Bombay High Court Commissioner Of Income Tax-4 vs M/S Hindustan Organics Chemicals ... on 11 July, 2014 Bench: S.C. Dharmadhikari vrd 1 ITXA399/12

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.399 OF 2012

Commissioner of Income Tax-4,

Mumbai 400 020 ...Appellant

v/s

M/s Hindustan Organics Chemicals Ltd.,
Mumbai 400 002 ...Respondent

Mr A.R. Malhotra for Appellant. Mr K. Gopal with Mr Jitendra Singh for Respondent. CORAM : S.C. DHARMADHIKARI AND B.P. COLABAWALLA JJ. RESERVED ON : 27th June, 2014.

PRONOUNCED ON : 11th July, 2014.

ORAL JUDGMENT : (Per B.P. Colabawalla J.) :-

1. This Appeal under section 260A of the Income Tax Act, 1961 is filed by the Commissioner of Income Tax - 4 against the judgment and order

dated 26th August 2011 passed by the Income Tax Appellate Tribunal, 'H' Bench, Mumbai (hereinafter referred to as "the ITAT"). The Assessment Year in question is 2006-07. Mr Malhotra, learned counsel appearing on behalf of the Appellant submitted that in the facts of the present case, vrd 2 ITXA399/12 substantial questions of law arise in this Appeal and they read as under :- "(A) Whether on the facts and in the circumstances of the case, the Hon'ble Tribunal, in law, was right in allowing the claim of the Assessee on account of delayed payments of P.F. Of employees' contribution amounting to Rs.1,82,77,138/- by relying on the decision of the Hon'ble Supreme Court in the case of CIT vs. Alom Extrusion Ltd. (319 ITR 306) ?

(B) Whether on the facts and in the circumstances of the case, the Hon'ble Tribunal, in law, was right in deleting the disallowance of Rs.10,00,300/- on bond registration charges and allowing the claim of the assessee u/s 37(1) of the I.T. Act 1961 ?"

2. According to Mr Malhotra, the ITAT erred in dismissing the Appeal of the Revenue by upholding the order of the CIT (Appeals). With reference to the first question, the CIT (Appeals) held that the deduction with respect to payment made towards employees' contribution amounting to Rs.1,82,77,138/- was an allowable deduction and accordingly directed the Assessing Officer to allow the payment made by the Assessee within the grace period, and disallow the payment made after the grace period. As far as the second question is concerned, he submitted that similarly the ITAT erred in confirming the order of the CIT (Appeals), who allowed the deduction of Rs.10,00,300/- that was incurred by the Assessee towards bond registration charges. Hence, the present appeal.
3. The facts stated briefly are that the Assessee Company is engaged in the business of manufacturing basic chemicals and chemical intermediates and is a Government of India enterprise. The return of income of the Assessee for the assessment Year 2006-07 was filed on 30 th November 2006 vrd 3 ITXA399/12 declaring a total loss of Rs.28,54,70,623/-. The case of the Assessee was selected for scrutiny and thereafter the assessment was completed and an Assessment Order was passed under section 143(3) of the Act determining the total income of the Assessee at Rs.25,75,61,100/- after making various additions / disallowances. For the purpose of the present Appeal, the disallowance with reference to the payment of employees' contribution to the P.F. amounting to Rs.1,82,77,138/- and expenses of Rs.10,00,300/- towards bond registration charges are in dispute. Being aggrieved by the said Assessment Order, the Assessee preferred an Appeal before the CIT (Appeals) who by his order dated 17th February 2010 partly allowed the Assessee's Appeal. With reference to the employees' contribution to P.F., the CIT (Appeals) directed the Assessing Officer to allow the deduction in respect of payments made within the grace period

and disallow the payments made after the grace period. As regards bond registration charges, the CIT (Appeals) observed that this very issue was covered by the order in the Assessee's own case for Assessment Year 2003-04 wherein appeal orders for Assessment Years 1998-99, 2001-02 and 2002-03 were followed and accordingly deleted the disallowance towards the bond registration charges. Being dissatisfied with the order of the CIT (Appeals), the Revenue preferred an Appeal before the ITAT which has dismissed the same by the impugned order. vrd 4 ITXA399/12

4. Mr Malhotra, the learned counsel appearing on behalf of the revenue, submitted that admittedly there was a delay in payment of the employees' contribution to P.F. amounting to Rs.1,82,77,138/- and therefore, as per the provisions of section 43B r/w section 36(i)(va) of the Act, deductions on account of the said contribution towards P.F. was not allowable if the payments were made after the due dates specified in the relevant Act. He submitted that as per the provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (the P.F. Act), the due date for payment was the 15th day of each succeeding month. He therefore submitted that the Assessing Officer had rightly disallowed the said deduction of Rs.1,82,77,138/- which ought not to have been deleted by the CIT (Appeals) or the ITAT. According to Mr Malhotra, this gives rise to a substantial question of law that needs to be answered by this Court.

5. We find no merit in the aforestated contention. Section 43B of the Income Tax Act 1961 was inserted in the Act with effect from 1 st April 1984 by which the mercantile system of accounting with regard to tax, duty and contribution to welfare funds stood discontinued and under section 43B of the Act, it became mandatory for the Assessees to account for the aforestated items not on a mercantile basis but on a cash basis. This situation continued between 1st April 1984 and 1st April 1988 when Parliament again amended section 43B and inserted the first proviso thereto vrd 5 ITXA399/12 which inter alia laid down that in the context of any sum payable by the Assessee by way of tax, duty, cess or fee, if paid by the Assessee even after the closing of the accounting year but before the date of filing of the return of income, the Assessee would be entitled to the deduction under section 43B on actual payment basis and such deduction would be admissible for that accounting year. This proviso however did not apply to contributions made by the Assessees to the Labour Welfare Funds. In view thereof, by the Finance Act 1988, the second proviso came to be inserted which read as under :- "Provided further that no deduction shall, in respect of any sum referred to in clause (b), be allowed unless such sum has actually been paid during the previous year on or before the due date as defined in the Explanation below clause (va) of sub-section (1) of section 36." Thereafter, the said second proviso was further amended vide Finance Act 1989 with effect from 1st April 1989 which read as under :- "Provided further that no deduction shall, in respect of any sum referred to in clause (b), be allowed unless such sum has actually been paid in cash

or by issue of a cheque or draft or by any other mode on or before the due date as defined in the Explanation below clause (va) of sub- section (1) of section 36, and where such payment has been made otherwise than in cash, the sum has been realised within fifteen days from the due date."

6. On a plain reading of the above provisos, it became ex-facie clear that the Assessees - employers were entitled to deductions only if the contributions to any fund for the welfare of the employees stood credited on or before the due date given in the relevant Act. vrd 6 ITXA399/12
7. However, the second proviso once again created further difficulties for the Assessees - employers. Therefore, Industry once again made representations to the Ministry of Finance who, after taking cognizance of the difficulties, inserted an amendment vide Finance Act, 2003 which came into force with effect from 1st April 2004. In other words, with effect from 1st April 2004, two changes were made in section 43B viz. deletion of the second proviso to section 43B and further amendment in the first proviso which reads as under:- "Provided that nothing contained in this section shall apply in relation to any sum 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." Therefore, the amendments introduced by the Finance Act, 2003 put on par the benefit of deductions of tax, duty, cess and fee on the one hand with contributions to various Employee's Welfare Funds on the other.
8. The section referred to above viz. section 43B and the amendments thereto came up for consideration before the Hon'ble Supreme Court in the case of Commissioner of Income Tax v/s Alom Extrusions Ltd., reported in (2009) 319 ITR 306 (SC) when the Supreme Court inter alia held that the amendments to the said section brought about by the Finance Act, 2003 with effect from 1st April 2004 were retrospective in nature and would vrd 7 ITXA399/12 operate from 1st April 1988. The ITAT, relying upon the aforesaid judgment of the Supreme Court, has dismissed the Revenue's Appeal and confirmed the order passed by the CIT (Appeals). In this view of the matter and in view of the fact that the Supreme Court has expressly held that the amendments to section 43B that were brought about by the Finance Act, 2003 are retrospective in nature, we find that the ITAT was fully justified in deleting the addition of Rs.1,82,77,138/- on account of delayed payment of Provident Fund of employees' contribution. We therefore find that no substantial question of law arises on this count as sought to be contended by Mr Malhotra on behalf of the Revenue.
9. Even otherwise, we fail to understand how this deduction could have been disallowed to the Assessee. Admittedly, the Assessment Year in question is 2006-07. The second proviso to section 43B quoted above was deleted with effect from 1st April 2004 and simultaneously the first proviso was also amended bringing about a uniformity in deductions claimed towards

tax, duty, cess and fee on the one hand and contribution to the employees' provident fund, superannuation fund and other welfare funds on the other. These deductions being claimed in the return of income filed for the Assessment Year 2006-07, the amendments to Section 43B which came into force with effect from 1st April 2004 would have clearly applied to the Assessee's case. In this view of the matter also, we find that the ITAT was vrd 8 ITXA399/12 fully justified in deleting the addition of Rs.1,82,77,138/- on account of delayed payment of provident fund of employees' contribution.

10. As far as the second question is concerned, we find that the CIT (Appeals) as well as the ITAT merely followed the decisions in the case of this very Assessee in the preceding years in deleting the disallowance of Rs.10,00,300/- incurred towards bond registration charges and in view thereof, the ITAT came to the finding that the said expenditure was a revenue expenditure and hence allowable under section 37(i) of the Act. We are of the view that the aforesaid finding of the ITAT cannot be in any way said to be vitiated on the ground of perversity or any error apparent on the face of the record and therefore does not give rise to any substantial question of law which needs to be answered by this Court.
11. In view thereof, we find no merit in this Appeal and the same is dismissed. No order as to costs. (B.P. COLABAWALLA J.) (S.C. DHARMADHIKARI J.)