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2018.12.06 11:49

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

ITA No.403 of 2016

Date of decision: 21.11.2018

M/s Glaxo Smithkline Consumer Healthcare Limited

.....Appellant

Vs.

Assistant Commissioner of Income Tax

.....Respondent

**CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL,
HON'BLE MRS. JUSTICE MANJARI NEHRU KAUL**

Present: Mr. Ajay Vohra, Sr. Advocate with Mr. Rohit Jain and Mr.
Vishal Gupta, Advocate for the appellant.

Ms. Urvashi Dhugga, Sr. Standing Counsel for the respondent.

Ajay Kumar Mittal,J.

1. This order shall dispose of a bunch of six appeals bearing ITA Nos.403 of 2016, 505 to 508 and 537 of 2008, as according to the learned counsel for the parties, the issue involved in all these appeals is identical. However, the facts are being extracted from ITA No.403 of 2016.

2. ITA No.403 of 2016 has been filed by the appellant-assessee under Section 260A of the Income Tax Act, 1961 (in short, "the Act") against the order dated 5.4.2016, Annexure A.3 passed by the Income Tax Appellate Tribunal, Chandigarh (in short, "the Tribunal") in ITA No.475/CHD/2002 for the assessment year 1997-98, claiming following substantial questions of law:-

“a) Whether on the facts and in the circumstances of the case, the Tribunal erred in law in (in-effect) upholding the disallowance of ₹ 6,19,34,656/- which represented unutilised

MODVAT credit of excise duty as on 31.3.1997 i.e. the end of the relevant accounting year, in terms of Section 43B of the Act?

b) Whether on the facts and in the circumstances of the case, the Tribunal erred in law in not treating the unutilised MODVAT credit, balance as at the end of the year as payment of excise duty, as allowable deduction in terms of Section 43B of the Act?

c) Whether on the facts and in the circumstances of the case, the Tribunal erred in law in not following and applying the principles laid down by the various judicial pronouncements (including those of the Hon'ble Supreme Court) to the effect that MODVAT credit is as good as tax paid and does not represent purchase cost of raw materials?

3. A few facts relevant for the decision of the controversy involved as narrated in ITA No.403 of 2016 may be noticed. The appellant-assessee is a public limited company, engaged in the manufacture and sale of consumer healthcare products. It filed its return of income for the assessment year 1997-98 on 26.11.1997 declaring income of ₹ 61,07,86,140/-. The assessee uses duty paid input in the manufacture of its products. In respect of the duty paid on such inputs purchased, the assessee is entitled to MODVAT credit for the duty element embedded therein to be set off against the final duty payable on the products manufactured by it. According to the assessee, in the system of accounting followed, in accordance with the method approved by the Institute of Chartered Accountants of India, the purchases are stated net of duty/MODVAT credit even though the vendor has been paid the full amount. The MODVAT credit accumulated is set off against the excise duty payable on the final products manufactured by the assessee. To the extent MODVAT credit remained unutilised at the year end, the assessee

claimed deduction under Section 43B of the Act since the moneys to that extent had irretrievably gone out of its coffers. During the assessment year in question, the assessee had paid excess advance excise duty by way of deposit with the Commissioner of Central Excise under Rule 173G(1) of the Central Excise Rules, 1944 (in short, “the Rules”) amounting to ₹ 5,75,63,219/- as well as had unutilised MODVAT credit under RG23A amounting to ₹ 6,19,34,656/-. Accordingly, the assessee claimed total deduction of ₹ 11,94,97,875/- in the return of income for the assessment year 1997-98 under Section 43B of the Act. The return was processed. In response to the query, the assessee submitted that notwithstanding that the amount of ₹ 11,94,97,875.- was in the nature of advance excise duty, the same having irretrievably gone out of its coffers in favour of the excise authorities, it was allowable as deduction under Section 43B of the Act on payment basis. The Assessing Officer vide assessment order dated 1.2.2000, Annexure A.1 passed under Section 143(3) of the Act rejected the plea of the assessee and disallowed the amount of ₹ 11,94,97,875/- claimed as deduction under Section 43B of the Act on the ground that excise duty being a post manufacturing levy, the same had been allowed as deduction to the assessee to the extent of goods cleared from the factory and the advance deposited by the assessee with the excise authorities did not amount to payment of duty as per the scheme of Section 43B of the Act. The assessee assailed the assessment order before the Commissioner of Income Tax (Appeals) [CIT(A)] on the ground that the provisions of section 43B of the Act override the method of accounting generally followed by an assessee and mandate deduction of statutory liabilities in the year of payment thereof notwithstanding accrual in another year. The appellant asserts that in order to ensure timely payment of excise duty by the manufacturers, under Rule

173G of the Rules, a manufacturer is required to deposit excise duty in an account with the excise authorities and adjust the duty payable on excisable goods against such deposit. Vide order dated 6.3.2002, Annexure A.2, the CIT(A) set aside and reversed the assessment order, allowing deduction of ₹ 11,94,97,875/- claimed by the assessee under Section 43B of the Act. Aggrieved by the order, the revenue filed appeal before the Tribunal. In the meantime, similar disallowance was made by the Assessing Officer in the case of the assessee for the subsequent years including assessment year 2001-02 which was also set aside and deleted by the CIT(A) following the order dated 6.3.2002 for the assessment year 1997-98. Aggrieved by the said order for the assessment year 2001-02, the revenue preferred appeal before the Tribunal. The assessee vide letter dated 3.4.2006 requested the Tribunal to refer the said matter to the President of the Tribunal for constitution of a special Bench to resolve the issue involved in the present case as there were conflicting opinions of different benches of the Tribunal. Consequently, the appeal for the assessment year 2001-02 was heard by a bench of five members. On 20.07.2007, the Special bench of the Tribunal passed the order in the case of the appellant-assessee for assessment year 2001-02 ruling partly in favour of the assessee-appellant and partly in favour of the revenue, on the issue of allowability of unutilized MODVAT credit under RG 23A claimed by the assessee as deduction under Section 43B of the Act. Vide order dated 05.04.2016, Annexure A.3, the Tribunal in the appeal for the assessment year 1997-98 remanded the matter back to the file of the Assessing Officer, to be adjudicated in accordance with the conclusions reached by the Special Bench of the Tribunal. The order passed by the CIT(A) was set aside and disallowance of ₹ 6,19,34,656/- representing unutilized MODVAT credit under RG 23A as deduction under Section 43B

of the Act was confirmed. Hence the instant appeals by the appellant-assessee.

4. We have heard learned counsel for the parties.

5. The Apex Court in a recent judgment in *Commissioner of Income Tax –II Vs. Modipon Limited* [2017] 299 CTR 306 considered the question whether the assessee was entitled to claim deduction under Section 43B of the Act in respect of excise duty paid in advance in the Personal Ledger Account. Therein, the assessee had been claiming deduction under Section 43B of the Act in respect of the balance amount in the Personal Ledger Account at the end of each accounting year and the assessee had been adding back the same amount as part of the taxable income in the immediately succeeding accounting year in order to avoid double deduction. The said practice adopted by the assessee had been accepted by the revenue. The revenue urged that though levy of excise was on manufacture of excisable goods, actual payment of duty was at the stage of removal. Thus, the amount of advance deposit did not represent actual payment of duty so as to entitle an assessee to the benefit of deduction under Section 43B of the Act. After considering the relevant statutory provisions and the case law on the point, it was held by the Apex Court that the advance deposit of Central Excise Duty constitutes actual payment of duty within meaning of Section 43B and, therefore, the assessee was entitled to benefit of deduction of the said amount. The relevant paras of the judgments are quoted below:-

“7. On merits it has been submitted by Shri Vohra that under Section 3 of the Central Excise Act, the event for levy of excise duty is the manufacture of goods though the duty is to be paid at the stage of removal of the goods. Pointing out the provisions of Rule 173G of the Central Excise Rules, 1944 it is submitted

that the advance deposit of central excise duty in a current account is a mandatory requirement from which adjustments are made, from time to time, against clearances effected. Though, sub-rule (1)(A) contemplates refund from the current account, such refund can be granted only on reasons being recorded by the concerned authority i.e., the Commissioner on the application filed by the assessee. Refund is not a matter of right. The amount deposited in the PLA is irretrievably lost to the assessee, it is argued. Payment of central excise duty takes place at the time of deposit in the PLA, though the deposit is on the basis of an approximation and the precise amount of duty qua the goods removed is ascertained at the stage of removal/clearances. The said facts, according to the learned counsel, would not make the deposit anything less than actual payment of duty.

8. We have considered the submissions made on behalf of the parties. Notwithstanding the acceptance by the Revenue of the practice adopted by the assessee-Modipon Ltd., in all the assessment years except for the ones under dispute as enumerated above and the absence of any challenge to the decisions of the Delhi and the Punjab & Haryana High Courts, the present challenge would still be entertainable so long as it discloses a substantial question of law or an issue impacting public interest or the same has the potential of recurrence in future. The Revenue cannot be shut out from the present proceedings merely because of its acceptance of the practice of accounting adopted by the assessee or its acceptance of the decision of the two High Courts in question. An adjudication of the question(s) arising cannot be refused merely on the above basis. We will, therefore, have to proceed to answer the merits of the challenge made by the Revenue in the present appeals.
9. Deposit of Central Excise Duty in the PLA is a statutory requirement. The Central Excise Rules, 1944, specify a distinct procedure for payment of excise duty leviable on manufactured goods. It is a procedure designed to bring in orderly conduct in the matter of levy and collection of excise duty when both

manufacture and clearances are a continuous process. Debits against the advance deposit in the PLA have to be made of amounts of excise duty payable on excisable goods cleared during the previous fortnight. The deposit once made is adjusted against the duty payable on removal and the balance is kept in the account for future clearances/removal. No withdrawal from the account is permissible except on an application to be filed before the Commissioner who is required to record reasons for permitting an assessee to withdraw any amount from the PLA. Sub-rules (3), (4), (5) and (6) of Rule 173G indicates a strict and vigorous scrutiny to be exercised by the central excise authorities with regard to manufacture and removal of excisable goods by an assessee. The self removal scheme and payment of duty under the Act and Rules clearly shows that upon deposit in the PLA the amount of such deposit stands credited to the Revenue with the assessee having no domain over the amount(s) deposited.

10. In ***CIT V. Pandavapura Sahakara Sakkare Karkhane Ltd.*** [1992] 198 ITR 690 (Kar.) and ***CIT V. Nizam Sugar Factory Ltd.*** [2002] 120 Taxman 378/253 ITR 68 (AP), cited at the Bar, the High Courts of Karnataka and Andhra Pradesh respectively had occasion to consider as to whether the amounts credited to the Molasses Storage Fund out of the sale proceeds of molasses received by the assessee constitute taxable income of the assessee. Under the scheme, the assessee had no control over the amounts deposited in the fund and the assessee was also not entitled to withdraw any amount therefrom without the approval of the authorities. Further the amount deposited could be utilized only for the purpose specified. In those circumstances, the High Court held and in our view correctly, that the deposits made, though a part of the sale proceeds of the assessee, did not constitute taxable income at the hands of the assessee. We do not see why the same analogy would not be applicable to the case in hand.
11. The Delhi High Court in the appeals arising from the orders passed by it has also taken the view that the purpose of

introduction of Section 43B of the Central Excise Act (Sic. Income-Tax) was to plug a loophole in the statute which permitted deductions on an accrual basis without the requisite obligation to deposit the tax with the State. Resultantly, on the basis of mere book entries an assessee was entitled to claim deduction without actually paying the tax to the State. Having regard to the object behind the enactment of Section 43B and the preceding discussions, it would be consistent to hold that the legislative intent would be achieved by giving benefit of deduction to an assessee upon advance deposit of central excise duty notwithstanding the fact that adjustments from such deposit are made on subsequent clearances/removal effected from time to time.

12. The above discussions, coupled with the peculiar features of the case, noticed above i.e. consistent practice followed by the assessee and accepted by the Revenue; the decisions of the two High Courts in favour of the assessee which have attained finality in law; and no contrary view of any other High Court being brought to our notice, should lead us to the conclusion that the High Courts were justified in taking the view that the advance deposit of central excise duty constitutes actual payment of duty within the meaning of Section 43B of the Central Excise Act (Sic. Income-Tax) and, therefore, the assessee is entitled to the benefit of deduction of the said amount.”

6. Similarly, in *CIT Vs. Raj & San Deeps Limited* [2007] 293 ITR 12 (P&H), the issue before this Court was whether the Tribunal was right in law in deleting the addition made under Section 43B of the Act on account of advance excise duty paid which was neither debited to the profit and loss account nor sales account or made part of the purchase price. It was held that once it was found as a fact by the Tribunal that excise duty as per statutory provisions became payable, the moment goods were manufactured and then assessee was under obligation to deposit that much amount in

“account current” and amount so deposited in “account current” being non refundable, there was no reason for the revenue to deny the benefit of deduction of excise duty in the year in question when the goods were manufactured and the amount was deposited in the “account current”. It was further held that the expense would certainly relate to the year in which the goods were manufactured and the amount was deposited which could not possibly be treated as an advance. The relevant paras of the judgment read thus:-

“The only contention raised by learned counsel for the Revenue is that since the goods in question were not removed from the premises of the assessee during the year in question, the duty amount would be considered to have been paid in advance and accordingly the assessee was not entitled to deduction thereof during the year in question as the expense was to relate to the year in which the goods were removed from the factory. Any advance payment of taxes, which do not relate to the assessment year in question, is not a permissible deduction.

On the other hand, learned counsel for the assessee submitted that the assessee was statutorily required to deposit the duty the moment goods, were manufactured and was under obligation to keep amount to the extent of duty as calculated on the goods so manufactured in the “account-current”. The assessee was not entitled to refund of the amount once deposited in the “account-current”, however, debit entry was made at the time of removal of goods from the factory. He has relied upon the judgment of the Gauhati High Court in *India Carbon Ltd. Vs. IAC of IT*. [1993] 200 ITR 759.

Having heard learned counsel for the parties, we find the contention raised by learned counsel for the Revenue to be totally misconceived. Once it is found as a fact by the Tribunal that duty as per the statutory provisions became payable, the

moment goods were manufactured then the assessee was under obligation to deposit that much amount in the “account-current” and the amount so deposited in the “account-current” being non-refundable, there was no reason for, the Revenue to deny the benefit of deduction in the year in question when the goods were manufactured and the amount was deposited in the “account-current”. The expense would certainly relate to the year in which the goods were manufactured and the amount was deposited, which cannot possibly be treated as an advance.”

Similar view was taken by the Delhi High Court in *CIT vs. Modipon Limited (No.2)*, (2011) 334 ITR 106(Delhi) and *Commissioner of Income Tax, Delhi-1 vs. M/s Samtel India Limited*, ITA No.130 of 2000, decided on 26.9.2013.

7. In view of the law laid down by the Apex Court in *Modipon Limited’s* case (supra) holding that the advance deposit of Central Excise duty constitutes actual payment of duty within the meaning of Section 43B of the Act and that the assessee would be entitled to benefit of deduction of the said amount, the substantial questions of law raised in these appeals are answered in favour of the assessee and against the respondent-revenue. Consequently, all the six appeals are allowed and the impugned orders passed by the Tribunal in all the appeals are set aside.

(Ajay Kumar Mittal)
Judge

November 21, 2018
‘gs’

(Manjari Nehru Kaul)
Judge

Whether speaking/reasoned
Whether reportable

Yes
Yes