IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.9.2015

CORAM :

THE HONOURABLE MR.JUSTICE V.RAMASUBRAMANIAN
AND
THE HONOURABLE MR.JUSTICE T.MATHIVANAN

T.C.A.No.730 of 2015

Commissioner of Income Tax,
Puducherry. ...Appellant

Vs

M/s.DXN Herbal Manufacturing
Industries Pvt. Ltd., Mannadipet,
Pondicherry. ...Respondent

APPEAL under Section 260A of the Income Tax Act, 1961 against the order dated 5.12.2014 in I.T.A.No.526/Mds/2013 on the file of the Income Tax Appellate Tribunal, Madras 'B' Bench, against the order of the Commissioner of Income Tax (Appeals) XII, Chennai - 34, dated 27.12.2012 and made in ITA No. 317/2011-2012, against the order of the Joint Commissioner of Income Tax, Pondicherry, dated 16.12.2011 and made in PAN/G.I. No.AABCD4141M/D-16.

For Appellant : Mr.J.Narayanasamy

JUDGMENT WAS DELIVERED BY V.RAMASUBRAMANIAN,J

This appeal is by the Revenue raising the following question of law :

> "Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the duty paid by the assessee in advance under protest by treating the payment as loan and advance in the balance sheet without debiting the payment in the profit and loss account is allowable as a deduction under Sections 37 and 43B ?"

2. Heard Mr.J.Narayanasamy, learned Standing Counsel for the Revenue.

3. The assessee is engaged in the sale of ayurvedic products. For the assessment year 2009-10, the assessee filed original return of income on 28.9.2009 admitting a particular total income after claiming deduction under Section 80IB. Subsequently, the assessee filed a revised return of income admitting a total income, which was lesser than what was reflected in the original return and claiming a deduction under Section 80IB to the extent little lesser than the deduction as original claim.

4. The revised return was processed under Section 143(1) and the case was selected for scrutiny. A notice under Section 143(2) was issued. In the course of scrutiny, it was found that the assessee claimed a deduction of Rs.3,30,39,169/- as excise duty paid. The claim was made under 43B on payment basis. But unfortunately, the said payment had been made pursuant to a conditional order passed by the High Court in a litigation between the assessee and the Department of Central Excise. In other words, the liability of the assessee to pay excise duty had not crystallized or at least attained finality. Therefore, the assessee did not show this amount in the profit and loss account, but showed it under the heading of loans and advances in the fond hope of getting a refund after succeeding in the litigation.

5. The Assessing Officer rejected the claim for deduction under Section 43B on the ground that the amount was not reflected in the profit and loss account. The Commissioner (Appeals), by an order dated 27.12.2012, allowed the claim of the assessee on the ground that once the amount had actually been paid, though under protest, it is a business expenditure incurred and paid during the year. Therefore, the Commissioner (Appeals) held that the payment made was an allowable expenditure incurred under Section 37 as well as under Section 43B.

6. The Revenue filed a further appeal to the Tribunal raising a specific ground in ground No.2 to the effect that if the assessee had not claimed the expenditure in its books of accounts, but had shown the same only as advance receivable in the balance sheet, the deduction could not have been allowed. The grievance of the Revenue is that without considering the said ground of attack, the Tribunal dismissed the appeal of the Revenue.

7. As rightly pointed out by the Tribunal in paragraph 5 of its order, the assessee has actually paid the said amount as excise duty

in the relevant previous year for enabling them to move the goods out of their factory. This payment was made pursuant to an order passed by this Court. The fact that the assessee has taken up the matter on appeal to the Supreme Court on their litigation with the Department of Central Excise, would not make the payment a non payment. The heading, under which, the assessee has incurred expenditure is only a duty payment. Therefore, the Tribunal was right in holding that the assessee satisfied both the statutory provisions of Sections 37 and 43B.

8. Mr.J.Narayanasamy, learned Standing Counsel pointed out that even the third ground raised by the Department to the effect that the assessee failed to produce any order of excise duty or demand notice of any other statutory authorities for proving the liability was not considered by the Tribunal.

9. But, we do not think that the Department can ask for anything more than the factum of payment. The actual payment of the amount was not disputed even in the order of the Assessing Officer. What the Assessing Officer has recorded is that no order or demand of excise duty served upon the assessee was produced. But, the Assessing Officer has recorded the fact that even in the order of the High Court, it was mentioned that the goods moved out of the factory after payment. The point that was raised by the Assessing Officer was that there was no demand on the part of the Department. The crystallization of demand may not really be a ground to suspect the actual payment. In any case, it is a question of fact. Hence, we are of the considered view that the question of law raised by the Department does not arise for consideration.

10. Accordingly, the tax case appeal is dismissed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

RS

To

1. The Income Tax Appellate Tribunal,
Madras 'B' Bench.

2. The Commissioner of Income Tax (Appeals)-XII,
Chennai - 34.

3. The Joint Commissioner of Income Tax,
Pondicherry.

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SV (CO)
PSI (28.09.2015)