

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO.602 OF 2011

Commissioner of Income Tax-2,
Aayakar Bhavan, M.K.Road,
Mumbai- 400 020.

..Appellant.

v.

Upendra T. Kapadia,
Laxmi Niwas,
37, L. Jagmohandas Marg,
Mumbai-400036.

..Respondent.

Mr. Vimal Gupta, Sr. Advocate with Ms. Padma Divakar for the
Appellant.
Mr.Atul K. Jasani for the Respondent.

**CORAM : J.P. DEVADHAR AND
M.S. SANKLECHA, JJ.**

DATE : 30TH OCTOBER, 2012

JUDGMENT (PER M.S. SANKLECHA, J.):

This appeal by the revenue under Section 260 A of the Income Tax Act, 1961 (“the Act”) is against the order dated 26/10/2009 passed by the Income Tax Appellate Tribunal (“the Tribunal”) relating to the assessment year 2004-05.

2) Being aggrieved, the following questions of law have been formulated by the appellant for the consideration by this Court.

A) Whether on the facts and in the circumstances of the case and in law the Tribunal was justified in deleting the disallowance of Rs.52,85,205/- made by the Assessing Officer u/s. 43B of the Income Tax Act being interest payable by the assessee to Shree Mahalaxmi Mercantile Co-operative Bank Limited even though there was no evidence furnished by the assessee to substantiate the claim that the assessee had made the payment of interest before the filing of his return of income?

B) Whether on the facts and in the circumstances of the case and in law the Tribunal was justified in holding that Shree

Mahalaxmi Mercantile Co-operative Bank Ltd. is not a scheduled bank within the meaning of Section 43B and Section-11(5) of the Income Tax Act even though the said Shree Mahalaxmi Mercantile Co-operative Bank Limited is a co-operative society which is engaged in banking and thus the provisions of section 43B(e) will not apply to the assessee?

3) The appeal is admitted on questions (a) and (b). At the request of the Advocates for the appellant and the respondent the appeal is itself taken up for final hearing.

4) The respondent-assessee is an individual engaged in the business of trading in cotton bales. For the assessment year 2004-05, the respondent-assessee filed his return of income declaring a loss of Rs.61.38 lacs. In his return the respondent assessee had claimed a deduction/expense on account of interest of Rs.52.85 lacs payable by him to Shree Mahalaxmi Mercantile Co-operative Bank Limited on a loan taken. During the course of

the assessment proceedings the Assessing Officer noticed that the aforesaid amount of interest of Rs.52.85 lacs had not been actually paid even upto the date of filing of return of income for the assessment year 2004-05. Consequently, the Assessing Officer in his assessment order dated 30/11/2006 disallowed the deduction/expenses claimed by the assessee on account of interest of Rs.52.85 lacs under Section 43B of the Act and added it back to the income of the assessee.

5) Being aggrieved, the respondent-assessee filed an appeal to the Commissioner of Income Tax (Appeals). By an order dated 25/9/2008, the Commissioner of Income Tax (Appeals) dismissed the respondent-assessee's appeal on the ground that it is an admitted position that the interest of Rs.52.85 lacs had not been paid to Shree Mahalaxmi Mercantile Co-operative Bank Limited upto the date of filing of the return. In the circumstances, on application of Section 43B of the Act the order of the Assessing Officer dated 30/11/2006 was upheld.

6) On second appeal, the Tribunal by its order dated

26/10/2009 held that Section 43B of the Act would not apply in case of payment of interest to a co-operative bank for the reason that the section is applicable only in respect of interest payable on a loan taken from a scheduled bank. Under terms of Explanation 4(aa) to Section 43B of the Act a scheduled bank would have a meaning assigned to it in the Explanation to clause (iii) of sub section 5 of Section-11 of the Act. The Tribunal held that Shree Mahalaxmi Mercantile Co-operative Bank Ltd. is not covered within the definition of scheduled bank under Section 43B of the Act. Thus, the appeal of the respondent-assessee was allowed.

7) Mr. Vimal Gupta, Senior Counsel appearing for the revenue in support of the appeal submits that there is no dispute that the amount of interest has not been actually paid by the respondent-assessee to Shree Mahalaxmi Mercantile Co-operative Bank Limited up to the date of filing of the return for the assessment year 2004-05. Further, he contends that a co-operative bank being a co-operative society would be covered within the meaning of scheduled bank under Section-43B of the Act read with Section 11(5) (iii) of the Act. In the circumstances

he contends that the deduction/expenses of Rs.52.85 lacs being the interest payable to Shree Mahalaxmi Mercantile Co-operative Bank Limited is not allowable in view of the bar under Section 43B of the Act. As against the above, Mr. Atul Jasani, Advocate for the respondent-assessee submits that though there is no dispute about the non payment of interest till the date of filing of the return, the same is not germane to the controversy at hand. Mr. Jasani submits that Section 43B of the Act is not applicable to the payment of interest made to Shree Mahalaxmi Mercantile Co-op. Bank Ltd. In support of his submission, he relies upon an order of the Tribunal dated 26/10/2009 and states that no substantial question of law arises and the appeal be dismissed.

8) We may usefully reproduce the relevant portion of Section-43B of the Act and Section 11(5)(iii) of the Act for an appropriate adjudication of the present controversy. The relevant portion of Section 43B of the Act reads as under:

“Certain deductions to be only on actual payment.

43B. Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of-

- (a)
- (b)
- (c)
- (d)or
- (e) any sum payable by the assessee as interest or any loan or advances from a scheduled bank in accordance with the terms and conditions of the agreement governing such loan or advance or
- (f) any sum payable by the assessee as an employer in lieu of any leave at the credit of his employee,

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 such 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 the Explanation to clause (iii) of sub-section (5) of section 11;

Section 11(5)(iii) of the Act is reproduced along with the explanation as under:

- (iii) deposit in any account with a scheduled bank or a co-operative society engaged in carrying on the business of banking (including

a co-operative land mortgage bank or a co-operative land development bank).

Explanation- In this clause, "scheduled bank" means the State Bank of India constituted under the State Bank of India Act, 1955 (23 of 1955), a subsidiary bank as defined in the State Bank of India (Subsidiary Banks) Act, 1959 (38 of 1959), a corresponding new bank constituted under section 3 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 (5 of 1970), or under section 3 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980 (40 of 1980) or any other bank being a bank included in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934);"

From the reading of the above sections, it is amply clear that Section 43B of the Act is applicable only in respect of any amount paid as interest to a scheduled bank. A scheduled bank as defined in Explanation 4 to Section 43B of the Act would have the same meaning as contained in the Explanation to Section 11(5) (iii) of the Act. The Explanation to Section 11(5)(iii) of the Act defines a scheduled bank to mean various banks referred to therein i. e. State Bank of India, its subsidiaries, Nationalized Banks and any bank included in the second schedule to Reserve Bank of India Act, 1924. The Shree Mahalaxmi Co. op.

Bank Ltd. Is not mentioned in the second schedule to the Reserve Bank of India Act, 1934 nor covered by any other Banks mentioned to the Explanation to Section 11(5)(iii) of the Act. Consequently, the Tribunal was correct in its conclusion that non payment of interest amount to a co-operative bank would not attract the provisions of Section 43B of the Act. This is for the reason that in terms of Explanation (4) to Section 43B of the said Act scheduled bank would have a meaning given to it in the Explanation to Section 11(5)(iii) of the Act. Therefore, one has to merely look at the Explanation to Section 11(5)(iii) of the Act to determine whether or not Shree Mahalaxmi Mercantile Co-operative Bank limited is included within the meaning of a Scheduled Bank. Sub Clause (iii) of sub section 5 of Section 11 speaks about the deposit of any amount in a scheduled bank or co-operative Society engaged in banking but the same is of no consequence. This is for the reason that for purposes of Section 43B of the Act we would be governed by the meaning given in the explanation to Section 11(5) (iii) of the Act and not by the main part thereof. Therefore, no fault can be found with the order of the Tribunal dated 26/10/.2009.

9) In view of the above clear position of law both the questions of law (a) and (b) are answered in the affirmative i. e. in favour of the respondent-assessee and against the appellant-revenue.

10) Appeal is dismissed. No order as to costs.

(M.S.SANKELCHA, J.)

(J.P. DEVADHAR, J.)