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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **W.P.(C) 2130/1990**

ABHISHEK CEMENT LTD. ..... Petitioner
Through : Mr. R. Sanganathan, Advocate.

versus

UOI & ORS. ..... Respondents
Through : None.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V.EASWAR

O R D E R

% 22.05.2012

1. This writ petition under Article 226 and 227 of the Constitution of India impugns intimation dated 29.3.1990 issued by the Assessing Officer under Section 143(1)(a) of the Income Tax Act, 1961 (for short 'the Act') creating a demand of Rs.4,36,108/-. The amount determined was subsequently revised by an order dated 19.3.1991 under Section 154 of the Act.

2. For the assessment year 1989-90, the petitioner had field a return claiming loss of Rs.99,99,575/-. In the adjustment explanatory sheet enclosed with the intimation under Section 143(1)(a), the Assessing Officer had made adjustments on following grounds/reasons:-

"Loss		4,26,92,420/-
(i)	Interest not paid being disallowable u/s 43-B	37,02,281/-
(ii)	Entry tax u/s 43-B	5,981/-

(iii)	Welfare cess u/s 43-B	4,419/-
(iv)	P.F. unpaid u/s 43-B	18,548/-
(v)	cash payment exceeding Rs.10,000 u/s 40-A(3) read with rule 6DD	37,655/-
(vi)	Dep. for separate consideration	3,253/-
(vii)	Charity & donation	2,411/-
(viii)	Short disallowance made for entertainment	1,250/-
		37,75,828/-
		(-) 3,49,16,592/-"

3. This created a demand of Rs. 4,36,108/- towards additional tax.

4. As far as cash payments, charity & donation, disallowance towards entertainment and disallowance on depreciation is concerned, in our view the said adjustments are impermissible and not mandated under Clause (iii) to Section 143(1)(a) of the Act. The section 143(1)(a) at the relevant time was as under:

> "**Section 143 Assessment**-(1)(a). Where a return has been made under section 139, or in response to a notice under subsection (1) of section 142,
>
> (i) if any tax or interest is found due on the basis of such return, after adjustment of any tax deducted at source, any advance tax paid and any amount paid otherwise by way of tax or interest, then, without prejudice to the provision of sub-section (2), an intimation shall be sent to the assessee specifying the sum so payable, and such intimation shall be deemed to be a notice of demand issued under section 156 and all the provisions of this Act shall apply accordingly ; and
>
> (ii) if any refund is due on the basis of such return, it shall be granted to the assessee :
>
> Provided that in computing the tax or interest payable by, or refundable to, the assessee, the following adjustments shall be made in the income or loss declared in the return, namely :
>
> (i) any arithmetical errors in the return, accounts or documents accompanying it shall be rectified ;
>
> (ii) any loss carried forward, deduction, allowance or relief, which, on the basis of the information available in such return, accounts or documents, is prima facie admissible but

which is not claimed in the return, shall be allowed;

(iii) any loss carried forward, deduction, allowance or relief claimed in the return, which, on the basis of the information available in such return, accounts or documents, is prima facie inadmissible, shall be disallowed. "

5. Interpreting clause (iii) to Section 143(1)(a) in the case of ***S.R.F. Charitable Trust v. Union of India and Ors. (1992) 193 ITR 95 (Delhi),*** it has been held:-

> "In the instant case, it is clause (iii) of the proviso which was sought to be applied by the Income-tax Officer. The said clause clearly provides that the Income-tax Officer can make an adjustment to the income or loss declared in the return if, on the basis of the information available in such return, accounts or documents, the deduction allowance or relief claimed is prima facie inadmissible. The conclusion that the claim of the assessee is inadmissible must, in other words, flow from the return as filed. No power is given to the Income-tax Officer to disallow a claim for the reason that there is no proof in support of the claim made by the assessee. In a way, the said clause (iii) of the proviso is analogous to section 154 of the Act. Where it is evident from the return as filed, along with the documents in support thereof, that a claim of the assessee is inadmissible, only then an adjustment under the said proviso can be made. If proof in support of the claim is not, furnished by an assessee, then for the lack of proof, no disallowance or an adjustment can be made. The only option which is open to the Income-tax Officer, in such a case, is that he can require the assessee to furnish proof in which case he will presumably have to issue notice under section 143(2). This is also evident from the fact that, except for the documents specified, the assessee is not required to file the entire books of account or other documents along with the return. The proof in support of the claim may be evidenced from correspondence, from the books of account or other documents and it is not the law, as we understand it, that, in support of a claim made in the return for deduction or non-taxability of a receipt, all, the

proofs available and original documents must be filed along with the return. It is apparent on a reading of the said provision that adjustment can be made only if there is information available in such return that prima facie a claim or allowance is inadmissible. For the aforesaid view which we are taking, support is available from the understanding of the said provision by the Department itself. Learned counsel for the petitioner has drawn our attention to Circular No. 549 reported at [1990] 182 ITR (St.) 1, at page 21, issued by the Central Board of Direct Taxes wherein examples have been given of adjustments which can be carried out. The relevant part of the said circular is as under :

"The prima facie adjustments mentioned at (ii) above can be made only on the basis of information available in the return or the accompanying accounts or documents and not on the basis of the past records of the assessee. Some examples of such prima facie admissibles or inadmissibles in respect of which adjustments can be made to the returned income or loss are :

(i) While computing income under the head 'Salaries', standard deduction under section 16(1) is not claimed, or claimed at a figure which is less than or in excess of the permissible limit.

(ii) While computing income under the head 'Income from house property', deduction for 1/6th for repairs or for a new unit under the proviso to section 23(1) is not claimed, or claimed at a figure which is less than or is in excess of the permissible amount.

(iii) While computing income under the head 'Profits and gains of business or profession', depreciation is claimed at rates lower or higher than those provided for in the Income-tax Rules.

(iv) While computing capital gains, deduction of Rs. 10,000 under section 48(2) is not claimed or claimed less or in excess of this amount.

(v) Carried forward speculation loss set off against income from business or profession or against income under any other head.

(vi) Loss under any head, other than under the head 'Profits and gains of business or profession', carried forward and set off against the current income.

(vii) Carried forward loss of business set off against income of the current year under other heads.

(viii) Old loss of more than eight assessment years set off against the current business income, if the information is available in the return or the accompanying documents.

(ix) Deduction under section 80C in respect of provident fund contributions or life insurance premia or N. S. C. VI or VII Issue not claimed, though the information is available in the documents accompanying the return, or claimed at a figure which is less than or is in excess of the permissible amount.

(x) Deduction under section 80L not claimed or claimed at a figure which is less than or is in excess of the permissible amount.

(xi) Deduction under section 80G not claimed, although allowable on the basis of the information available in the return or the accompanying documents or claimed at a figure which is less than or is in excess of the permissible limit.

(xii) Deduction under section 80M claimed at sixty per cent. of gross dividend income instead of on net dividend income in violation of the provisions of section 80AA.

It may be mentioned that the above is not an exhaustive but only an illustrative list of prima facie admissibles or inadmissibles for which adjustments can be made to the returned income or loss."

The aforesaid examples contained in the circular clearly show that, for want of proof, no disallowance or adjustment can be made. It is only when a disallowance is evident from the facts on record that an adjustment can be made."

6. The said four additions are clearly contrary to the observations

and the ratio of the aforesaid decision as they relate to debatable issues or aspects which required examination of explanation or production of documents which were not required to be filed with the return.

7. This leaves us with the main contentious addition, i.e. the disallowance under Section 43B of the Act. In the tax audit report enclosed with the return, the tax auditor in the column No. 7, under the heading "Any tax duty or other sum debited to profit and loss account but not paid during the previous year" had given the following details:-

"a)	Entry Tax	: 5,981.00
b)	Welfare Cess	: 4,419.75
c)	Provident Fund (Employer's Contribution)	: 18,548.30
d)	Interest to Public Financial Institutions	: 37,02,281.00"

8. It is apparent that the Assessing Officer had picked up the entire amount mentioned in the tax audit report, while making the said adjustment under Section 143(1)(a).

9. Learned counsel for the petitioner has submitted that this adjustment was impermissible under Section 43B of the Act, as disallowance cannot be made if the assessee had paid the said sum before the due date of filing of the return. He submits that the tax auditor and the assessee was not required and mandated under law to state whether or not the aforesaid sums were paid before the due date of filing of the return. Thus, the Assessing Officer could not have made the said addition except by way of issue of notice under Section

143(2) and after verifying the facts in a scrutiny assessment.

10. We have considered the said contention but are not inclined to accept the same. The proviso to Section 43B of the Act as applicable with effect from 1.4.1989 reads:-

> "Provided that nothing contained in this section shall apply in relation to any sum referred to in clause (a) or clause (c) or clause (d) 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:"

11. As per the said proviso the assessee could pay the sums covered by clauses (a) to (f) in respect of liability of the previous year, at any time but before the due date of filing of the return. However, the proviso mandates that evidence of such payments should be furnished by the assessee along with the return of income. In the case of ***S.R.F. Charitable Trust*** (supra) distinction has been drawn between the documents which are mandated and required to be filed with the return and documents or evidences which an assessee may be required to produce in the assessment proceedings. Reference to Clause (iii) of Section 143(1)(a) supports the stand and stance of the Revenue. In the present case, there was lapse and failure on the part of the assessee to file the requisite document as per Section 43B. As per the proviso the petitioner was required to enclose with the return of income, the

documents to show evidence for payment of tax etc. on or before the due date of filing of the return. Thus, the Assessing Officer had rightly made and was justified in making *prima facie* adjustment for want of mandatory documents.

12. The petitioner, in the present case, did not file any application under Section 154 before the Assessing Officer claiming or stating therein that they had paid tax on or before the due date of filing of the return and, therefore, benefit under the proviso should be given to them. Even in the writ petition filed before this Court, it is not pleaded or averred that the amounts in question were paid on or before the due date of filing of the return. The petitioner may have succeeded if the documents were on record. It is further apparent that the assessee had not paid the amounts mentioned in the adjustment sheet under the heading '43-B'. The Assessing Officer had acted on the basis of the tax audit report and the documents which were enclosed with the return to make the disallowance/addition as per law.

13. Therefore, the adjustment made by the Assessing Officer was appropriate as per the then applicable existing provisions. Thus, in respect of the four amounts covered under Section 43B of the Act we do not see any reason and ground to interfere with the adjustments made by the Assessing Officer.

14. The writ petition is accordingly partly allowed in respect of

adjustments made under the columns cash payments, charity & donation, disallowance towards entertainment and disallowance on depreciation. With regard to the other disallowances/adjustments under Section 43B, we do not see any reason to interfere with the order of the Assessing Officer.

15. The present writ petition is disposed of. In the facts of the case, there will be no orders as to costs.

SANJIV KHANNA, J

R.V.EASWAR, J

MAY 22, 2012

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