THE HONBLE SRI JUSTICE L.NARASIMHA REDDY AND THE HONBLE SRI JUSTICE M.SATYANARAYANA MURTHY

R.C.No.86 of 2001

02-07-2014

**CIT, Visakhapatnamapplicant.**

**.M/s. The Andhra Sugars Limited, Tanuku...Respondent.**

!Counsel for applicant: Sri Challa Gunuranjan

Counsel for Respondent : Sri S.R.Ashok

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? Cases referred

1.123 ITR 429

2.(2007) 289 ITR 154 (Raj.)

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AND

THE HONBLE SRI JUSTICE M.SATYANARAYANA MURTHY

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ORDER: (Per the Honble Sri Justice L.Narasimha Reddy)

 The respondent is a Sugar Factory. As part of its activity,

it is under obligation to pay tax on the purchase of sugarcane,

made by it from time to time. Before Section 43B of the Income

Tax Act, 1961 (for short the 1961 Act) was inserted, the law was

that the assessee shall be entitled to deduct any amount

representing tax, duty or cess, levied upon him or it, whether or

not paid actually. Section 43B of the 1961 Act mandates that

certain deductions can be effected only on actual payment.

 For the assessment year 1984-85, the respondent submitted

a return claiming deduction of interest payable on the purchase

tax, though it was not actually paid. The plea was that the

requirement of actual payment to claim benefit under Section 43B

of the 1961 Act, is only in respect of tax; and deduction of interest

payable thereon, can be claimed even without making payment.

The Assessing Officer did not allow the deduction. The

respondent carried the matter in appeal to the Commissioner of

Income Tax (Appeals). The appeal was allowed. Thereupon, the

Department filed I.T.A.No.182/Hyd/1990 along with two other

appeals for two more assessment years; before the Hyderabad

Bench A of the Income Tax Appellate Tribunal (for short the

Tribunal).

 Through its order, dated 11.12.1995, the Tribunal partly

allowed the appeals, but remanded the matter to the

Commissioner (Appeals), for fresh consideration. Not satisfied

with the result, the Department filed R.A.No.315/Hyd/1996, under

Section 256(1) of the 1961 Act, with a prayer to refer the following

questions to this Court for answer:

1. In the facts and on the circumstances of the

case, whether the I.T.A.T. is justified in holding

that the provisions of Section 43B are not

applicable to interest payable on Purchase

Duty?

2. Whether the I.T.A.T. is justified in ignoring that

interest is a part and parcel of tax liability as

decided by the Supreme Court in the case of

Mahalakshmi Sugar Mills Co., Vs. C.I.T. (123

ITR 429)?

 The application was allowed through order, dated

29.11.2002. Hence, this reference.

 Sri S.R. Ashok, learned Senior Standing Counsel for the

Department, submits that the Commissioner as well as the

Tribunal erred in treating interest as a separate and independent

entity, in the context of the liability to pay tax. He contends that

the interest forms part of the actual tax liability, and there does

not exist any justification to treat the component of interest

separately. Learned counsel further submits that the Tribunal

rested its conclusions on the judgment of the Supreme Court in

Mahalakshmi Sugar Mills Co. v. Commissioner of Income-

Tax, Delhi , which is totally unrelated to the actual controversy.

He submits that recently the Rajasthan High Court in Shree Pipes

v. Deputy Commissioner of Income-Tax (Assessment)

dealt with the issue and held that the interest is part of the tax

and it cannot be treated independently.

 Sri Challa Gunuranjan, learned counsel for the assessee, on

the other hand, submits that Section 43B of the 1961 Act, dealt

with specific amounts that can be claimed as deductions and since

interest is not mentioned in the relevant clause, it cannot be

treated as part of the tax, duty or cess. He contends that

wherever the Parliament wanted that the deduction of even

interest can also be made, only on payment, it was specific, such

as in the case of interest payable on loans, under Section 43B(d)

of the 1961 Act. He submits that the Tribunal has assigned cogent

reasons in support of its conclusions and the questions need to be

answered against the Revenue.

 In the context of processing of the returns filed by an

assessee, deductions of various categories are permitted under the

relevant provisions of the 1961 Act. Controversy persisted as to

whether deduction of any amount can be permitted only when it is

paid actually in the form of tax, duty or cess or on just incurring of

the liability to pay. Judicial pronouncements are to the effect that

irrespective of the actual payment, the deduction can be made

once the liability is incurred in the form of demand or levy.

Obviously to put this at rest, the Parliament introduced Section

43B of the 1961 Act. It mandates that deductions of various

categories mentioned therein can be claimed only on actual

payment of the amount. The provision reads:

 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, 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

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:

 (remaining portion of the section is omitted, since it is

not relevant for the purpose of this case.)

 The deduction claimed by the respondent is, as regards interest

on purchase tax. It is not clear as to whether the respondent paid the

purchase tax for the concerned period or whether deduction thereof has

been claimed. It is not in dispute that the component of interest on

which the deduction was claimed, was not paid. The plea taken by the

respondent is that it is only in respect of the property tax that the

condition as to prior payment is applicable under Section 43B of the

1961 Act, and not for the interest thereon. The Commissioner as well

as the Tribunal accepted their contention by placing reliance upon the

judgment of the Supreme Court in Mahalakshmi Sugar Mills Co.s

case (1 supra).

 We have carefully gone through the judgment of the Supreme

Court in Mahalakshmi Sugar Mills Co.s case (1 supra). Basically,

it was not with reference to Section 43B(d) of the 1961 Act, but it was

only in relation to Section 10(2)(xv) of the Income Tax Act, 1922 (for

short the 1922 Act). The point for discussion in that case was as to

whether the deduction of the amount payable as interest levied under

Section 3 of the U.P. Sugarcane Cess Act, 1956, is permissible under

Section 10(2)(xv) of the 1922 Act. The distinction between levy of

penalty under Section 4, on the one hand, and imposition of interest

under Section 3 of the U.P. Act, on the other, was discussed at length.

Ultimately, Their Lordships took the view that the interest payable on

tax, cannot be treated as part of the tax for the purpose of Section

10(2)(xv) of the 1922 Act. The reason stated is that such amount

cannot be treated as penalty for infringement of law. The relevant

portion reads:

 In our opinion, the interest paid under S.3(3) of the

Cess Act cannot be described as a penalty paid for an

infringement of the law. As that is the only ground on which

the revenue resist the claim of the assessee to a deduction of

the interest under s.10(2)(xv) of the Indian I.T. Act, 1922,

the assessee is entitled to succeed. There is no dispute that

the payment of interest represents expenditure laid out

wholly or exclusively for the purpose of the business. There

is also no dispute that it is in the nature of revenue

expenditure.

 The facts of the present case are totally different. There is no

comparison between the provisions that govern both the cases. As a

matter of fact, Section 43B of the 1961 Act was not in force when

Mahalakshmi Sugar Mills Co.s case (1 supra) was decided. The

principle laid down therein does not provide any guidance, for

adjudication of this case.

 The Rajasthan High Court had an occasion to deal with the

question as to whether the interest on tax, duty or cess under Section

43B of the 1961 Act partakes the same character as the principal

amount; in Shree Pipess case (2 supra). After taking into account,

the principles of interpretation and the ratio in certain decided cases,

their Lordships took the view that interest that becomes payable on tax,

which is otherwise permissible for deduction under the provisions of the

Income Tax Act, while computing the total income, is part of tax, within

the meaning of Section 43B of the 1961 Act.

 Learned counsel for the respondent sought to impress us by

pleading that the Parliament itself maintained a distinction between the

component of the tax, duty or cess, on the one hand, and interest, on

the other hand, and wherever it wanted to bring interest within the fold

of Section 43B of the 1961 Act, it did so specifically. Reference is made

to Clause (b) of Section 43B of the 1961 Act. A perusal of the same

discloses that the interest was mentioned separately, where that

amount alone, and not the corresponding principal, is permitted as

deduction. Under Clause (d), what is permitted to be deducted is not

the loan, but the interest thereon.

 If the contention of the respondent that the component of

interest must be permitted to be deducted just by making a provision,

and not making actual payment, it will lead to almost a semblance of

absurdity. If the actual tax, duty, or cess can be deducted only on

payment, it is just un-understandable as to how the interest thereon can

be deducted without making payment thereof. Take an instance, where

an assessee is placed under obligation to pay the tax, duty or cess of

Rs.5,00,000/- and it remained unpaid for about 5 or 6 years.

He cannot make deduction thereof, because it was not paid. If the law,

under which the tax, duty or cess is levied, provides for payment of

interest, and a substantial amount had accrued on that amount, the

assessee may try to get the benefit of deduction of that equivalent

amount, without actually paying it by treating as separate and

independent of the tax liability. Such a situation may, in fact, lead to

absurdity, and Courts would never permit it.

 We, therefore, answer the questions in favour of the Department

and against the assessee.

 The reference is accordingly answered.

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L.NARASIMHA REDDY, J.

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M.SATYANARAYANA MURTHY, J.

Date:02.07.2014