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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX REFERENCE NO.177 OF 1998

Commissioner of Income Tax
Bombay City-I, Bombay. ..Applicant
Versus
Hindustan Petroleum Corporation Ltd. ..Respondent

....
Mr. Suresh Kumar a/w Ms. Samiksha Kanani for the Applicant.
Mr. S. J. Mehta for the Respondent.
....

CORAM: M. S. SANKLECHA &
A. K. MENON, JJ.

DATE : 18th JULY, 2016

P.C.:

1. This is the Reference under Section 256(1) of the Income Tax Act, 1961 (the Act) by the Income Tax Appellate Tribunal (Tribunal).

2. This Reference seeks our opinion on the following substantial questions of law:-

> *"(i) Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the unpaid sales-tax liability of Rs.8,44,27,279/- would not be hit by the provisions of Section 43B?*
>
> *(ii) Whether on the facts and in the circumstances of the case and on a true and proper interpretation of the provisions of Section 43B of the Income Tax Act, 1961, the Tribunal was justified in law in holding that the claim for deduction of*

> *Rs.877.38 lakhs in respect of excise duty included in the closing inventory was not admissible in computing the total income?*
>
> *(iii) Whether the finding of the Tribunal that the acceptance of the claim for deduction of excise duty included in the closing inventory would result in double deduction is supported by any evidence and justified in law?*"

Question no.(i) is referred to us by the Tribunal at the instance of the Revenue.

Question nos.(ii) and (iii) are referred to us by the Tribunal at the instance of the Respondent-Assessee.

2. Regarding Question no.(i):-

(a) Mr. Suresh Kumar, the learned counsel for the Revenue very fairly states that the issue raised herein viz. the sales tax collected by the assessee in the last quarter of the year was paid in the subsequent quarter before filing of the return, is to be allowed as a deduction in view of Section 43B of the Act, stands concluded against the Revenue by the decision of the Apex Court in ***Allied Motors (P.) Ltd. v/s. Commissioner of Income Tax 224 ITR 677***.

(b) In the above view, the question is answered in the affirmative i.e. in favour of the assessee and against the Revenue.

3. Regarding Question nos.(ii) and (iii):-

The brief facts are as under:-

(a) The assessee claimed that the excise duty aggregating to Rs.877.38 lakhs which was included in the value of its closing inventory as a deduction in view of the aforesaid amount of Rs.877.38 lakhs having been paid into Treasury. This in view of Section 43B of the Act. The assessee sought the deduction by placing reliance upon the decision of the Gujarat High Court in ***Lakhanpal National Ltd. v/s. Income Tax Officer 162 ITR 240.***

(b) The Tribunal held that excise duty portion included in the closing stock cannot be allowed as a deduction as it would lead double deduction. The Tribunal emphasized the fact that the respondent had valued the closing stock at cost price. Therefore excise duty paid is also a part of the cost of its stock in trade. Thus, disallowed the claim of the respondent-assessee for deduction under Section 43B of the Act.

(c) We find that the decision of the Gujarat High Court in Lakhanpal National Ltd. (supra) arose on identical facts and the excise duty in fact paid was allowed as a deduction under Section 43B of the Act even when the same had been included in the cost of the closing stock. This decision was subject to consideration by the Apex Court in ***Berger Paints India Ltd. v/s. Commissioner of Income Tax 266 ITR 99*** and approved. Similarly, this Court in ***CIT v/s. Bharat Petroleum Corporation Ltd. 252***

ITR 43 had occasion to consider identical issue, earlier to the Apex Court order in Berger Pants India (I) Ltd. (supra) and it had followed the decision of the Gujarat High Court in Lakhanpal National Ltd. (supra). Therefore in view of the above decisions the deduction in respect of excise duty paid during the previous year relevant to the subject assessment year under Section 43B of the Act was allowed even though the same was included in arriving at the cost of the closing stock.

(d) However, the Revenue contests the aforesaid position by emphasizing the fact that the respondent-assessee had adopted the cost price method of valuing of its closing stock. Therefore, the entire cost has to be included in the closing stock which includes the excise duty which has been paid. Therefore no deduction under Section 43B of the Act is permissible. This would, according to the learned counsel for the Revenue lead to a double deduction of excise duty. The distinction sought to be made by Mr. Suresh Kumar on behalf of the Revenue is a non-existing distinction. Section 43B of the Act provides that deduction would only be available when the duties/taxes are actually paid. In the present case, it is an undisputed position that the excise duty to the extent of Rs.877.38 lakhs had been paid by the respondent-assessee. Thus the deduction on account of the same is to be allowed even if it is included in the closing inventory. There is no question of double deduction, as deduction under

Section 43B of the Act is allowable only on actual payment. The actual payment of Rs.877.38 lakhs has admittedly been done during the previous year relevant to the subject assessment year for which the deduction is claimed. There could be no occasion of making the same payment of Rs.877.38 lakhs on duties/taxes in future. This is so as the payment has been made in the previous year relevant to the subject assessment year. Accordingly, question nos.(ii) and (iii) are covered by the decision of the Apex Court in Berger Paints India Ltd. (supra). Accordingly, both the questions are answered in the negative i.e. in favour of the assessee and against the Revenue.

4. In the above view, our answers to the above questions posed by the Tribunal for our opinion are answered as under:-

Question No.1 – in the affirmative i.e. in favour of the assessee and against the Revenue; and

Question Nos.2 & 3 – in the negative i.e. in favour of the assessee and against the Revenue.

5. Reference is disposed of in above terms. No order as to costs.

(A. K. MENON, J.) **(M. S. SANKLECHA, J.)**

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