

Before G. C. Mital and S. S. Sodhi, JJ.

COMMISSIONER OF INCOME TAX, PATIALA,—*Applicant.*

*versus*

M/S. JINDAL BROTHERS, RICE MILLS,—*Respondent.*

*Income Tax Reference No. 22 of 1986.*

March 14, 1989.

*Income Tax Act (XLIII of 1961)—Ss. 32, 43(1)—Assessee taking benefit of incentive policy of 15 per cent subsidy of plant, machinery, land and building—Depreciation claimed on actual cost—I.T.O. reducing actual cost after deducting cash subsidy amount—Such deduction—Whether valid.*

Held, that on a consideration of the matter, we are of the opinion that the subsidy of 15 per cent allowed on the cost of machinery, plant and building clearly comes within the ambit of S. 43 (1) and the 'actual cost' of these items means the actual cost of the assessee reduced by the amount of subsidy for the purposes of granting depreciation allowance under S. 32 of the Income Tax Act, 1961. (Para 5).

Held, that when it is specified in the incentive policy that 15 per cent of the cost of plant, machinery and building would be provided by the State Government, underlying object is to reduce the value of the plant, machinery and building by 15 per cent of the actual cost. The actual cost would so stand reduced within the meaning of S. 43(1) of the Act.

(Para 5).

*Reference Under Section 256(1) of the Income-tax Act 1961, by Income Tax Appellate Tribunal to the Hon'ble High Court of Punjab and Haryana for opinion of the following question of law arising out of the order of the Tribunal dated 10th December, 1984 in I.T.A. No. 285 of 1983 relating to the assessment year 1977-78 :—*

*"Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that cash, subsidies received by the assessee are not to be deducted from the cost of machinery and plant and building under section 43(1) of the Income-tax Act, 1961, for determining their actual cost for the purposes of depreciation allowance under section 32 of the Act ?"*

(ASSESSMENT YEAR : 1977-78).

Ashok Bhan, Sr. Advocate with Ajay Mittal, Advocate, for the applicant.

Sanjay Bansal, Advocate, for the respondent.

## JUDGMENT

*Gokal Chand Mittal, J.*

(1) Here, we are called upon to decide an interesting and important question of law, namely, whether in calculating the actual cost of building, machinery and plant, the amount received by way of subsidy has to be deducted from the actual cost for the purposes of allowing depreciation under Section 32 of the Income Tax Act, 1961 (for short 'the Act').

(2) In order to give incentive for setting up new industries the Central Government and State Governments have been notifying policies from time to time. Here, we are concerned with such a policy notified by the Government of Punjab,—*vide* notification No. 28/35/78/51 B1-79/1464, dated 21st March, 1979 under the Rules made by the Governor of Punjab known as "The Punjab Industrial Incentives Code under the Industrial Policy Statement 1978". Rule 2 defines certain words and phrases. Rule 3 provides for registration of a unit with a District Officer for seeking benefit of the industrial incentives. Unit is defined in Rule 2.7 to mean a new industrial unit or manufacturing undertaking which has taken effective steps to set up industry on or after the 1st April, 1978, with new plant and machinery or part thereof. Rule 4 deals with the grant of interest free loans and the procedure for doing so. Rule 5 provides for subsidy on electric tariff for power based industries and procedure for securing the benefit. Rule 6 provides for exemption from electricity duty and the procedure for getting the exemption. Rule 7 provides for exemption, refund of octroi/terminal tax and the procedure. Rule 8 provides for capital subsidy and the procedure for getting subsidy at the rate of 15 per cent on the fixed capital investment made by the unit in certain specified areas, and on the specified industries and the conditions for eligibility and allied matters. 'Fixed capital investment' is defined in rule 2.19 to mean investment on land/building, plant and machinery. Rule 8.3(1) provides the mode of computation of entitlement of subsidy and is important for consideration of the point and thus deserves to be reproduced :

"8.3. (1) The amount of subsidy shall be 15 per cent of the fixed capital investment to be assessed as follow :—

*Land & Building*

Actual price paid for the land building including development charges to the extent needed for the purpose of

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the unit. Where land and/or building is held on premium lease arrangements premium paid by the leaseholder will be eligible for claiming subsidy where land and or building are already owned by the unit, the market value thereof assessed by the authority competent to sanction subsidy will also be taken for purpose of computation fixed capital investment. "Rent of a hired building will not be taken into account.

*Plant & Machinery.*

The cost of Plant and machinery as erected as site will be taken into account which will include the cost of productive equipment as tools, jigs, dies and moulds, transport, charges, insurance, premium, erection cost etc. will also be included. Balancing accessories, etc. added to the main plant and machinery for modernisation, diversification, etc would also be taken into account while computing the value of plant and machinery."

(3) M/s Jindal Brothers, the assessee obtained benefit of the aforesaid incentive policy of the Government of Punjab and set up new industry and got subsidy of 15 per cent on plant machinery, land and building. In the income tax returns filed for the assessment years 1977-78, it claimed depreciation on the actual cost of machinery, plant and building under Section 32 of the Act, but the Income Tax Officer took notice of the subsidy of 15 per cent received by the assessee under these heads and reduced the actual cost of the plant, machinery and building by the amount of subsidy received under the respective heads and on the cost so found allowed the depreciation. The assessee took the matter in appeal and the Commissioner of Income Tax (Appeals) decided the matter in favour of the assessee and directed the Income Tax Officer to allow depreciation without deducting the amount of subsidy. On further appeal, filed by the Revenue the Income Tax Appellate Tribunal, Chandigarh, upheld the order of the Commissioner of Income Tax in view of the decision of the Special Bench of the Tribunal (1983) 15 ITJ, 88, which was followed by the Chandigarh Bench in the case of *Plaza Hosiery, Ludhiana*, decided on 20th June, 1984.

At the instance of the Revenue, the following question has been referred for opinion of this Court :—

“Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that cash, subsidies received by the assessee are not to be deducted from the cost of machinery and plant and building u/s 43(1) of the Income-tax Act, 1961, for determining their actual cost for the purposes of depreciation allowance u/s 32 of the Act?”

(4) For decision of the aforesaid question Section 43(1) of the Act falls for consideration. It is in these terms:—

“43.

(1) “actual cost” means the actual cost of the assets to the assessee, reduced by that portion of the cost thereof, if any, as has been met directly or indirectly by any other person or authority.”

Herein, we are to consider the meaning of ‘has been met directly or indirectly by any other person or authority. The argument on behalf of the department is that the amount of subsidy on the cost of the plant, machinery and building given by the State Government to the assessee comes within the ambit of the aforesaid provision, and, therefore, the actual cost thereof has to be reduced by the amount of the subsidy and depreciation is allowable at such reduced cost. In highlighting it was argued that the subsidy is in the nature of providing portion of the cost of land, building, plant and machinery by the State Government, whether it is considered directly or indirectly. Emphasis is laid on the words ‘directly or indirectly’ signifying that in whatever manner actual cost is reduced by the subsidy granted by the State Government such reduced cost shall be the ‘actual cost’ within the meaning of Section 43(1) of the Act and on such cost depreciation would be allowable. In support of the argument, reliance is placed on a decision of this Court in *Ludhiana Central Cooperative Consumers Stores Ltd. v. C.I.T. Patiala-I* (1) and a decision of the Gujarat High Court in *C.I.T. Gujarat-I v. Kaira District Cooperative Milk Producers Union Ltd.* (2).

(1) 122 I.T.R. 942

(2) 116 I.T.R. 319.

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On behalf of the assessee it is argued that Section 43(1) of the Act is not applicable as there is no provision in the scheme to show that the entrepreneurs are granted the subsidy for the specific purpose of meeting the portion of the cost of the assets and rather the scheme provides only for quantification of the subsidy by a specific percentage of the fixed capital cost and the specific percentage is the measure adopted under the scheme to quantify the subsidy. Further, the counsel for the assessee also relied on the opinion rendered by three High Courts in the following decisions :—

1. *C.I.T. v. Godavari Plywoods Ltd.* (3)
2. *C.I.T. v. Diamond Dies Manufacturing Corporation Ltd.* (4)
3. *C.I.T. v. Premier Extraction (P) Ltd.* (5)
4. *C.I.T. v. Bhandari Capacitors (P) Ltd.* (6)

(5) On a consideration of the matter, we are of the opinion that the subsidy of 15 per cent allowed on the cost of machinery, plant and building clearly comes within the ambit of Section 43(1) and the 'actual cost' of these items means the actual cost of the assessee reduced by the amount of subsidy for the purposes of granting depreciation allowance under Section 32 of the Act. The afore-quoted four judgments of A.P., Karnatka and M.P. High Courts do support the argument raised on behalf of the assessee but on deep consideration we are unable to subscribe to the view taken therein. The Industrial Policy statement in question grants numerous incentives/benefits to the new entrepreneurs to set up industries in the backward areas. At the cost of repetition, they are in the nature of grant of interest-free loans, subsidy on electricity tariff for power based industries, exemption from electricity duty, exemption refund of octroi/terminal tax, investment loan interest bearing for priority industries, costs of feasibility reports, land subsidy with regard to developed plots in focal points, land subsidy on un-developed land etc. besides capital subsidy. Capital subsidy is not the only incentive but is one of the several incentives. All the incentives taken together may encourage an assessee to set up new industry in the backward areas and if he/it does so, would be entitled to numerous

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(3) 168 I.T.R. 632 (A.P.)

(4) 172 I.T.R. 655 Karnataka.

(5) 175 I.T.R. 22 (M.P.)

(6) 168 I.T.R. 647 (M.P.)

incentives. If a person other than the Government authority wants to pay a portion of the cost of the machinery, plant or building, he/it may do so in any manner. It may discriminate between the one industrial entrepreneur as compared to another meaning thereby that if two new industrial entrepreneurs were to spend same amount, to one more may be given and to the other less may be given. But when such matters are to be dealt with by the State Government or Government authorities, then a policy is to be laid down for universal application without causing any discrimination because if Government policy is discriminatory, it would be liable to be struck down under Article 14 of the Constitution of India. Therefore, to involve a universal policy and to avoid discrimination, it is to be stated in the policy how much incentive Government wants to give and the only reasonable way to do so is by providing percentage of the cost of plant, machinery and building. When it is specified in the incentive policy that 15 per cent of the cost of plant, machinery and building would be provided by the State Government underlying object is to reduce the value of the plant, machinery and building by 15 per cent of the actual cost. The actual cost would stand reduced within the meaning of Section 43(1) of the Act. We are not in agreement with the view taken by the three High Courts in the decisions relied upon on behalf of the assessee to the effect that there is no provision in the scheme that the entrepreneurs are granted subsidy for the specific purpose of meeting a portion of the cost on these items. We are equally not impressed by the reasoning that the basis adopted for determining the cash subsidy with reference to the fixed capital cost is only a measure adopted and cannot make the subsidy only for the specific purpose of meeting any portion of the fixed capital cost. The percentage adopted by way of subsidy is for the specific purpose of meeting the fixed capital cost to that extent, and the actual cost stands reduced by the percentage allowed as the subsidy. We are equally not in agreement with the following view taken in *Diamond Dies's case* (supra) :—

“Nowhere had the scheme provided as to how the subsidy should be utilised and for which assets. It was open to the assessee to legitimately reduce the cost of land in its books of account to the full extent of the subsidy, in which case the cost of plant and machinery would remain in invoice price uninfluenced by the amount of subsidy. The amount received by way of subsidy could be utilized for any purpose such as acquiring land on which no depreciation was admissible or on plant and machinery or

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for erection of buildings or for working capital or for repaying the loans already borrowed. Hence, unless the subsidy received had a nexus, direct or indirect, to meet a portion of the actual cost of any specific capital asset, it could not be brought within the purview of Section 43(1) of the Act.”

The incentive by way of subsidy is given for each item separately and it would not be open to the assessee to appropriate the subsidy for a purpose other than it was given to him. Even if the assessee wrongly maintains the account books and utilizes the entire subsidy against the value of the land to reduce its cost, the Income Tax Officer would not overlook the matter and would appropriate the subsidy in reducing the cost of the machinery, plant and building for which subsidy was specifically granted. There is nexus between the cost of each item and the subsidy under each head.

(6) In view of the above, we are of the opinion that the subsidy of 15 per cent is separately allowable towards the cost of the machinery, plant and building, under the incentive scheme. It reduces the ‘actual cost’ thereof and Section 43(1) of the Act is clearly attracted.

(7) The two judgments cited on behalf of the Revenue are distinguishable as the points involved here did not directly arise in those cases. In *Ludhiana Central Cooperative Consumers Stores’s case* (supra), subsidy given to meet the managerial and rental expenses was considered revenue receipt and was brought to tax. In *Kaira District Cooperative Milk Producers Union’s case* (supra), subsidy was given to a running concern and it was held that it was not capital employed and benefit of Section 80J on the amount of subsidy was not allowed to the assessee. Hence, these cases are of no help in deciding the case in hand.

(8) For the reasons recorded above, we answer the question in favour of the Revenue, in the negative, leaving the parties to bear their own costs.