. At the time when the actual cost of the assets came to be computed under section 43(1) of the Act, Explanation 10 was not on the statute book and therefore, the assessee was not required to reduce the amount of subsidy from the actual cost. Moreover, at that point of time,

though the subsidy had been sanctioned, the same was not disbursed. The subsidy came to be actually given in the year under consideration; a long time after the actual cost of assets came to be determined under section 43(1) of the Act. The question that arises for consideration is as to whether Explanation 10 to section 43(1) of the Act can be given effect to in the facts and circumstances of this case, by reducing the actual cost of the assets by the amount of subsidy received by the assessee. To put it differently, whether at this stage it would be possible to ascertain the actual cost of such assets in terms of Explanation 10 to section 43(1) of the Act, inasmuch as, once such assets enter the block, the depreciation is computed on the written down value of the block of assets as envisaged in section 43(6)(c) of the Act. In terms of section 43(6)(c) of the Act, the written down value can be computed only in the manner provided thereunder, namely, by adding the actual cost of any asset falling within that block acquired during the previous year or by deducting the moneys payable in respect of any asset within the block, which is sold, discarded or demolished or destroyed during the previous year together with the amount of

the scrap value. The statute does not contemplate any other category for computing the written down value of a block of assets. Therefore, section 43(6) (c) of the Act does not permit reducing the written down value of the block of assets by the amount of subsidy received in relation to some of the assets forming part of the block of assets. Consequently, the costs of assets cannot be reduced out of the written down value of their respective blocks to the extent of Rs.25,00,000/- as the statute does not envisage any manner of doing so. When the Assessing Officer reduces the cost of assets out of the written down value of the block of assets, he is reducing not only the cost of assets in relation to which the subsidy is granted, but the cost of all assets forming part of the block, irrespective of whether any subsidy was granted in respect of such assets. Under the circumstances, when the statute does not contemplate computation of actual cost of asset after it becomes part of a block of assets, Explanation 10 to sub-section (1) of section 43 of the Act cannot be made applicable to assets of which the actual cost has been determined much before the insertion thereof and which also

form part of a block of assets. Therefore, when it is not possible to apply Explanation 10 of section 43(1) of the Act, in relation to an asset which has entered into the block much before the insertion thereof, it must be regarded as never having been intended by the legislature to apply to assets forming part of a block of assets which have entered the block much before the insertion of Explanation 10 to sub-section (1) of section 43 of the Act.

10. Another aspect of the matter is that on the date when the assessee had invested in fixed capital assets, Explanation 10 to sub-section (1) of section 43 of the Act was not on the statute book and hence, the actual cost came to be computed in terms of the law as existing at the relevant time. Nothing happened in the year under consideration so as to justify the action of reduction from the written down value of the block of assets. Explanation 10 to sub-section (1) of section 43 of the Act came into effect only from 1.4.1999 that too prospectively and, therefore, has no application, more so, when plant itself was set-up in assessment year 1993-94."

6. Qua the first question which has been posed before this Court admittedly, the subsidy which was received against the investment was made in a backward area where industries were not present. The same was for promotion and that will not reduce the value of the assets. In that view of the matter, considering the evidence on record, both the issues, i.e. issue No.1 and 2 are required to be answered in favour of the assessee.

Sd/-  
(K.S. JHAVERI, J.)

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THE HIGH COURT  
OF GUJARAT

Sd/-  
(G.R. UDHWANI, J.)

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