
(2001) 04 RAJ CK 0083

In the Rajasthan High Court

Case No : Income Tax Reference No. 22 of 1995

Commissioner of Income Tax

APPELLANT

Vs

Agarwal Flooring Stone Co.

RESPONDENT

Date of Decision : 19-04-2001

Acts Referred:

Income Tax Act, 1961 — Section 28, 43B

Citation : (2002) 253 ITR 595 : (2002) 1 RLW 560 : (2002) 2 WLN 75

Hon'ble Judges : Sunil Kumar Garg, J;Rajesh Balia, J

Bench : Division Bench

Advocate : J.K. Singh, for the Appellant; P.K. Kasliwal, for the Respondent

Judgement

R. Balia, J.—The Income Tax Appellate Tribunal, Jaipur Bench, Jaipur, at the instance of the Commissioner of Income Tax, Jaipur, has referred the following question of law arising out of ITA No. 719/JP of 1988 relating to the assessment year 1985-86 :

"Whether, on the facts and in the circumstances of the case and in law, the Tribunal was justified in setting aside the addition of Rs. 37,826 made u/s 43B with the direction that if the amount of sales tax is paid within the time allowed under the sales tax law, although after the close of the year, it shall be allowed as deduction ?"

2. The facts relevant for determining the aforesaid question are that the assessee has claimed deduction on account of the liability to pay sales tax amounting to Rs. 37,826 which had not been actually paid during the previous year relevant to the assessment year in question. The assessee has claimed that as per the relevant sales tax law, the assessee has incurred the liability for the previous year and the payment of said sum was also made within the time allowed for such payment under the provisions of the Sales Tax Act before the submission of a return in time. He, according to law governing the said tax, was not a defaulter, yet by invoking Section 43B his claim for deduction of the said amount paid by

way of tax has not been allowed in computing his income from profits and gains of business for the assessment year in question. He has claimed that it is not hit by Section 43B of the Income Tax Act, 1961. The assessing authority did not agree with the contention of the assessee and disallowed the claim, inter alia, on the ground that since the amount of tax had actually not been paid in the previous year relevant to the assessment year to which the assessment related, the same cannot be allowed u/s 43B as deduction and can be allowed as deduction only in the year of actual payment.

3. In appeal, the Commissioner of Income Tax (Appeals) had confirmed the order of the Income Tax Officer.

4. However, the Tribunal, on second appeal before it, had accepted the contention of the assessee in principle. However, it was of the opinion that since sufficient material was not on record to find the actual date on which such payment was drawn/made, remanded the case back to the Assessing Officer with the direction that in case the Assessing Officer finds that the disputed amount of sales tax has been paid within the time allowed under the sales tax law, although after the close of the previous year, it shall be allowed as deduction.

5. On an application being made by the Commissioner of Income Tax u/s 256(1) for making a reference of the aforesaid question of law for the opinion of this court, the Tribunal noticed that there is a conflict of opinion between various High Courts, the Delhi High Court supporting the view of the Revenue, whereas other High Courts have held in favour of the assessee and has referred the aforesaid question as a question of law for the opinion of this court.

6. We have heard learned counsel for the parties.

7. Section 43B inserted by the Finance Act, 1983, with effect from April 1, 1984, reads as under :

"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 or duty under any law for the time being in force, or. . .

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."

8. Later on, operation of Clause (a) was widened by substituting words "tax, duty, cess or fee by whatever name called," for the words "tax or duty" vide Finance Act, 1988 (No. 26 of 1988), with effect from April 1, 1989, and Clauses (c), (d) and (e) were also inserted from time to time, which are not relevant for the present. Relevant for the present case are the provisions one which was

inserted by the Finance Act, 1987 (No. 11 of 1987), with effect from April 1, 1988, and modified along with the insertion of Clauses (c), (d) and (e), and Explanation 2, which was inserted vide Act No. 13 of 1989 with retrospective effect from April 1, 1984. The provision reads as under :

"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 : . . .

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."

9. It reveals that the proviso has been added to Section 43B that nothing contained in Section 43B shall apply in relation to any sum referred to in Clause (a) 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. Thereafter, Explanation 2 was also inserted defining the expression "any sum payable" used in Clause (a) as in force at all material times to mean 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.

10. Significantly, both the provisions continue to remain as part of Section V. Explanation 2 is not a non obstante clause which can override the proviso referred to above and continues to be operative as part of the statute. If the contention rendered by the Revenue is accepted, that unless payment is made of a liability incurred during the previous year before the close of the previous year, the same is not an allowable expense in terms of Section 43B(a) read with Explanation 2 in respect of the assessment of income for that period, the aforesaid first proviso shall be rendered nugatory and a dead letter. Such an interpretation which renders any part of the statute nugatory has to be avoided, if it is possible to construe the two provisions harmoniously. In our opinion for that purpose one does not have to strain.

11. The substantive provision of Clause (a) of Section 43B restricts that 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, 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. Therefore, Explanation 2 which governs the meaning of expression "any sum payable" under Clause (a) would refer to the payability of tax by the assessee not on the basis of the due date for its payment but with reference to incurring of liability to pay and ordinarily such rule would prevail. The proviso referred to above carves out an exception to the operation of Clause (a) read with Explanation 2 giving meaning to the expression "any sum payable" used thereunder in the strict letter of law, with the object of mitigating the hardship to wide amplitude and unintended field that may be covered by the substantive provision, so much so it deprives a person of his legitimate claim to deduction of his expenses for which he has incurred liability to pay though he is not a defaulter in payment. Clause (a) of Section 43B was intended to deny the benefit of deduction of any expenses incurred on account of taxes lawfully imposed but in respect of which he is in default. Thus, after explaining the rigour of the provision of Clause (a) of Section 43B, the exception under the proviso is provided to take the non-defaulter out of such rigour and it conveys that though any sum payable by the assessee during the relevant previous year was not actually paid during the previous year, the assessee will still be allowed deduction with reference to such liability if on the date of filing of the return by him as due u/s 139(1), he does not remain a defaulter. Succinctly, put the above proviso to Section 43B is remedial in nature and ought to be considered as clarificatory rather than modificatory in nature and must be deemed to apply as co-extensive with existence of Clause (a) of Section 43B.

12. It may be noticed that even without the aid of this proviso, the various High Courts have taken the view that where a sum is payable under the relevant tax law within the time limit allowed thereunder and the period within which the amount is required to be paid under the relevant tax law has still not expired on the date the previous year closes, then on payment of such tax within the period provided under the relevant taxing statute, it would still be allowable deduction, and Clause (a) has been construed accordingly. That view has been expressed by the Gujarat High Court in *Commissioner of Income Tax Vs. Chandulal Venichand*, ; the Calcutta High Court in *Commissioner of Income Tax Vs. Sri Jagannath Steel Corporation*, and by the Patna High Court in *Jamshedpur Motor Accessories Stores Vs. Union of India (UOI) and Others*, , without multiplying the instances it may be noticed that the Madhya Pradesh High Court, the Andhra Pradesh High Court and the Rajasthan High Court have also expressed the similar views.

13. The Delhi High Court in *Escorts Ltd. v. Union of India* [1991] 189 ITR 81, had taken a contrary view.

14. Our aforesaid view is fortified by the decision of the Supreme Court in *Allied Motors (P.) Ltd. Vs. Commissioner of Income Tax, Delhi*, in which the decision of the Delhi High Court in *Escorts Ltd.*'s case [1991] 189 ITR 81 which had followed its earlier decision in *Sanghi Motors v. Union of India* [1991] 187 ITR 703 was

reversed and the view in *Sanghi Motors v. Union of India* [1991] 187 ITR 703, was overruled. On the same point, the view taken by the Gujarat, Patna and Calcutta High Courts referred to above has been approved. The Supreme Court has held that Section 43B(a), and the first proviso to Section 438 and Explanation 2 have to be read together as giving effect to the true intention of Section 43B. If Explanation 2 is retrospective, the first proviso will have to be so construed. Without the first proviso, Explanation 2 would not obviate the hardship or the unintended consequences of Section 43B. The proviso supplies an obvious omission. But for this proviso the ambit of Section 43B becomes unduly wide bringing within its scope those payments, which were not intended to be prohibited from the category of permissible deductions. The first proviso to Section 43B therefore, has to be treated as retrospective. The court said that the rule of reasonable construction must be applied while construing a statute.

15. As a result of the aforesaid discussion, we hold that u/s 43B if the amount of sales tax is paid within the time allowed under the first proviso to that section although after the close of the relevant previous year, it shall still be allowed as deduction and the case of the assessee has to be viewed in that light.

16. Accordingly, the question referred to us is answered. There shall be no order as to costs.