**(2010) 04 KAR CK 0053**

**In the Karnataka High Court**

**Case No :** IT Appeal No. 2960 of 2005

Commissioner of Income Tax — APPELLANT

Vs

Mac Charles (India) Ltd. — RESPONDENT

**Date of Decision :** 06-04-2010

**Acts Referred:**
Income Tax Act, 1961 — Section 40 (a) (i), 43 B

**Citation :** (2010) 195 TAXMAN 296

**Hon'ble Judges :** K.L. Manjunath, J;B.V. Nagarathna, J

**Bench :** Division Bench

**Advocate :** K.V. Aravind and M.V. Seshachala, for the Appellant; S. Parthasarathi and Mallaha Rao, for the Respondent

**Final Decision :** Dismissed

## Judgement

1. This appeal is filed by the revenue challenging the order dated 5-4-2005passed in I.T.A. No. 731/Bang./2001 on the following substantial questions of law:

(i) Whether the Appellate Authorities were correct in holding that employers contribution to PF & ESI made belatedly, i.e., after the year ending was a permissible deduction by treating the amendment to Section 43B introduced by the Finance Act of 2003 with effect from 1-4-2004 as retrospective and applicable to the current assessment year?

(ii) Whether the Appellate Authorities were correct in holding that the provision made by the Assessee towards foreign exchange fluctuation in respect of technical know-how fee is a permissible deduction and the provisions of Section 40(a)(i) of the Act is not applicable as this amount was treated by the Assessee as debit?

2. The facts leading to the filing of this appeal are that the Assessee, who is engaged in hotel industry for the assessment year 1991-92, filed its return of income declaring a loss. The said return was processed and thereafter taken up

 

for scrutiny assessment. The assessing officer found that the employers contribution towards PF and ESI had been remitted belatedly and the same was disallowed u/s 43B of the Income Tax Act. The assessing officer also found that a sum of Rs. 1,09,200 had been provided as a liability on account of foreign exchange fluctuation in respect of technical know-how fee. This amount had been debited to the profit and loss amount even though no payment in this regard had been made to the foreign parties. According to the assessing officer, there could be no deduction of tax at source on this amount and therefore the entire amount was disallowed u/s 40(a)(z) of the Act, by holding that the disallowance of Rs. 1,09,200 was not warranted. Against the said order, an appeal was filed before the Commissioner of Appeals. The said appeal was allowed by an order dated 12-7-2000.

3. Being aggrieved by the said order, the revenue carried the matter before the Appellate Tribunal. The Tribunal on both the contentions raised by the Assessee granted the relief and dismissed the appeal of the revenue. The said order is under challenge in this appeal.

4. We have heard the learned Counsel for the Appellant-Revenue and the learned Counsel for the Respondent Assessee.

5. During the course of submissions, it brought to our notice that as far as substantial question of law No. 1 is concerned, the same has to be answered in favour of the Assessee and against the revenue, by virtue of the decision of the Apex court in the case of CIT v. Alom Extrusions Ltd. (2009) 185 Taxman 416, disposed of on 25-11-2009 and, therefore, on the basis of the said submission, we, accordingly, answer the said question against the revenue.

6. As far as substantial question of law No. 2 is concerned, it is seen that the expenses claimed on exchange rate fluctuation of fees paid during the assessment years 1991-92 and 1992-93 had been allowed as expenses in respect of the very same Assessee. However, the contention of the learned Counsel for the Appellant is that only a provision was made with regard to the technical know-how fee but on account of the differences in the rate of dollar in relation to the rupee, the fluctuation that would have resulted would also be a part of the technical fee and, therefore, the Assessee had to deduct TDS in respect of the said differential amount also.

7. It is to be noted that the increase or decrease in the actual payment of the technical know-how fee would ultimately depend upon the foreign exchange fluctuation and that when a provision has been made on the basis of the exchange rate then existing and TDS has been deducted on the said sum, in the event of there being any higher payment of fee made on account of fluctuation, it would not be necessary to once again deduct TDS on the said amount as the same would have to be done when the amount would be actually paid at a future date. Since the Assessee is following the Mercantile System of Accounting, it is only in respect of the provision made in the accounts that the TDS amount would

 

be deducted and the same would have been passed on to the department. It is also to be noted that on account of the fluctuation in the foreign exchange if there would be a reduction of the technical know-how fee, then there is no provision for return of the refund of the TDS which would have already been paid by the Assessee on account of the said fluctuation.

8. In the circumstances, the Tribunal was justified in not accepting the contention of the revenue and for the aforesaid reasons and the reasons assigned by the Tribunal, we find that the substantial question of law No. 2 has to be answered against the revenue. Consequently, the appeal is dismissed.