
(2000) 06 CAL CK 0004

In the Calcutta High Court

Case No : IT Ref No. 19 of 1996 22 June 2000 A.Y. 1984-85 and 1988-89

COMMISSIONER OF INCOME TAX

APPELLANT

Vs

ORIENT BEVERAGES LTD.

RESPONDENT

Date of Decision : 22-06-2000

Acts Referred:

Income Tax Act, 1961 — Section 263, 43B, 43b(a)

Citation : (2001) 164 CTR 529

Hon'ble Judges : S.N. Bhattacharjee, J;Chatterjee, J

Bench : Full Bench

Judgement

By the Court

On the application of the Commissioner, West Bengal-III, Calcutta, the following question has been referred by the Tribunal for decision by this court :

"Whether on the facts and in the circumstances of the case and on a proper interpretation of the provisions of section 43B, the Tribunal was right in law in holding that the assessee was entitled to the deduction of the interest payable on the outstanding municipal taxes ?"

However, before the Tribunal the following questions were referred :

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the assessee was entitled to the deduction of the interest payable on the outstanding municipal taxes thereby cancelling the order of the Commissioner passed u/s 263 of the Income Tax Act ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the assessee was justified in holding that the assessee was justified to the deduction of the interest payable on the outstanding municipal taxes thereby reversing the order of the Commissioner (Appeals) ?"

2. The reference arises out of the assessment of M/s Orient Beverages Ltd. for the assessment years 1984-85 and 1988-89. The company (hereinafter referred

to as the assessee), is engaged in the business of purchasing land or taking the same on lease putting up construction thereon and letting out the building for rent. The two main properties held by the assessee at the material time were at No. 50, Chowringhee Road, Calcutta, and the building was known as Tiveli Park Building, 225C, A.J.C. Bose Road, Calcutta.

In the assessment order for the assessment year 1984-85, the assessing officer allowed a deduction of Rs. 5,61,042 being payable to Calcutta Municipal Corporation on the amount of municipal taxes outstanding. The rent received in respect of the Tiveli Park building was considered as "Property income" whereas, the rent received from the building at Chowringhee Road was assessed as "business income". The Commissioner initiated a proceeding u/s 263 of the Income Tax Act and held that the assessing officer was wrong in allowing deduction in respect of interest payable to the Calcutta Municipal Corporation since the interest was part of the municipal tax itself, and was liable to be disallowed u/s 43B of the Income Tax Act, (hereinafter referred to as the Act) as the same had not been actually paid.

In respect of the assessment years 1988-89, the Income Tax Officer himself disallowed the interest of Rs. 8,83,503 u/s 43B of the Act. The disallowance was upheld by the Commissioner (Appeals).

3. The assessee filed appeals to the Tribunal against the order of the Commissioner for the assessment year 1984-85 and the order of the Commissioner (Appeals) for the assessment year 1988-89. The appeals were heard and disposed of together. The Tribunal after considering the relevant provisions held that the interest payable in respect of the outstanding municipal tax, was not to be treated as an adjunct or part of the municipal taxes and, therefore, the provisions of section 43B of the Act could not be invoked for disallowing the outstanding interest. In coming to that conclusion, the Tribunal applied the principles laid down by the Supreme Court in *Mahalaxmi Sugar Mills Co. Vs. Commissioner of Income Tax, Delhi*, for the purpose of finding out whether the interest formed part of the tax or not.

4. After considering the aforesaid Supreme Court decision and also a decision of the Calcutta High Court in *Precision Instrument Manufacturing Co. Vs. Commissioner of Income Tax, Delhi*, it was found by the Tribunal that the interest cannot be disallowed u/s 43B of the Act.

After considering the orders of the assessing officer and the Commissioner (Appeals), the Tribunal framed the aforesaid question for decision by this court.

5. Mr. Agarwal, learned advocate appearing for the department however, submits that although the aforesaid question was only framed by the Tribunal, even then the department would be entitled to argue before this court relating to the other two questions which were heard by the Tribunal. To give an answer to this submission, we examined the entire materials on record, and also the judgments and orders passed by the assessing officer, Commissioner (Appeals) and also the

Tribunal. After a perusal of the aforesaid judgments and orders and considering the fact the said questions were already decided by the Tribunal and excepting the question as referred to hereinabove, nothing was urged before the Tribunal, we are not inclined to permit Mr. Agarwal, to raise the questions which were already decided by the Tribunal, Let us now come back to the question already framed by the Tribunal which has been referred for our decision. Before we proceed to consider the decisions cited by the learned counsel for the parties, it would not be out of place to reproduce section 43B of the Income Tax Act which is as follows:

"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 loans or borrowing, or

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

6. We have carefully examined the scope and ambit of section 43B of the Act. In our view, this section has two parts. The first part is that whether the interest paid in addition will at all be deductible under this section and if so, then the question would arise whether the assessee would be entitled to the deduction until and unless the said amount is actually paid. So far as this case is concerned, we are not concerned with the second part. Therefore, let us concentrate ourselves on the first part of the section 43B of the Act. The question that is to be decided is, whether the interest paid u/s 43B(a) of the Act would be deductible under the said section. No dispute has been raised by Mr. Agarwal, learned advocate, appearing for the department that in this particular case section 43B(a) would be applicable. The section 43b(a), as noted earlier, provides, 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. In our view, this question has been set at rest by the decision of the Supreme Court as well as by another decision of this court.

7. In *Mahalakshmi Sugar Mills Co. v. CIT* (supra), as noted herein earlier, the Supreme Court, while considering a case u/s 3(3) of the U.P. Sugarcane Cess Act, 1956 on arrears of cess payable held that the interest payable did not fall within the scope of section 10(2)(xv) of the Indian Income Tax Act, 1922, because it was paid by way of penalty or infringement of the Cess Act. In that actual situation the Supreme Court held that the interest payable u/s 3(3) of the Cess Act was not a penalty paid for an infringement of law and was an allowable deduction u/s 10(xv) of the Act. At p. 434 of the said decision, the Supreme Court has made the following observation ..

"In truth, the interest provided u/s 3(3) is in the nature of compensation paid to the Government for delay in the payment of cess. It is not by way of penalty. "

(Emphasis here italicised in print, supplied)

From the above it is clear that in this decision the Supreme Court has made it clear that the interest paid under the Cess Act, is not a penalty but a compensation paid to the Government. Mr. Agarwal, learned advocate appearing on behalf of the department, however, seeks to distinguish this decision on the footing that this decision was rendered on a different fact situation. This argument of Mr. Agarwal, we are afraid, is not acceptable because on the similar question subsequent decision was rendered by a Division Bench of this court in *Russels Properties (P) Ltd. v. CIT* (supra) following the aforesaid decision of Supreme Court in *Mahalakshmi Sugar Mills Co. v. CIT* (supra), in the said case, Their Lordships also came to a conclusion that interest paid under the Calcutta Municipal Act, 1951 which is also a matter for consideration by us in this case, is not for defiance of law and, therefore, this is an allowable deduction under the Act.

At p. 365 of the said decision, Sabyasachi Mukherji, J. observed as follows

"The Supreme Court was of the view that interest payable on arrears of cess u/s 3(3) was in reality part and parcel of the liability to pay cess. It was an accretion to the cess. The arrears of cess, according to the Supreme Court, if the cess was not paid within the prescribed period, a larger sum would become payable as cess. We have noticed the nature of sub-section (3) of section 236 of the Calcutta Municipal Act, which is more or less in similar terms. It is also a like expression as used in section 3(3) of the U.P. Sugarcane Cess Act, 1956 which enjoins that "Interest shall be payable". The Supreme Court was of the view that in truth the interest provided in section 3(3) of the U.P. Sugarcane Cess Act 1956 was in the nature of compensation paid to the Government for delay in the payment of cess. It was not by way of penalty for which provision has been separately made by section 3(5)."

(Emphasis, here italicised in print, supplied)

8. From the above, we cannot agree with Mr. Agarwal, learned advocate for the revenue , that since the principle laid down in the said decision of the Supreme Court cannot be applied to the facts of this case, as we find that Sabyasachi Mukherji, J (as His Lordship then was) in the aforesaid Division Bench decision considered the Cess Act as well as the Calcutta Municipal Act, with which we are now therefore (sic), it cannot be disputed that the decision of Hindustan Motors Ltd. as rendered by Sabyasachi Mukherji J. (as His Lordship then was) was so rendered applying the principles laid down in the aforesaid decision of the Supreme Court and the submission of Mr. Agarwal that the decision of, the Supreme Court was not applicable to this case, cannot be alleged. That apart, we are also fortified by a recent decision of this court in the case of Hindustan Motors Limited Vs. Commissioner of Income Tax, . It appears that there was a difference of opinion on the question mentioned above between the Hon''ble Chief Justice Mr. K.C, Agarwal (as His Lordship then was) and the Hon''ble Justice Mrs. Ruma Pal (while she was in this Court). The matter was referred to a Third Judge, the Hon''ble Justice Prabir Kumar Majumdar (as His Lordship then was). His Lordship by his order dated 20-2-1995, agreed with the views expressed by Ruma Pal, J and held that he was not inclined to agree with the answer put forward by the Hon''ble Chief Justice K.C. Agarwal, but on the other hand, he accepted and agreed with the answer proposed by Ruma Pal, J. There is yet another Division Bench decision of this court Commissioner of Income Tax Vs. Padmavati Raje Cotton Mills Ltd., , which also laid down the same principle following the Division Bench decision just now referred to above in the case of Hindusthan Motors Ltd. v. CIT (supra). In the case of Pratibha Processors & Ors. v. Union of India & Ors. 1966 (11) SCC 101. In para. 13, the Supreme Court has observed as follows :

"In fiscal statutes, to import of the words "tax", "interest", "penalty", etc." are well known. They are different concepts. "Tax" is the amount payable as a result of the charging provision. It is a compulsory exaction of money by a public authority for public purposes, the payment of which enforced by law. Penalty is ordinarily levied on an assessee for some contumacious conduct or for a deliberate violation of the provision of the particular statute. Interest is compensatory in character and is imposed on an assessee, who has withheld payment of any tax and when it is due and payable, the levy of interest is geared to actual amount of tax withheld and the extent of the delay in paying the tax in the due date. Essentially it is compensatory and duty for penalty which is penal in character":

(Emphasis, here italicised in print, supplied)

9. In view of our discussion made hereinabove, it is, therefore, clear that the interest payable for arrears of municipal taxes is really compensatory in nature and not a penalty or tax.

For the reasons aforesaid, we answer the question raised before us against the revenue and in favour of the assessee.

There will be no order as to costs.