

**IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income-Tax)
(Original Side)**

Present:

The Hon'ble Mr. Justice Bhaskar Bhattacharya

And

The Hon'ble Mr. Justice Sambuddha Chakrabarti

I.T.A. No.2 of 2004

**Paharpur Cooling Towers Ltd.
Versus
Commissioner of Income-Tax, WB-IV,**

For the Appellant:

Mr. J.P. Khaitan,
Mr. Sanjoy Bhowmick,
Mr. C. S. Das.

For the Respondent:

Md. Nizamuddin.

Heard on. 23.06.2011.

Judgment on: July 15, 2011.

Bhaskar Bhattacharya, J.:

This appeal under Section 260A of the Income-tax Act, 1961 is at the instance of an assessee and is directed against an order dated August 29, 2003, passed by the Income-tax Appellate Tribunal, "E" Bench, Kolkata, in Income-tax

(Appeal) bearing ITA Nos.787 and 813/Cal/2000 for the Assessment Year 1996-97 and thereby dismissing the appeal preferred by the assessee.

Being dissatisfied, the assessee has come up with the present appeal.

A Division Bench of this Court formulated the following four substantial questions of law for the purpose of disposal of this appeal:

- “i) Whether on a true and proper interpretation of Section 43B of the Income Tax Act, 1961, the appellant was entitled to deduction of the excise duty of Rs.322.46 lacs actually paid by it during the previous year relevant to the assessment year 1996-97 and the Tribunal was justified in law in disallowing the deduction on the ground that liability for payment of the said amount was incurred not in the assessment year 1997-97 but in the subsequent assessment year?
- “ii) Whether in interpreting the scope and manner of the explanation to Section 73 of the Act the statutory fiction introduced for treating the loss arising from the business of purchasing and selling of shares as loan from speculation business is confined are restricted only for the purpose of Section 73 of the Act and whether the said fiction which is specifically created for the particular purpose can be extended or applied to other provisions of the Act when the parliament itself in clear and unambiguous terms restricted the operation of the said explanation to Section 73?

“iii) Whether in a case where the transaction arising from the business of purchasing and selling of shares does not come within the ambit and scope of Section 43(5) of the Act defining speculative transaction, the loss arising from the purchase and sale of shares can be treated as loss from speculation business by applying explanation to Section 73 of the Act for the purpose of the claim for setoff of such loss under Section 70, 71 and 72 of the Act?

“iv) Whether the loss arising the decrease in value of shares which are held as stock in trade of the assessee can be treated as a loss of speculation within the meaning of explanation to Section 73 of the Act?”

Mr. Khaitan, the learned Advocate appearing on behalf of the appellant, at the very outset, submitted that he was not inclined to press the point Nos. (ii) to (iv) mentioned above, as those were covered by a decision of the Division Bench of this Court in the case of assessee itself, viz. Paharpur Cooling Tower Ltd. vs. CIT, IV, Calcutta reported in (2011) 198 Taxman 83 and consequently, should be answered against his client.

Mr. Khaitan, thus, only presses the point No. (i).

The facts relevant for the purpose of disposal of the aforesaid point may be summarized thus:

- a) The appellant is a public limited liability company within the meaning of the Companies Act, 1956 and the present appeal arises out of the appellant's assessment for the Assessment Year 1996-97 for which the relevant previous year was the Financial Year ending on March 31, 1996.
- b) During the previous year relevant to the Assessment Year 1996-97, the appellant paid, *inter alia*, a sum of Rs.322.46 lakh on account of excise duty, the liability for payment of which was incurred in the previous year relevant to the Assessment Year 1997-98. The appellant claimed deduction in respect of the said amount actually paid by it during the previous year ending on March 31, 1996 in its assessment for the Assessment Year 1996-97 by taking aid of the provisions of Section 43B of the Act.
- c) The Assessing Officer, however, disallowed the claim of the appellant for deduction of the said amount on the ground that the liability for the said amount was not incurred during the previous year relevant to the Assessment Year 1996-97. The Assessing Officer in his order, however, wrongly mentioned the aforesaid amount as Rs.3 crore instead of the correct figure of Rs.322.46 lakh.
- d) Being dissatisfied, the appellant preferred an appeal before the Commissioner of Income-tax (Appeals) and the Commissioner of

Income-tax (Appeals) by an order dated 28th March, 2000 allowed the claim of the appellant for deduction of excise duty but upheld the action of the Assessing Officer in respect of other points involved in the said appeal.

- e) Being dissatisfied, the appellant preferred an appeal before the Income-tax Appellate Tribunal against the other findings of the Commissioner of Income-tax (Appeals), while the Department preferred an appeal before the Tribunal against the allowance of deduction of excise duty in respect of Rs.322.46 lakh.
- f) By the order impugned herein the Tribunal below has dismissed the appeal preferred by the appellant and allowed the appeal preferred by the Revenue.

Being dissatisfied, the appellant has come up with the present appeal.

As indicated earlier, the appellant has restricted its claim on the point No.1 relating to deduction of Rs.322.46 lakh under Section 43B of the Act which was the subject-matter of the appeal preferred by the Revenue before the Tribunal.

After going through the order impugned in this appeal, we find that the Tribunal held that there was no liability incurred by the assessee for payment of the excise duty in the Assessment Year 1996-97 and the said payment was made

only as an advance payment to be adjusted in the subsequent year when the actual liability to pay the excise duty would become due and as such, according to the Tribunal below, Section 43B of the Act was not attracted.

In order to appreciate the aforesaid question it will be profitable to refer to the provisions contained in Section 43B of the Act which is quoted below:

Section 43B. CERTAIN DEDUCTIONS TO BE ONLY ON ACTUAL PAYMENT.

Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of -

(a) Any sum payable by the assessee by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force,

(b) Any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees,

(c) Any sum referred to in clause (ii) of sub-section (1) of section 36,

(d) Any sum payable by the assessee as interest on any loan or borrowing from any public financial institution or a state financial corporation or a state industrial investment corporation, in accordance with the terms and conditions of the agreement [692c governing such loan or borrowing.

(e) Any sum payable by the assessee as interest on any term loan from a scheduled bank in accordance with the terms and conditions of

the agreement governing such loan, shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in section 28 of that previous year in which sum is actually paid by him.

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) or clause (e) 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 694a :

Provided further that no deduction shall, in respect of any sum referred to in clause (b), be allowed unless such sum has actually been paid in cash or by issue of a cheque or draft or by any other mode on or before the due date as defined in the Explanation below clause (va) of sub-section (1) of section 36 and where such payment has been made otherwise than in cash, the sum has been realised within fifteen days from the due date.

Explanation [1] : For the removal of doubts, it is hereby declared that where a deduction in respect of any sum referred to in clause (a) or clause (b) of this section is allowed in computing the income referred to in section 28 of the previous year (being a previous year relevant to the assessment year commencing on the 1st day of April, 1983 or any earlier assessment year) in which the liability to pay such sum was incurred by the assessee, the assessee shall not be entitled to any

deduction under this section in respect of such sum in computing the income of the previous year in which the sum is actually paid by him.

Explanation 2 : For the purposes of clause (a), as in force at all material times, "any sum payable" means a sum for which the assessee incurred liability in the previous year even though such sum might not have been payable within that year under the relevant law.

Explanation 3 : For the removal of doubts, it is hereby declared that where a deduction in respect of any sum referred to in clause (c) or clause (d) of this section is allowed in computing the income referred to in section 28 of the previous year (being a previous year relevant to the assessment year commencing on the 1st day of April, 1988, or any earlier assessment year) in which the liability to pay such sum was incurred by the assessee, the assessee shall not be entitled to any deduction under this section in respect of such sum in computing the income of the previous year in which the sum is actually paid by him.

Explanation 3A : For the removal of doubts, it is hereby declared that where a deduction in respect of any sum referred to in clause (e) of this section is allowed in computing the income referred to in section 28 of the previous year (being a previous year relevant to the assessment year commencing on the 1st day of April, 1996, or any earlier assessment year) in which the liability to pay such sum was incurred by the assessee, the assessee shall not be entitled to any deduction under this section in respect of such sum in computing the income of the previous year in which the sum is actually paid by him.

Explanation 4 : For the purposes of this section, - (a) "Public financial institution" shall have the meaning assigned to it in section 4A of the Companies Act, 1956 (1 of 1956);

(aa) "Scheduled bank" shall have the meaning assigned to it in clause (ii) of the Explanation to clause (viiia) of sub-section (1) of section 36;

(b) "State financial corporation" means a financial corporation established under section 3 or section 3A or an institution notified under section 46 of the State Financial Corporations Act, 1951 (63 of 1951);

(c) "State industrial investment corporation" means a Government company within the meaning of section 617 of the Companies Act, 1956 (1 of 1956), engaged in the business of providing long-term finance for industrial projects and approved by the Central Government under clause (viii) of sub-section (1) of section 36."

After hearing the learned counsel for the parties and after going through the aforesaid provisions including the Explanation 2 added thereto, we find that the requirement of the provision contained in Section 43B (a) of the Act is that the assessee must have actually paid the amount as well as incurred liability in the previous year for the payment even though such sum might not have been payable within that year under the relevant law. In the case before us, the assessee has undoubtedly paid the duty in the previous year and such payment was made consequent upon the liability incurred in that very year but in view of the fact that it follows the mercantile system of accounting, the amount is legally payable in the next year. Thus, the case clearly comes under the purview of Section 43B (a) of the Act read with Explanation 2 added thereto.

The position would have been different if the amount was not paid in the previous year and in such a case the appellant would not have been eligible to get the benefit. The object of the legislature is to give the benefit of deduction of tax, duty, etc. only on payment of such amount liability of which the assessee had incurred and not otherwise. Thus, even if the tax or duty is payable in the next year in view of the system of accounting followed by the assessee, if the liability was *ascertained* in the previous year and the tax was also paid in the said previous year, there is no scope of depriving the assessee of such benefit.

In this connection, we may profitably refer to the following observations of the Supreme Court in the case of Allied Motor (p) Ltd vs. Commissioner of Income tax, Delhi, reported in 1997 AIR SCW 1473, while interpreting the scope of Section 43B of the Act:

“Explanation 2 was added to Sec. 43-B by the Finance Act of 1989 with retrospective effect from 1-4-1984. The Memorandum explaining the reasons for introducing Explanation 2, states, inter alia, as follows ((1989) 176 ITR (St.) 123) :

"24. Under the existing provisions of Section 43-B of the Income-tax Act, a deduction for any sum payable by way of tax, duty, cess or fee, etc., is allowed on actual payment basis only. The objective behind these provisions is to provide for a tax disincentive by denying deduction in respect of a statutory liability which is not paid in time. The Finance Act, 1987, inserted a proviso to section 43-B to provide that any sum payable by way of tax or duty, etc., liability for which was incurred in the previous year will be allowed as a deduction, if it is actually paid by the due date of furnishing the return under Section

139(1) of the Income-tax Act, in respect of assessment year to which the aforesaid previous year relates. This proviso was introduced to remove the hardship caused to certain taxpayers who had represented that since the sales tax for the last quarter cannot be paid within that previous year, the original provisions of section 43-B will unnecessarily involve disallowance of the payment for the last quarter. Certain Courts have interpreted the provisions of Section 43-B in a manner which may negate the very operation of this section. The interpretation given by these Courts revolves around the use of the words 'any sum payable'. The interpretation given to these words is that the amount payable in a particular year should also be statutorily payable under the relevant statute in the same year. This is against the legislative intent and it is, therefore, proposed, by way of a clarificatory amendment and for removal of doubts, that the words 'any sum payable' be defined to mean any sum, liability for which has been incurred by the taxpayer during the previous year irrespective of the date by which such sum is statutorily payable.

This amendment will take effect from April 1, 1984.

“While interpreting Section 43-B without the first proviso some of the High Courts, in order to prevent undue hardship to the assessee, had taken, the view that Section 43-B would not be attracted unless the sum payable by the assessee by way of tax, duty, cess or fee was payable in the same accounting year. If the tax was payable in the next accounting year, Section 43-B would not be attracted. This was done in order to prevent any undue hardship to assesseees such as the ones before us. The memorandum of reasons takes note of the combined effect of Section 43-B and the first proviso inserted by the Finance Act, 1987. After referring to the fact that the first proviso now removes the hardship caused to such tax payers it explains the insertion of Explanation 2 as being for the purpose of removing any

ambiguity about the term 'any sum payable' under Clause (a) of Section 43-B. This Explanation is made retrospective. The Memorandum seems to proceed on the basis that Section 43-B read with the proviso takes care of the hardship situation and hence Explanation 2 can be inserted with retrospective effect to make clear the ambit of Section 43-B(a). Therefore, Section 43-B(a), the first proviso to Section 43-B and Explanation 2 have to be read together as giving effect to the true intention of Section 43-B. If Explanation 2 is retrospective, the first proviso will have to be so construed. Read in this light also, the proviso has to be read into Section 43-B from its inception along with Explanation 2.

10. This position is reinforced by a departmental Circular No. 550 dated 1st of January 1990. [(1990) 182 ITR (St.) 114, 123] :-

"AMENDMENT OF PROVISIONS RELATING TO CERTAIN DEDUCTIONS TO BE ALLOWED ONLY ON ACTUAL PAYMENT

15.1 Under the existing provisions of Section 43-B of the Income-tax Act, 1961, a deduction for any sum payable by way of tax, duty, cess or fee, etc., is allowed on actual payment basis only. The objective behind these provisions is to provide for a tax disincentive by denying deduction in respect of a statutory liability which is not paid in time. The Finance Act, 1987, inserted a proviso to section 43-B to provide that any sum payable by way of tax or duty, etc., liability for which was incurred in the previous year will be allowed as a deduction, if it is actually paid by the due date of furnishing the return under Section 139(1) of the Income-tax Act, in respect of the assessment year to which the aforesaid previous year relates. This proviso was introduced to remove the hardship caused to certain taxpayers who had represented that since the sales tax for the last quarter cannot be paid within the previous year, the original provisions of Section 43-B will unnecessarily involve disallowance of the payment for the last quarter.

Certain Courts have interpreted the provisions of Section 43-B in a manner which may negate the very operation of this Section. The interpretation given by these Courts revolves around the use of the words 'any sum payable'. The interpretation given to these words is that the amount payable in a particular year should also be statutorily payable under the relevant statute in the same year. Thus, the sales tax in respect of sales made in the last quarter was held to be totally outside the purview of Section 43-B since the same is not statutorily payable in the financial year to which it relates. This is against the legislative intent and, therefore, by way of inserting an Explanation, it has been clarified that the words 'any sum payable' shall mean any sum, liability for which has been incurred by the taxpayer during the previous year irrespective of the date by which such sum is statutorily payable....."

The departmental understanding also appears to be that Section 43-B, the proviso and Explanation 2 have to be read together as expressing the true intention of Section 43-B. Explanation 2 has been expressly made retrospective. The first proviso, however, cannot be isolated from Explanation 2 and the main body of Section 43-B. Without the first proviso, Explanation 2 would not obviate the hardship or the unintended consequences of Section 43-B. The proviso supplies an obvious omission. But for this proviso the ambit of Section 43-B becomes unduly wide bringing within its scope those payments which were not intended to be prohibited from the category of permissible deductions."

Moreover, in the light of the purposive and objective interpretation of the said provision, and the mischief sought to be remedied through the insertion of the Explanation 2, it becomes abundantly clear that the said claim is allowable only in the year of payment. At this stage, it will be profitable to refer to the

following observation of the Supreme Court in the case of K. P. Varghese vs. ITO, reported in AIR 1981 SC 1922 where it has been held:

“.....where the plain literal interpretation of a statutory provision produces a manifestly absurd and unjust result which could never have been intended by the legislature, the Court may modify the language used by the legislature or even do some violence to it, so as to achieve the obvious intention of the legislature and produce a rational construction.”

It was never the intention of the legislature to deprive an assessee of the benefit of deduction of tax, duty etc. actually paid by him during the previous year, although in advance, according to the method of accounting followed by him. If we accept the reasoning given by the Tribunal, an advance payer of tax, duty etc. payable in accordance with the method of accounting followed by him will not be entitled to get the benefit even in the next year when liability to pay would accrue in accordance with the method of accounting followed by him because the benefit of Section 43B is given on the basis of actual payment made in the previous year.

We, thus, find that the Tribunal below committed substantial error of law in denying the benefit of Section 43B (a) of the Act to the appellant only on the ground that the tax was paid in advance in accordance with the mercantile system of accounting.

The appeal is, thus, allowed by answering the point No.1 in favour of the assessee in the negative and directing the Assessing Officer to give benefit of the provision of Section 43B (a) of the Act in respect of the amount of Rs. 322.46 lakh paid by the assessee.

In the facts and circumstances, there will be, however, no order as to costs.

(Bhaskar Bhattacharya, J.)

I agree.

(Sambuddha Chakrabarti, J.)