

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No.50 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

HONOURABLE MR.JUSTICE Z.K.SAIYED Sd/-

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
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, 1950 or any order made thereunder ?	NO
5	Whether it is to be circulated to the civil judge ?	NO

COMMISSIONER OF INCOME TAX - Applicant(s)

Versus

SHREE SHANTINATH SILK MILLS - Respondent(s)

Appearance :

MR BB NAIK for Applicant(s) : 1,

MR SN DIVATIA for Respondent(s) : 1,

CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA

and

HONOURABLE MR.JUSTICE Z.K.SAIYED

Date : 26/02/2008

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

(1) Following two questions have been referred by

Income-tax Appellate Tribunal, Ahmedabad Bench

'B' under Sections 256(2) of the Income-tax Act, 1961 at the instance of the Commissioner of Income-tax, Surat:

"1. "Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT was right in holding that by crediting the partners capital account by the amount standing to the credit of the Investment Allowance Reserve account does not result in distribution by way of profit of such reserve in a case where assessee has utilised the amount credited to the investment allowance reserve account for the purpose of acquiring new machinery and plant for the purpose of the business of the undertaking?"

2. Whether on the facts and in the circumstances of the case and in law, the Tribunal was right in holding that if out of three conditions as prescribed by the provisions of sec. 32A(5), one condition in sub-clause (b) is satisfied and the other two conditions as mentioned in sub-clause (a) and clause (c) are not satisfied even then in that case the provisions of section 155(4A) will not be applicable?"

(2) The Assessment Years are 1979-80 and 1980-81.

The corresponding accounting periods are Samvant Years 2034 and 2035. It appears that investment allowance was granted in Assessment Years 1978-79, 1979-80 and 1980-81 to the assessee, a registered partnership firm. The assessee had created investment allowance reserve as required by provisions of Section 32A(4) of the Act to the tune of Rs.9,38,000/- for A.Y. 1978-79, Rs.1,54,000/- for A.Y. 1979-80 and Rs.1,79,601/- for A.Y. 1980-81. The Assessing Officer made an order under Section 155 (4A) of the Act on 06.10.1989 withdrawing investment allowance for all the three assessment years on the ground that investment allowance reserve had been utilized for distribution as profits amongst the partners of the firm before the expiry of ten years, namely in Samvant Year 2041. The Assessing Officer, therefore, withdrew a sum of Rs.9,93,090/- for A.Y. 1978-79, Rs.1,56,625/- for A.Y. 1979-80 and Rs.1,93,125/- for A.Y. 1980-81 which was the

investment allowance granted in the respective years.

- (3) The assessee carried the matter in appeal before the Commissioner (Appeals), who came to the conclusion that the action of the Assessing Officer was bad in law as the assessee had in fact purchased new machineries valued at an amount higher than the amount standing to the credit of investment allowance reserve account. That the transfer of the amount of reserve thereafter to the capital account of the partners did not constitute violation of any of the provisions contained in Section 32A(5) of the Act.
- (4) The Revenue carried the matter in Second Appeal before the Tribunal. The Tribunal, for the reasons stated in order dated 02.12.1993, upheld the order made by the Commissioner (Appeals) by placing reliance on decision of this Court in the case of Commissioner of Income-tax Vs. Karamchand Premchand Pvt. Ltd.,

[1993] 200 ITR 281 (Guj.).

(5) Heard Mr.B.B.Naik, learned Standing Counsel for the applicant-revenue and Mr.S.N.Divatia, learned advocate for the respondent-assessee.

(6) The controversy revolves round the provisions of Section 32A(5) of the Act and the relevant extract reads as under:-

“5. Any allowance made under this section in respect of any ship, aircraft, machinery or plant shall be deemed to have been wrongly made for the purposes of this Act –

(a) if the ship, aircraft, machinery or plant is sold or otherwise transferred by the assessee to any person at any time before the expiry of eight years from the end of the previous year in which it was acquired or installed;

(b) if at any time before the expiry of ten years from the end of the previous year in which the ship or aircraft was acquired or the machinery or plant was installed, the assessee does not utilise the amount credited to the reserve account under sub-section (4) for the purposes of acquiring a new ship or a new aircraft or new machinery or plant [other than machinery or plant of

the nature referred to in clauses (a), (b) and (d) of the proviso to sub-section (1)] for the purposes of the business of the undertaking; or

(c) if at any time before the expiry of the ten years aforesaid, the assessee utilises the amount credited to the reserve account under sub-section (4) for distribution by way of dividends or profits or for remittance outside India as profits or for creation of any assets outside India or for any other purpose which is not a purpose of the business of the undertaking,

and the provisions of sub-section (4A) of section 155 shall apply accordingly:

- (7) On a plain reading it becomes apparent that any investment allowance granted under Section 32A of the Act shall be deemed to have been wrongly granted if any one of the three conditions laid down in Clauses (a), (b) and (c) are shown to have been violated. Clause (a) entitles the Assessing Officer to withdraw the investment allowance if the ship, aircraft, machinery or plant is sold or otherwise transferred by the assessee to any person at any time before the expiry of eight

years from the end of the previous year in which the ship, etc. was acquired or installed. Similarly, under clause (b) if at any time before the expiry of ten years from the end of the previous year of acquisition or installation, as the case may be, the assessee does not utilize the amount credited to the reserve account for the purposes of acquisition of a new ship, etc. then the Assessing Officer becomes entitled to withdraw the investment allowance. Under Clause (c) before the expiry of ten years period as stipulated in clause (b), if the assessee utilizes the amount credited to the reserve account for distribution by way of dividends or profits, etc. the Assessing Officer becomes entitled to withdraw the investment allowance. In each of the three cases provisions of Section 155(4A) of the Act would come into play if the conditions are shown to be specified. However, each of the clauses is separated by the use of the term "or", which

is placed after semicolon which is used at the end of each of the first two clauses indicating that each of the conditions are in alternate to each other. In other words, on the revenue being in a position to show that any one of the three conditions is satisfied it would be permissible to exercise powers under Section 155(4A) of the Act and withdraw the investment allowance already granted.

- (8) In the facts of the present case both the Commissioner (Appeals) and the Tribunal have concurrently found that the assessee had utilized the amount standing to the credit of the investment allowance reserve account for purchase of new machinery and plant; that in fact the value of the purchases of new machinery and plant was greater than the amount standing credited in the reserve account. That such purchases of new machinery and plant had taken place before the expiry of ten years from the end of the previous year in which the machinery or plant had been

installed for which investment allowance had been granted. That year is Samvant Year 2041 i.e. eight years from Samvant Year 2033.

- (9) It is nobody's case that there is any violation of conditions stipulated by clause (a). Similarly, in light of the facts noted hereinabove, there is no violation of conditions stipulated by clause (b), the only question that would survive is as to whether there is any violation of condition stipulated by clause (c). In this regard the Tribunal has found, and rightly so, the amount credited to the reserve account having already been utilized for the purposes of acquiring new machinery and plant, there can be no further utilization of the same amount only because a corresponding credit entry is made to the capital account of the partners while debiting the investment allowance reserve account. Making of a mere entry cannot constitute utilization by way of distribution of profits to the partners. In fact, even on this count,

there is a finding based on facts and appreciation of evidence on record, to the effect that the said amount credited to the capital account of the partners has thereafter not been dealt with in any manner whatsoever by the partners. Furthermore, clause (c) stipulates utilisation of investment allowance reserve for any other purpose which is not a purpose of the business of the undertaking. Here, purchase of plant and machinery cannot be stated to be a purpose which is not a purpose of the business of the undertaking.

- (10) In the aforesaid set of facts and circumstances of the case, it is not possible to accept the contention of the revenue that the Tribunal has committed any error in law. The decisions of this Court and the Apex Court in the following cases, though in relation to development rebate, would apply in the facts of the present case also considering the fact that the provisions for allowance of development rebate and investment allowance are more or

less similar:

(i) Commissioner of Income-tax Vs. Karamchand Premchand Pvt. Ltd., [1993] 200 I.T.R. 281 (Guj.); AND

(ii) Hunsur Plywood Works Ltd. Vs. Commissioner of Income-tax; [1998] 229 I.T.R. 112 (S.C.);

(11) Both the questions referred to this Court are, therefore, answered in the affirmative i.e. in favour of the assessee and against the revenue. The reference stands disposed of accordingly. There shall be no order as to costs.

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Sd/-
[D.A. MEHTA, J]

THE HIGH COURT
OF GUJARAT

Sd/-
[Z.K. SAIYED, J]

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