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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ITA 161/2016

**NATIONAL AGRICULTURAL COOPERATIVE MARKETING
FEDERATION OF INDIA LTD. Appellant**

Through: Mr. M.S. Syali, Senior Advocate with
Mr. Satyen Sethi and Mr. Arta Trana Panda,
Advocates.

versus

**COMMISSIONER OF INCOME TAX, DELHI-XI
& ANR. Respondents**

Through: Mr. Dileep Shivpuri, Senior Standing
Counsel with Mr. Sanjay Kumar and Mr. Vikash
Maheshwari, Advocates.

**CORAM: JUSTICE S. MURALIDHAR
JUSTICE CHANDER SHEKHAR**

**ORDER
19.04.2017**

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1. This appeal by the National Agricultural Cooperative Marketing Federation of India Limited ('NAFED') under Section 260A of the Income Tax Act, 1961 ('Act') is directed against an order dated 16th October, 2015 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA Nos. 1999 & 2000/Del/2008 for the Assessment Year ('AY') 2001-02 and 2002-03.

2. On 23rd February, 2016, while admitting this appeal the Court framed the following question of law for consideration:

“Whether on the facts and circumstances of the case and in law, the Special Bench was right in law in holding that the Appellant did not incur the liability to pay interest to Alimenta, directed to be paid by the decree dated 28.1.2000?”

3. The facts leading to the filing of the present appeal are that the Appellant entered into an Agreement with Alimenta SA Switzerland (‘Alimenta’) on 12th January, 1980 and 3rd April, 1980 for export of 5,000 and 4,000 MT HPS groundnut during the years 1979-80 and 1980-81.

4. The disputes that arose from said agreements were referred to arbitration.

5. An Award dated 14th September, 1990 was passed in favour of Alimenta and against NAFED whereby NAFED was required to pay Alimenta a sum of US\$ 45.26 lakhs as principal together with US\$ 48.81 lakhs as interest from 13th February, 1981 till the date of the Award.

6. Alimenta initiated proceedings for recognition and enforcement under Section 5 of the Foreign Awards (Recognition and Enforcement) Act, 1961 in this Court. By an order dated 28th January, 2000, this Court made the Award rule of the Court and held that the Alimenta would be entitled to interest @ 18% per annum from the date of the Award till the date of payment.

7. In computing its income for the AYs 2000-01 and 2001-02, for which returns were filed in October 2002 and 2003 respectively, NAFED, in terms of the decree dated 28th January 2000, claimed deduction of interest payable to Alimenta on the outstanding amount of the Award. Meanwhile, on an appeal filed by NAFED against the order dated 28th January 2000 making

the Award rule of the Court, a Division Bench (DB) of this Court by an order dated 28th February, 2001 granted stay of the execution of the said decree.

8. Alimenta then went in appeal to the Supreme Court of India by way of a Special Leave Petition ('SLP') in which by an order dated 5th April, 2002, the Supreme Court directed NAFED to either furnish a bank guarantee ('BG') or a proper security for the principal amount of the decree. It is stated that NAFED then furnished a BG in the sum of Rs. 22.5 crores for the principal amount.

9. On 8th January 2003, the Supreme Court modified the above order dated 5th April, 2002 and clarified that NAFED would furnish a BG to be renewed from year to year failing which the stay of the execution of the decree would automatically stand vacated.

10. The Assessing Officer ('AO') framed the assessment for the AY 2001-02 on 28th December, 2007 under Sections 147 read with 143(3) of the Act. The claim of interest payable to Alimenta on the amount awarded was disallowed by the AO by holding that the liability was contingent and not even acknowledged in the books of accounts.

11. As regards the assessments for AYs 1996-97 to 1998-99, NAFED's appeals were dismissed by the ITAT by an order dated 25th January, 2008 holding that the interest liability crystallised only in the AY 2001-02 and as such deduction of interest could not be allowed in any of the AYs earlier thereto.

12. Notwithstanding the above order dated 25th January, 2008, the Commissioner of Income Tax (Appeals) [‘CIT (A)’] by an order dated 31st March, 2008 for AYs 2001-02 and 2002-03 upheld the disallowance of interest as ordered by the AO.

13. Aggrieved by the above order dated 31st March 2008, NAFED filed appeals before the ITAT for AYs 2001-02 and 2002-03. NAFED’s appeal for AY 2003-04 was disposed of by the ITAT on 18th July, 2008 allowing the deduction of interest payable to Alimenta.

14. The Members of the ITAT hearing the appeals for AYs 2001-02 and 2002-03 disagreed with the earlier order dated 18th July, 2008 for AY 2003-04. A reference was made to the Special Bench of the ITAT to consider the following question:

“Whether in the facts and circumstances of the case, where claim of damages and interest thereon is disputed by the assessee in the court of law, deduction can be allowed for the interest claimed on such damages while computing business income?”

15. By the impugned order dated 16th October 2015, the Special Bench answered the above question in the negative i.e., against the Assessee NAFED and in favour of the Revenue. It was held that since the decree dated 28th January, 2000 was stayed by the Division Bench of this Court on 28th February, 2001, there was no liability on NAFED to pay interest to Alimenta at 18%.

16 This Court has heard the submissions of Mr. M.S. Syali, learned Senior

counsel appearing for NAFED and Mr. Dileep Shivpuri, learned Senior Standing Counsel appearing for the Revenue.

17. The reasoning of the Special Bench of the ITAT in the impugned order is that under the mercantile system of accounting, a deduction can be granted only where the incurring of liability is a certainty. A distinction has been drawn between a contractual liability and a statutory liability. The latter is said to be incurred on the mere issuance of a demand notice which becomes deductible with the issuance of such notice. In such a case, the fact that the Assessee may have raised a dispute against such a demand “does not ruin the incurring of liability.” It arises only “when such a claim is either acknowledged or in a case of non-acceptance when a final obligation to pay is fastened coupled with the claimant acquiring a legal right to receive such an amount.” It is further noted that “a legal obligation to pay is attached on an Assessee when a competent court passes order and a suit is decreed against him and not during the pendency of litigation.”

18. On the basis of this reasoning, it was concluded that as a result of the stay order granted by the DB of this Court, the liability of NAFED to pay interest @ 18% to Alimenta remained suspended from the date of such stay. It is stated that it is only upon passing of the consequential judgment by the DB of this Court in September, 2010 that NAFED incurred a legally enforceable liability to pay interest to Alimenta. Reference was made by the ITAT to the decisions in *CIT v. Hindustan Housing & Land Development Trust Ltd.*(1986) 161 ITR 524 (SC) and *Jasjeet Films (P) Ltd. v. CIT* (2007) 165 Taxmann 599 (Del). The alternative point of view regarding the

deduction being hit by Section 40(a)(i) of the Act was held to be non-applicable “as the underlining condition for its applicability, being the otherwise eligibility of deduction for expense, becomes wanting.”

19. The Court is unable to agree with the above reasoning of the ITAT as it runs contrary to the well-settled legal position explained by the Supreme Court in several decisions. In *Shree Chamundi Mopeds Ltd. v. Church of South India Trust Association* (1992) 3 SCC 1, the effect of an interim order was explained as thus:

“While considering the effect of an interim order staying the operation of the order under challenge, a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order results in the restoration of the position as it stood on the date of the passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. **It only means that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence.**”
(emphasis supplied)

20. In *Haji Lal Mohd. Biri Works v. CIT* (1997) 3 SCC 659 SC it was explained by referring to the decisions in *Kedarnath Jute Mfg. Co. Ltd. v. CIT* (1972) 3 SCC 252 and *CIT v. Kalinga Tubes Ltd.* (1996) 2 SCC 277 that “when the assessee is following mercantile system of accounting, in case of sales tax payable by the assessee, the liability to pay sales tax would accrue the moment the dealer made sales which are subject to sales tax and, at that stage, the obligation to pay the sales tax arises and the raising of the dispute in this connection before the higher authorities would be irrelevant.”

21. In ***Kanoria Chemicals & Industries Limited v. U.P. State Electricity Board (1997) 5 SCC 772***, the Court explained the legal position that would result in the above grant of stay of a government order in terms of which surcharge on electricity was payable. The contention was that even if the Board did not raise a demand as a result of the stay order, the obligation of the consumers to pay the charges at the enhanced rate would be relieved.

22. In ***Central India Electric Supply Company v. CIT 247 ITR 54 (SC)***, it was explained that the amount payable under an arbitral Award became due when the Award was made rule of the Court within the previous year relevant to the AY in which it was made.

23. In the present case, with the Award having been made rule of the Court by a learned Single Judge of this Court, the mere fact that the said judgment and decree was stayed by a DB would not relieve NAFED of its obligation to pay interest in terms thereof to Alimenta. Such liability commenced in the previous year in which the said judgment and decree was passed by the learned Single Judge. To borrow the phraseology of the Supreme Court in ***Shree Chamundi Mopeds Ltd. v. Church of South India Trust Association (supra)***, it cannot be said that merely because there is a stay granted by the DB of this Court that the order of the learned Single Judge has been “wiped out from existence.”

24. For the aforementioned reasons, this Court is unable to sustain the impugned order of the Special Bench of the ITAT. Accordingly, the question framed is answered in the negative i.e., in favour of the Assessee NAFED and against the Revenue.

25. The impugned order dated 16th October, 2015 of the ITAT is hereby set aside. The appeal is allowed but, in the circumstances, with no order as to costs.

S. MURALIDHAR, J

CHANDER SHEKHAR, J

APRIL 20, 2017
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