

THE HON'BLE SRI JUSTICE V.V.S. RAO
AND
THE HON'BLE SRI JUSTICE B.N. RAO NALLA

–
REFERRED CASE No.99 OF 1996

ORDER: (Per Hon'ble Sri Justice B.N. Rao Nalla)

The respondent – M/s.Andhra Ferro Alloys, (the assessee) is a private limited company engaged in the business of manufacture and sale of HC Ferro Chrome. During the year 1991-92, the assessee mostly did conversion processing for M/s. TISCO. In fact, from out of the total income of Rs.4,54,52,264/- credited to the profit and loss account, a sum of Rs.3,79,79,687/- was in the nature of conversion charges received from M/s. TISCO, and out of the remaining, Rs.56,57,540/- was from sale of off-grade HC Ferro Chrome which had been produced during the conversion process. The assessee has debited to profit and loss account a sum of Rs.1,67,10,388/- towards 'power consumed'. The said expenditure has been included under the head of 'manufacturing and other expenditure'. On being asked to furnish complete particulars in respect of the said expenditure and also the copies of demands raised by the Andhra Pradesh Electricity Board (for short 'the APSEB') as well as the details of payments made in pursuance thereof, the assessee complied the same. On scrutiny, it was found by the Revenue that though the demand made by the APSEB was Rs.1,67,10,388/-, the assessee had paid only a sum of Rs.1,14,86,598/- and the remaining amount of Rs.52,23,790/- was not paid either during the relevant previous year or on or before the time provided under Section 139(1) of the Income Tax Act,1961 (for short 'the Act') for furnishing the return of income. On being asked by the Revenue for payment of the balance amount of Rs.52,23,790/- to the APSEB, the assessee disputed the same stating that the original agreement with the APSEB for assessing the assessee company's tariff was under Category – I, however it has assessed the tariff under Category – III and raised demands for enhanced amounts. On receipt of such demand, the assessee approached this Court by filing writ petition and obtained stay.

The Assessing Officer being Deputy Commissioner of Income Tax, Visakhapatnam by order dated 31-03-1994 observing that there is a little doubt that electricity charges are clearly in the nature of fees because the

electricity charges paid as consideration for a distinct service availed of, held that electricity charges come within the ambit of Section 43B of the Act with effect from 01-4-1989, and therefore, the same can be allowed as deduction only on payment basis. Accordingly, from out of Rs.1,67,10,388/- raised by the APSEB, the assessee has actually paid only a sum of Rs.1,14,86,598/- and as such the said sum was allowed as deduction and the balance of Rs.52,23,790/- was disallowed. Aggrieved thereby, the assessee filed appeal before the Commissioner of Income Tax (Appeals), Visakhapatnam (for short 'the CIT'). However, the CIT dismissed the appeal confirming the order of the Assessing Officer. Assailing the same, the assessee preferred appeal in ITA No.1780/Hyd/94 before the Income Tax Appellate Tribunal, Hyderabad (for short 'the Tribunal') and the Tribunal by order dated 30.01.1995 allowed the appeal holding that the Assessing Officer was not justified in making the addition in terms of disallowance under Section 43B of the Act and set aside the order of the CIT deleting the addition of Rs.52,23,790/- made by the Assessing Officer.

The Tribunal on application of the Revenue under Section 256(1) of the Act, referred the following questions stated to be of law arising out of its order for the assessment year 1991-92 for the opinion of this Court.

Whether, on the facts and in the circumstances of the case, the Tribunal was justified in deleting the additions towards unpaid electricity charges on the ground that the provisions of Section 43B of the Act would not apply thereto"

Whether, on the facts and in the circumstances of the case, the Tribunal was not in error in overlooking that electricity charges are in the nature of fees and therefore, the provisions of Section 43B(i) would attract if such charges have remained unpaid either during the relevant previous year or on or before the due date under Section 139(1) of the I.T. Act, 1961.

From a perusal of the order of the Assessing Officer and the CIT, it appears that there is a dispute with regard to disallowance of a sum of Rs.52,23,790/- made by the Assessing Officer in terms of Section 43B of the Act towards unpaid electricity charges which are said to be in the nature of 'fees'. The learned standing counsel appearing for the Revenue submits that the electricity charges are paid by way of consideration for distinct services availed of and the APSEB in its very scheme of activities charges fees for services rendered by the assessee, and as such,

electricity charges come within the ambit of Section 43B of the Act with effect from 01.04.1989. He further submits that such charges can only be allowed on payment basis as per the provisions of Section 43B of the Act, and since the assessee has not paid the amount of Rs.52,23,790/- to the APSEB within the statutory time limit, the same has been disallowed and added back to the assessee's income.

The learned counsel for the respondent-assessee submits that the assessee is a private limited company. It follows mercantile system of accounting. As per the agreement entered into with the APSEB, assessee was placed under Category - I for the purpose of payment of electricity charges. Later, contrary to the agreement, the APSEB charged the rate applicable to Category - III and raised a higher demand. Then the assessee filed a writ petition before this Court challenging the action of the APSEB and this Court while granting stay, directed the APSEB to raise the demand for the net amount after giving the benefit of 25% rebate, and the assessee paid 75% of the bill as per the directions of this Court. Thus, out of a total demand of Rs.1,67,10,388/- raised by the APSEB towards electricity charges, a sum of Rs.1,14,86,598/- was paid in terms of the directions of this Court and the balance amount of Rs.52,23,790/- was shown as liability in the books of account, as the same was covered by the stay granted by this Court.

For reappraisal, it is expedient to quote Section 43B of the Act.

43B. 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, or**

- (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, or**

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

- (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 governing such loan or borrowing, or**

(e) any sum payable by the assessee as interest on any loan or advances from a scheduled bank in accordance with the terms and conditions of the agreement governing such loan or advances, 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 :

Provided that nothing contained in this section shall apply in relation to any sum 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.

Section 43B of the Act does not specifically mention about the electricity charges. The proviso to the Section says that an assessee has to pay the actual liability on or before the due date applicable in his case for furnishing the return of income. In the instant case, the assessee challenging the balance electricity charges of Rs.52,23,790/- filed a writ petition before this Court against the APSEB and this Court granted interim stay and the writ petition is pending. As such, the assessee has shown the said amount as liability. In this view of the matter, we are of the considered opinion that the assessee has not paid the disputed electricity charges of Rs.52,23,790/- to the APSEB as it obtained stay from this Court, and as such, the provisions of Section 43B of the Act would not attract to such unpaid electricity charges. Further, non-payment of such disputed electricity charges to the APSEB cannot be termed as 'fees' and that the Revenue has to give deduction to the said amount.

The Tribunal while allowing the Appeal held that the electricity charges partake the nature of statutory liability and accordingly will have to be allowed as deduction irrespective of whether or not the same has been paid and notwithstanding that the assessee has disputed any liability to pay any part of such charges. Section 43B of the Act does not speak about the electricity charges. Nowhere it is mentioned in the Section or proviso to it that unpaid electricity charges are not deductible. The Revenue cannot interpret the provisions of Section 43B of the Act in its favour, since the provisions of Section do not incorporate the electricity

charges. Therefore, we are of the considered opinion that such electricity charges are in the nature of statutory liability and the Revenue has to allow them as deduction irrespective of whether or not the same has been paid and notwithstanding that the assessee has disputed any liability to pay any part of such charges.

Accordingly, the questions referred to this Court are answered in the affirmative against the Revenue and in favour of the assessee.

The Referred Case shall stand disposed of accordingly. There shall be no order as to costs.

(V.V.S. RAO,J)

(B.N. RAO NALLA, J)

Date: _____
STP/PV

THE HON'BLE SRI JUSTICE V.V.S. RAO
AND
THE HON'BLE SRI JUSTICE B.N. RAO NALLA

-
-
-
-
-
-
-

-

-

REFERRED CASE No.99 OF 1996

Date: _____