
(2008) 05 RAJ CK 0137
In the Rajasthan High Court

Commissioner of Income Tax

APPELLANT

Vs

Ravindra Platinum P. Ltd.

RESPONDENT

Date of Decision : 13-05-2008

Acts Referred:

Income Tax Act, 1961 — Section 143, 43B

Citation : (2008) 90 CTR 220 : (2008) 302 ITR 229

Hon'ble Judges : N.P. Gupta, J;Kishan Swaroop Chaudhari, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

N.P. Gupta, J.—These three appeals relate to the same assessee and involve a common question of law, and are, therefore, being decided by this common order. Appeal No. 49 of 2005 relates to the assessment year 1993-94, Appeal No. 30 of 2005 relates to the assessment year 1994-95, and Appeal No. 132 of 2005 relates to the assessment year 1996-97.

2. The learned Income Tax Appellate Tribunal decided the appeals relating to the years 1993-94 and 1994-95 by a common order dated October 12, 2004, out of which two Appeals Nos. 49 and 30 arise, while appeal relating to the assessment year 1996-97 was decided, vide order dated October 18, 2004, by simply following its earlier judgment dated October 12, 2004.

3. The bereft of unnecessary details the facts are that during these relevant years, after assessment having been made u/s 143(1)(a), the cases were taken up for scrutiny, and after completing the requisite formalities revised assessment orders were passed. Since in the present matters the controversy relates only to the admissibility of deduction u/s 43B, we think it appropriate to confine on that aspect of the matter only.

4. In the revised assessment order, the learned Assessing Officer found that the assessee had collected sales tax during the relevant year, and did not deposit it in the State treasury, in view of the fact, that the assessee was issued eligibility

certificate under the Rajasthan Sales Tax Deferment Scheme, 1987, published in the Gazette on September 29, 1987, which was framed in exercise of the powers conferred u/s 7(2B) of the Rajasthan Sales Tax Act, 1954, hereafter referred to as "the Act of 1954", according to which the assessee was not required to pay to the Government the sales tax collected by it for a period of 7 years, and was to pay thereafter in accordance with the Scheme, and during this interregnum period, the amount of sales tax collected was deemed to have been actually collected by the Government, and disbursed as loan to the present assessee. In this regard the assessee relied upon a notification dated March 27, 1995, issued by the State of Rajasthan, so also the Central Board of Direct Taxes Circular No. 674, read with the provisions of the said Rajasthan Sales Tax Deferment Scheme, 1987. The learned Assessing Officer in all the years disallowed the deduction and made addition by holding that so far the assessment years 1993-94 and 1994-95 are concerned, the notification dated March 27, 1995, is not retrospective, and so far as the assessment year 1996-97 is concerned, the conversion of the sales tax amount into loan has not taken place during the financial year concerned, and that the assessee has failed to produce any evidence to establish that any entry has been passed in the Government account regarding conversion of sales tax collected as loan during the financial year concerned.

5. Against these assessment orders relating to all the three years, the assessee filed appeals before the learned Commissioner (Appeals). The appeals relating to the assessment years 1993-94 and 1994-95 were dismissed by the learned Commissioner (Appeals), holding that, according to Circular No. 496 (see [1988] 169 ITR 53), the sales tax deferred can be treated as actually paid if such an amendment is made, by the State Government in the Sales Tax Act and, according to Circular No. 674 (see [1994] 205 ITR 119), the sales tax liability converted into loans under the notified schemes of the State Government can be allowed as deduction u/s 43B in the previous year in which the conversion has been permitted under the Government orders and that, by notification dated March 27, 1995, the State Government has notified that deferred sales tax shall be deemed to have been paid where a loan liability equal to the amount of such tax payable by such dealer has been raised by RIICO/RFC or the Industries Department. Thus, it was found that Circular No. 496 (see [1988] 169 ITR 53) will not be applicable, as Government has not made any such amendment in the Act of 1954, while Circular No. 674 (see [1994] 205 ITR 119) will not be applicable, because in the present case sales tax deferred has not been converted into loan either by RIICO/RFC or the Industries Department during the year concerned. Thus, the addition was upheld. This order was passed by the learned Commissioner of Income Tax (Appeals) on October 18, 1996.

6. However, the appeal relating to the assessment year 1996-97 in this regard was allowed by the learned Commissioner (Appeals), vide order dated September 14, 1999, inter alia, holding that it is not in dispute that the State Government has issued notification to the effect that the sales tax collected by

the appellant to the equal of the loan liability raised by RIICO/ RFC or the Industries Department will be treated as loan, that too interest-free, and the same should be paid in instalments in the subsequent years, as desired by the Sales Tax Department. Thus, the observation of the Assessing Officer about non-conversion of sales tax into loan was not accepted in view of the certificate issued by the Industries Department. Thus, the Central Board of Direct Taxes Circular No. 674 (see [1994] 205 ITR 119) was found applicable and to the extent of this conversion of deferred sales tax amount as loan, the addition was deleted.

7. In view of the above, for the assessment years 1993-94 and 1994-95, the assessee filed appeals before the learned Tribunal, which were decided, as noticed above, vide order dated October 12, 2004, while in the case of the assessment year 1996-97, the Revenue filed appeal before the learned Tribunal, which was decided, vide order dated October 18, 2004. Since the order dated October 18, 2004, simply followed the order dated October 12, 2004, the appeals do clearly involve a common question of law.

8. These appeals were admitted by this Court, vide different orders, framing the following substantial question of law, common in all the three appeals:

Whether, on the facts and in the circumstances of the case, the assessee was entitled to deduction u/s 43B of the Act in respect of sales tax amount deferred under the State Government's Deferment Scheme?

9. Assailing the impugned judgments of the learned Tribunal, it is contended by learned Counsel for the Revenue, that so far the assessment years 1993-94 and 1994-95 are concerned, since the State Government's notification dated March 27, 1995, is not retrospective, no benefit thereof could be derived by, or allowed to the assessee, and so far the assessment year 1996-97 is concerned, it was contended, that the certificate of conversion of deferred sales tax into loan, has not been issued in that relevant financial year, therefore, it cannot be said that it was converted in the relevant previous year, so as to entitle the assessee to claim any deduction. It was also contended that even so far as the Central Board of Direct Taxes Circular No. 674 is concerned, since it is not shown on the side of the assessee, that entries have been made in the Government accounts giving effect to the deemed conversions by crediting appropriate receipt heads relating to disbursement of loan, and, therefore, the assessee is not entitled to deduction u/s 43B.

10. Learned Counsel for the assessee, on the other hand, supported the impugned judgment of the learned Tribunal.

11. Our attention was invited by learned Counsel for the Revenue, to the judgment of the hon'ble the Supreme Court in Commissioner of Income Tax Vs. Gujarat Polycrete Pvt. Ltd., to contend, that in the absence of the amendment having been effected in the relevant Sales Tax Act to provide, that the sales tax deferred under an incentive scheme would be treated as actually paid, it would

not satisfy the requirement of Section 43B about the amount actually having been paid. Then, reliance was placed by learned Counsel for the Revenue on the judgment of this Court also, in the case of Commissioner of Income Tax Vs. Devendra Udhyog, It may be observed here that the learned Tribunal while deciding the appeals in the assessment years 1993-94 and 1994-95, had also relied upon its earlier judgment in Commissioner of Income Tax Vs. Devendra Udhyog, which according to learned Counsel for the Revenue, has been set aside by this Court in the said judgment reported in Commissioner of Income Tax Vs. Devendra Udhyog,

12. To distinguish these cases, learned Counsel for the assessee invited our attention to the provisions of Section 7(2B) of the Act of 1954, which was inserted by an amendment with effect from September 10, 1987, and provides that notwithstanding anything contained in Sub-section (2) or Sub-section (2A), where the State Government is of the opinion, that it is necessary or expedient in the public interest so to do, it may, by notification in the Official Gazette, defer the payment of tax payable by any class of dealers for any period on such conditions and under such circumstances as may be specified in the notification. According to learned Counsel, since the Sales Tax Deferment Scheme, 1987, has been issued in exercise of the powers conferred by this provision, it clearly amounts to effecting amendment in the State Sales Tax Act, as contemplated in the judgment of the hon'ble Supreme Court in Commissioner of Income Tax Vs. Gujarat Polycrete Pvt. Ltd., . It was also submitted that in Commissioner of Income Tax Vs. Devendra Udhyog, the above amendment, so also the amendment made in the scheme, were not brought to the notice of the court ; firstly, it appears because nobody appeared for the assessee, and, secondly, the very basis of the judgment is, that this Court has found that for the purpose of benefit of the Central Board of Direct Taxes Circular No. 496 (see [1988] 169 ITR 53) dated September 25, 1987, unless the Government made amendment in the Sales Tax Act to the effect, that sales tax collected under the Sales Tax Deferment Scheme shall be treated as actually paid, for the purpose of Section 43B, the addition u/s 43B should be made, and admittedly no such amendment had been made in the Sales Tax Act by the State Government, and, therefore, the addition was upheld by setting aside the order of the Tribunal, while as a matter of fact the amendment has been made, by introducing Section 7(2B), and then, by adding the second proviso to paragraph 4 in the Deferment Scheme, providing, that notwithstanding anything contained in this notification, but subject to such conditions as the State Government may, by general or special order specify, where a dealer to whom incentive by way of deferment of sales tax has been granted by virtue of eligibility certificate issued under this notification, and where a loan liability equal to the amount of any such tax payable by such dealer has been raised by RIICO/RFC or the Industries Department, then such tax shall be deemed in the public interest to have been paid, and thus, since the judgment in Commissioner of Income Tax Vs. Devendra Udhyog, is on the basic misconception of law, and attention of the court having not been invited, that

judgment is no better than per incuriam. It was also submitted, that all said and done, in view of the Deferment Scheme, it cannot be said that for the purpose of Section 43B of the Income Tax Act, this sum was "payable" by the assessee by way of tax, and, therefore, the requirement of the proviso, requiring actual payment, to entitle the assessee to claim deduction, was not even attracted.

13. We have considered the submissions and have gone through the orders of the learned authorities below, including those of the learned Tribunal, in all the three matters, and have gone through the various judgments cited at the Bar.

14. Before proceeding further we may gainfully quote the provisions of Section 7(2B) of the Act of 1954, which is introduced by the amendment with effect from September 10, 1987, so also the provisions of the proviso to paragraph 4 of the Scheme, which was inserted, vide notification dated March 27, 1995, (without specifying as to, with effect from what date it has been introduced). These read as under:

(2B) Notwithstanding anything contained in Sub-section (2) or Sub-section (2A), where the State Government is of the opinion that it is necessary or expedient in the public interest so to do, it may, by notification in the Official Gazette, defer the payment of tax payable by any class of dealers for any period on such conditions and under such circumstances as may be specified in the notification.

4. Deferment of tax on sales:....

Provided further that notwithstanding anything contained in this notification but subject to such conditions as the State Government may, by general or special order specify, where a dealer to whom incentive by way of deferment of sales tax has been granted by virtue of eligibility certificate issued under this notification, and where a loan liability equal to the amount of any such tax payable by such dealer has been raised by RIICO/RFC or the Industries Department, then such tax shall be deemed in the public interest to have been paid.

15. Then, we may straightway consider the judgments cited at the Bar. The judgment in Commissioner of Income Tax Vs. Gujarat Polycrete Pvt. Ltd., is very short judgment, and a look thereat shows, that the hon'ble Supreme Court considered the Central Board of Direct Taxes Circular dated September 25, 1987 (this is Central Board of Direct Taxes Circular No. 496 (see [1988] 169 ITR 53)), and found, that its provision would apply only if a State Government had amended its Sales Tax Act, to provide, that the sales tax, that was deferred under an incentive scheme framed by it would be treated as actually paid, so as to meet the requirements of Section 43B of the Income Tax Act. It was also found that notice does not appear to have been taken of the Gujarat Sales Tax Act, 1969, to ascertain, whether or not there was such an amendment. With these conclusions, it was found, that the question of law clearly arises requiring to be answered by the High Court, and therefore, the order of the High Court was set aside, and the question was directed to be referred by the Tribunal to the High Court for consideration, after drawing up a statement of case. In the first

instance, it appears, that the attention of the hon'ble Supreme Court was not invited to the Central Board of Direct Taxes Circular No. 674 (see [1994] 205 ITR 119), which is dated December 29, 1993, while the appeal before the hon'ble Supreme Court was instituted in the year 1995, and was decided on March 17, 1999. At this stage we may gainfully quote the said Central Board of Direct Taxes Circular No. 674, which reads as under:

Subject : Scope of application of Section 43B--Amounts covered under the sales tax deferral schemes of State Governments--regarding.

1. The scope of application of the provisions of Section 43B to the sales tax collected but not actually paid under deferral schemes of the State Governments was considered in Boards Circular No. 496 (F. No. 201/34/86-ITA.II), dated September 25, 1987 (see [1988] 169 ITR 53), and it was decided that, where the State Governments make an amendment in the Sales Tax Act to the effect that the sales tax deferred under the scheme shall be treated as actually paid, the statutory liability shall be treated as discharged for the purposes of Section 43B.

2. It has since been brought to the notice of the Board that some State Governments, instead of amending the Sales Tax Act, have issued Government orders notifying schemes under which sales tax is deemed to have been actually collected and disbursed as loans. Such Government orders also provide that entries shall be made in the Government accounts giving effect to deemed collections by crediting the appropriate receipt-heads relating to sales tax collections and debiting the heads relating to disbursement of loans. It has, therefore, been represented that, as such conversion of the sales tax liability into loans have similar statutory effect as can be achieved through amendments of the Sales Tax Act, the amounts covered under the scheme should be allowed as deduction for the previous year in which the conversion has been permitted by the State Governments.

3. The Board have considered the matter and are of the opinion that such deferral schemes notified by the State Governments through Government orders meet the requirements of the Boards Circular No. 496, dated September 25, 1987 (see [1988] 169 ITR 53), in effect though in a different form. Accordingly, the Board have decided that the amount of sales tax liability converted into loans may be allowed as deduction in the assessment for the previous year in which such conversion has been permitted by or under the Government orders.

16. A look at this circular shows that this has been issued for the purpose of clarifying the scope of Section 43B, to the sales tax collected but not actually paid, under deferral schemes of the State Governments, and it was circulated, that the Board is of the opinion, that such deferral schemes notified by the State Governments through the Government orders, meet the requirements of the Board's Circular No. 496 (see [1988] 169 ITR 53), in effect, though in a different form. Accordingly, the Board had decided that the amount of sales tax liability,

converted into loans, may be allowed as deduction, in the assessment, for the previous year, in which such conversion has been permitted, by or under the Government orders. A look at Circular No. 674 [1994] 205 ITR 119) further shows that this circular was necessitated because it was brought to the notice of the Board, that some State Governments, instead of amending the Sales Tax Act, have issued Government orders, notifying schemes, under which sales tax is deemed to have been actually collected, and disbursed as loans. In our view, thus, even as per the directions contained in the judgment of the hon''ble Supreme Court, in Commissioner of Income Tax Vs. Gujarat Polycrete Pvt. Ltd., , it was required to be seen, as to whether the provisions of the Act of 1954 do contain the requisite amendment. Obviously, a look at Section 7(2B) does show that it does contain an amendment, authorising the State to frame the necessary scheme, and in exercise of those powers, this Sales Tax Deferment Scheme of 1987 has been framed and published which clearly satisfies the requirement of the Central Board of Direct Taxes Circular No. 674 (see [1994] 205 ITR 119). Thus, this judgment in Commissioner of Income Tax Vs. Gujarat Polycrete Pvt. Ltd., does not help the case of the Revenue.

17. So far as Commissioner of Income Tax Vs. Devendra Udhyog, is concerned, as noticed above, amendment in the Act was projected to have admittedly not been made, and as appears from the recapitulation of the submissions made before this Court by learned Counsel for the Revenue, the attention of this Court was invited to only Circular No. 496 (see [1988] 169 ITR 53), and it was contended that admittedly no amendment has been made, and that, in Circular No. 674 (see [1994] 205 ITR 119), if the sales tax collected, has neither been paid actually, nor that liability has been converted into loan, that amount is hit by the provisions of Section 43B, and in that case, the amount of sales tax had not been converted into loan, as required by Circular No. 674 (see [1994] 205 ITR 119). This Court, after noticing the submissions, found that neither there is an amendment in the Sales Tax Act to give effect to the provisions of the scheme, nor sales tax collected has been converted into loan, as required by Circular No. 674 (see [1994] 205 ITR 119). With these conclusions, the judgment of the learned Tribunal was set aside. As against this, in the cases in hand, as is clear from the narration of facts, made above, that admittedly the sales tax collected has been converted into loan, as required by Circular No. 674 (see [1994] 205 ITR 119). Thus, this judgment also cannot be said to be of any assistance to the Revenue.

18. Then, we may refer to a recent Division Bench judgment of the Gujarat High Court in the case of Commissioner of Income Tax Vs. Shree Talal Taluka Sahakari Khand Udyog Mandli Ltd., . In that case, the judgment of the hon''ble Supreme Court in Commissioner of Income Tax Vs. Gujarat Polycrete Pvt. Ltd., was also cited on the side of the Revenue, and it was noticed, that the Gujarat Government had passed a resolution, dated March 21, 1988, making it operative from April 1, 1983. This resolution was considered in the light of the Central Board of Direct Taxes Circular No. 496 (see [1988] 169 ITR 53), and it was found

that if the tax due to the Government is converted as a loan, which may be repaid by the assessee subsequently, by instalments, the Department shall treat the sales tax due as actually paid, for all purposes. Then, it was also considered that an amendment was introduced in the Gujarat Sales Tax Act, and the second proviso was inserted to Section 47(4) with effect from March 24, 1988, which amendment has been quoted in the judgment. And we find, that the said proviso is in pari materia, the proviso introduced in paragraph 4 of the Sales Tax Deferment Scheme of 1987, and it was held that the amendment made on March 24, 1988, is clarificatory in nature, and, therefore, it was found that the Tribunal was right in deleting the addition made by the Assessing Officer, by invoking the provisions of Section 43B, in respect of sales tax liability.

19. If the cases in hand are examined on the line of this judgment, with which we are inclined to concur, it is more than clear, that admittedly so far as the assessment year 1996-97 is concerned, this amendment in the Deferment Scheme had already been effected. In so far as assessment years 1993-94 and 1994-95 are concerned, we are in agreement with the view taken by the learned Gujarat High Court, that the amendment is clarificatory in nature, and, therefore, when the assessee has shown the certificate issued, showing that certain amount of tax collected has been converted into loan, obviously the assessee has rightly been held entitled to deduction, as it is being shown to have been paid, for the purpose of Section 43B.

20. Consequently, the question as framed is answered in the affirmative, i.e., against the Revenue and in favour of the assessee. Resultantly the appeals have no force, and are dismissed.