IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 13TH DAY OF FEBRUARY 2020

PRESENT

THE HON'BLE MR. JUSTICE ALOK ARADHE

AND

THE HON'BLE MR. JUSTICE RAVI V.HOSMANI

I.T.A. NO.384 OF 2010

BETWEEN:

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

2. THE ASST. COMMISSIONER OF INCOME-TAX
CIRCLE-11(5), C.R. BUILDING
QUEENS ROAD, BANGALORE.

... APPELLANTS

(By Sri.K.V.ARAVIND, ADV.)

AND:

M/S. JSW STEEL LIMITED
(FORMERLY KNOWN AS JINDAL
VIJAYANAGAR STEEL LIMITED)
JINDAL MANSION, 51
DR. G. DESHMUKH MARG
MUMBAI-400 026.

... RESPONDENT

(By Sri.A.SHANKAR, SENIOR COUNSEL FOR SRI.VENKATESH K. PANI, ADV.)

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THIS I.T.A IS FILED UNDER SECTION 260-A OF I.T. ACT, 1961, ARISING OUT OF ORDER DATED 31/5/2010 PASSED IN ITA NO.924/BANG/2009, FOR THE ASSESSMENT YEAR 2005-06, PARYING TO FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED THEREIN. ALLOW THE APPEAL AND SET ASIDE THE ORDERS PASSED BY THE ITAT, BANGALORE IN ITA NO.924/BANG/2009 DATED 31/5/2010 AND CONFIRM THE ORDER OF THE APPELLATE COMMISSIONER CONFIRMING THE ORDER PASSED BY THE ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE-11(5), BANGALORE, IN THE INTEREST OF JUSTICE AND EQUIYT.

THIS I.T.A. COMING ON FOR HEARING, THIS DAY, **ALOK ARADHE J.,** DELIVERED THE FOLLOWING:

JUDGMENT

This appeal which has been preferred under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act', for short) by the revenue has been admitted by a bench of this Court vide order dated 26.03.2012 on following substantial questions of law:

(i) *Whether the tribunal was correct in holding that a sum of Rs.39,78,92,211/- should be treated as a depreciation loss as claimed by the assessee as arising due to forward contracts as these contracts stood terminated during the current assessment year and the corresponding amount was deemed to be added to the value of the*

assets even when these assets had not been acquired or payments made?

(ii) *Whether the Tribunal was correct in proceeding to hold that no interest under Section 234B of the Act can be levied on the amount of tax payable under Section 115JB of the Act as clause (h) to Explanation 1 to Section 115JB of the Act was inserted with retrospective effect by Finance Act, 2008 which could not haven anticipated during the current assessment year 2005-06 and consequently reading the provision which was not within its jurisdiction?*

2. Facts leading to the filing of the appeal briefly stated are that assessee is engaged in the business of manufacturing and selling of pellets, hot/cold rolled coils, sheets, plates and slag cement. The assessee filed it's return of income for assessment year 2005-06 on 29.10.2005 declaring NIL income. Thereafter, the assessee filed a revised return on 06.03.2007. The case of the assessee was selected for scrutiny and notice under Section 143(2) of the Act was issued to the assessee. The Assessing Officer by an order dated 31.12.2007 it was held that the assessee in the

Income Tax depreciation working has already adjusted an amount of Rs.64,29,52,121/- on account of foreign exchange gains as provided under Section 43A of the Act on payment basis and that the assessee had not made any payments and purchased the assets. It was further held that assessee had only entered into forward contracts with the dealers for future purchase of plant and machinery at a specified rate to safeguard its interest from future foreign exchange fluctuation. It was further held that provisions of Section 43A of the Act do not apply to the case of the assessee. The loss claimed by the assessee to the tune of Rs.39,78,92,211/- on account of settlement of forward contracts in the previous year, which was shown as loss while computing the taxable income of the assessee was disallowed by the Assessing Officer.

3. The aforesaid order passed by the Assessing Officer was upheld by the Commissioner of Income Tax (Appeals) by an order dated 10.07.2009. Being aggrieved, the assessee as well as the revenue filed appeals before the Income Tax Appellate Tribunal (hereinafter referred to as

'the tribunal' for short). The Tribunal by order dated 31.05.2010 *inter alia* held that adjustment of the liability has to be allowed even in a case where the payment was not actually made. It was further held that such adjustment can be made only in the previous year, in which the foreign account was settled by the assessee. It was also held that case of the assessee is squarely covered by a decision of the Supreme Court in the case of ***'ASSISTANT COMMISSIONER OF INCOME TAX VS. ELECON ENGINEER CO. LTD.,', (2010) 322 ITR 20.*** It was further held that even though Section 43A was incorporated in the year 2002, however, the dispute in this case pertains to Assessment Year 2004-05 and therefore, the assessee had no occasion to add back the deferred tax provision to compute the book profits under Section 115JB of the Act and the assessee could not have paid advance tax retrospectively. It was also held that the law does not command to do anything, which is impossible to do. Accordingly, it was held that the Assessing Officer as well as the Commissioner of Income Tax (Appeals) erred in allowing the assessee to deduct Rs.25 Crores from computation of book profits under Section 115JB of the Act. Accordingly, the order of Commissioner of Income Tax (Appeals) was reversed. Being aggrieved, the revenue has filed this appeal.

4. Learned counsel for the revenue while inviting the attention of this court to para 8 of the decision in the case of ***ELECON ENGINEERING COMPANY LTD., SUPRA*** submitted that under the unamended provision, an assessee was required to acquire an asset before the change in the rate of exchange and since, in the instant case, no actual cost has been incurred by the assessee therefore, the assessee was not entitled to the benefit to unamended provision. It is further submitted that the Tribunal grossly erred in holding that the case of the assessee is covered by a decision in the case of ***ELECON ENGINEERING COMPANY LTD., SUPRA*** and in holding that amended provisions viz., Section 43A of the Act apply to the fact situation of the case. It is further submitted that the decision in the case of ***ELECON ENGINEERING COMPANY LTD., SUPRA*** was rendered in the peculiar facts of the case. In this connection, our attention has been invited to para 11 of the aforesaid

decision. It is further submitted that interest under Section 234B of the Act was leviable on the amount of tax as explanation (h) to Section 115JB was incorporated with effect from 01.04.2007. In support of his submissions, reliance has been placed on the decision of the Supreme Court in '***ASSISTANT COMMISSIONER OF INCOME TAX VS. ELECON ENGINEERING CO. LTD.,', (2010) 322 ITR 20 AND 'JOINT COMMISSIONER OF INCOME-TAX VS. ROLTA INDIA LTD.,', (2011) 330 ITR 470.***

5. On the other hand, learned counsel for the assessee submitted that the revenue has already adjusted an amount of Rs.64,29,52,121/- on account of foreign exchange gains as per Section 43B of the Act and the entire material was produced before the Assessing Officer with regard to the expenses incurred by the assessee. It is further submitted that irrespective of the decision of the Supreme Court in ***ELECON ENGINEERING COMPANY LTD.,*** supra, the assessee is entitled to succeed as in any case, the amount of loss has to be treated as revenue expenditure. Our attention has been invited to para 6 of the order passed by the

Tribunal and it has been submitted that adjustments have to be allowed even in a case where the payment was not actually made. It is further submitted that the aforesaid adjustments have to be made on the basis of the liability as on the last date of the previous year. It is also urged that the assessee cannot be asked to pay advance tax with retrospective effect. In support of aforesaid submission, reliance has been placed on division bench decision of this court in ***'COMMISSIONER OF INCOME TAX AND ANOTHER VS. JUPITER BIO-SCIENCE LTD.',*** AND ***'COMMISSIONER OF INCOME-TAX AND ANOTHER VS. JUPITER BIO-SCIENCE LTD.', (2013) 352 ITR 113 (KARN)*** and ***'STAR INDIA P. LTD. VS. COMMISSIONER OF CENTRAL EXCISE', (2006) 280 ITR 321 (SC).***

6. We have considered the submissions made by learned counsel for the parties and have perused the record. Section 43A as it is stood before the amendment required an assessee to revalue the foreign exchange liability at the end of every previous year and provide for the increase or decrease as a result of foreign exchange fluctuation. The

aforesaid adjustment has to be made even in a case where the payment was not actually made and the adjustments have to be made on the basis of the liability as on the last day of the previous year. By way of an amendment in the year 2002, the requirement of making of payment was inserted. The assessee even under unamended provision is entitled to benefit of the loss claimed by the assessee to the tune of Rs.39.78,92,211/- on account of settlement of forward contracts in the previous year, which was shown as loss while computing the taxable income of the assessee. We agree with the view taken by the Tribunal on this issue. Accordingly, the first substantial question of law is answered against the revenue and in favour of the assessee.

7. The Supreme Court in the case of ***Star India P. Ltd.,*** supra has held that liability to pay interest arising on default is in the nature of quasi punishment and even though it is permissible for the legislature to retrospectively legislate yet, such retrospectivity is normally not permissible to create an offence retrospectively. It is true that the assessee could not have paid advance tax in case of a deferred tax liability

in respect of Assessment Year 2005-06, when the amendment was brought into force in 2008. However, it is pertinent to mention here that clause (h) to second proviso to Section 115JB(2) of the Act has been incorporated with effect from 01.04.2001. The retrospective operation of the aforesaid provision has not been challenged by the assessee and therefore, the aforesaid provision has to be given effect to. The Tribunal clearly acceded to its jurisdiction in holding that no interest could be levied under Section 234B of the Act. In the result, the second substantial question of law is answered in favour of the revenue and against the assessee.

In view of preceding analysis, the appeal is allowed in part.

Sd/-
JUDGE

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JUDGE

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