IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.12043 of 2011

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Magadh Stock Exchange Association through its Director Sri Yashwir Singh, aged about 40 years, son of Late Soham Singh, Resident of 9th Floor, Ashiana Plaza, Budh Marg, in the town and District of Patna.

... ... Petitioner/s

Versus

1. The Commissioner Of Income Tax-I, Central Revenue Building, Bir Chand Patel Path, Patna.
2. The Assistant/ Deputy Commissioner of Income Tax, Circle-1 3rd Floor, Lok Nayak Bhawan, Dakbunglow Road,Patna-800001.

... ... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Ajay Kumar Rastogi, Advocate
For the Respondent/s : Mrs. Archana Sinha @ Archana Shahi, Advocate

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CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE S. KUMAR
C.A.V. JUDGMENT
(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 02-09-2020

In this petition filed under Articles 226 and 227 of the Constitution of India, petitioner lays a challenge to the order of assessment dated 26.12.2008 as affirmed by the Commissioner of Income Tax-I, Patna vide order dated 20.01.2011.

2. During the hearing, emphatically, petitioner laid challenge to the virus of the provisions of Section 43B of the Income-Tax Act, 1961. We allowed the learned counsel to address on the same. Also on the strength of decisions rendered by the Gauhati High Court in **India Carbon Ltd. v. Inspecting Assistant Commissioner of Income-Tax and another [1993]**

200 ITR 759 (Gau), as affirmed by the Hon'ble Apex Court in SLP (C) No.13038 of 1994, titled as **Inspecting Assistant Commissioner of Income Tax v. India Carbon Ltd**. vide order dated 23.08.1996 and subsequent decision dated 22.05.2003 passed in **Commissioner of Income-Tax v. India Carbon Ltd. [2003] 262 ITR 327 (Gau),** decision of Madras High Court in **CIT vs. Everest Litho Press, (2006) 285 ITR 297(Madras);** decision of Delhi High Court in **CIT v. Noble and Hewitt (I) Pvt. Ltd. (2008) 305 ITR 324 (Delhi),** the illegality and perversity in the order is sought to be argued.

3. Opposing the petition, Mrs. Archana Sinha, learned counsel for the Revenue seeks reliance upon a decision of the Hon'ble Apex Court in **M/s Chowringhee Sales Bureau (P) Ltd. Versus C.I.T. West Bengal, (1973) 1 SCC 46.**

4. Briefly facts set out are as under:-

5. For the assessment year 2006-07, petitioner filed its return of income showing total income at Nil. The return dated 17.01.2007 was selected for scrutiny through CASS. After issuance of due notice and compliance of procedural formalities, the Income Tax Officer vide order dated 26.12.2008 disallowed an amount of Rs.17,87,530/- deducted as Security Transaction Tax (STT) against the transaction of trading of one M/s Bharuka

Financial Services Ltd. The Officer found the said amount of STT not to be deposited with the authorities, and as such provisions of Section 43B of the Income-Tax Act, 1961 was squarely attractable. As such, the entire amount was assessed towards the income of the assessee. The Commissioner of Income-Tax has affirmed such order.

6. The Apex Court in **M/s Chowringhee Sales Bureau (P) Ltd.** (supra) while dealing with the case where the assessee had neither deposited the realized amount of sales tax with the State exchequer nor returned the same to the concerned party, added such amount to be part of business income. It is based on the strength of this decision, Revenue seeks to defend the impugned orders.

7. Noticeably, the decision does not deal with the provisions with which we are concerned.

8. Relevant portion of Section 43 B reads as under:-

> **"43B. Certain deductions to be only on actual payment.-** <u>Notwithstanding anything contained in any other provision of this Act</u>, a deduction otherwise allowable under this Act in respect of—
>
> (*a*) any sum payable by the assessee by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force, or
>
> (*b*) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees, or

(*c*) any sum referred to in Clause (*ii*) of sub-section (1) of section 36, or

(*d*) any sum payable by the assessee as interest on any loan or borrowing from any public financial institution or a State financial corporation or a State industrial investment corporation, in accordance with the terms and conditions of the agreement governing such loan or borrowing, or

(*e*) any sum payable by the assessee as interest on any loan or advances from a scheduled bank [*or a co-operative bank other than a primary agricultural credit society or a primary co-operative agricultural and rural development bank*] in accordance with the terms and conditions of the agreement governing such loan or advances, or

(*f*) any sum payable by the assessee as an employer in lieu of any leave at the credit of his employee, or

(*g*) any sum payable by the assessee to the Indian Railways for the use of railway assets,

<u>shall be allowed (irrespective of the previous year</u> in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in section 28 of that previous year in which such <u>sum is actually paid by him</u> :

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.

....

(Emphasis supplied)

9. In **Allied Motors (P) Ltd. versus Commissioner of Income Tax, Delhi, (1997) 3 SCC 472**, the Hon'ble Apex Court in paragraph 6 has gone into the legislative intent and history of enactment of Section 43-B. It observed that:-

"To understand the circumstances in which Section 43B came to be inserted in the Income Tax Act and the mischief which it sought to prevent, it is necessary to look at the memorandum explaining the provisions in the Finance Bill of 1983 [(1983) 140 ITR (St.) 160] :-

> "59. Under the Income Tax Act, profits and gains of business and profession are computed in accordance with the method of accounting regularly employed by the assessee. Broadly stated, under the mercantile system of accounting, income and outgo are accounted for on the basis of accrual and not on the basis of actual disbursements or receipts. for the purposes of computation of profits and gains of business and profession, the Income-tax Act defines the word 'paid' to mean 'actually paid or incurred' according to the method of accounting on the basis of which the profits or gains are computed.
>
> 60. Several cases have come to notice where tax payers do not discharge their statutory liability such as in respect of excise duty, employer's contribution to provident fund, Employees' State Insurance Scheme, etc. for long period of time, extending sometimes to several years. For the purpose of their income-tax assessments, they claim the liability as deduction on the ground that they maintain accounts on mercantile or accrual basis. On the other hand they dispute the liability and do not discharge the same. For some reason or the other undisputed liabilities also are not paid. To curb this practice, it is proposed to proved that deduction for any sum payable by the assessee by way of tax or duty under any law for the time being in force (irrespective of whether such tax or duty is disputed or not) or any sum payable by the assessee as an employer by way of contribution to any provident fund, or superannuation fund or gratuity fund or any other fund for the welfare of computing the income of that previous year in which such sum is actually paid by him."

10. To our mind, the said Section is an exception to the mercantile system of accounting. It is explicitly added to correct the mischief of claiming deductions without payment of taxes due even at a later stage. The expression used is "same is actually paid by him." In any event, we find the issue is no

longer *res Integra* for Constitutional validity of Section 43B, more particularly Clause (f) thereof, stands affirmed by the Hon'ble Apex Court in **Civil Appeal No.3545 of 2009** titled as **Union of India & Ors. Exide Industries Limited & Anr.** decided on April 24, 2020.

11. After discussing the legislative intent, the Court categorically held Section 43B to be a mixed bag with new and dissimilar entries inserted therein, from time to time, to cater to different fiscal scenarios. It was an enactment designed to prevent fraud upon the Revenue, and as such required liberal construction in its favour. The Court also held that sub-section (1) of Section 145 explicitly provides the method of accounting is a prerogative falling in the domain of the assessee who is well within its rights to follow the mercantile system of accounting. In the mercantile system of accounting, the assessment of income is made based on the accrual of liability and not based on actual expenditure in lieu thereof. However, Section 43B is not a provision to place an embargo upon the autonomy of the assessee in adopting a particular method of accounting, nor deprive him of any lawful deduction. Instead, it merely operates as an additional condition for the availment of deduction qua the specified head.

12. It further observed that “Section 43B bears heading “certain deductions to be only on actual payment”. It opens with a non-obstante clause. As per settled principles of interpretation, a non-obstante clause assumes an overriding character against any other provision of general application. It declares that within the sphere allotted to it by the Parliament, it shall not be controlled or overridden by any other provision unless expressly provided for. Out of the allowable deductions, the legislature consciously earmarked certain deductions from time to time and included them in the ambit of Section 43B so as to subject such deductions to the conditionality of actual payment. Such conditionality may have the inevitable effect of being different from the theme of the mercantile system of accounting on accrual of liability basis *qua* the specific head of deduction covered therein and not to other heads. But that is a matter for the legislature and its wisdom in doing so.”

(Emphasis supplied)

13. And after elaborately discussing the issue, eventually, the Court observed that “Notably, this regulatory measure is in sync with other deductions specified in Section 43B, which are also present and accrued liabilities. To wit, the liability in lieu of tax, duty, cess, bonus, commission etc. also

arise in the present as per the mercantile system, but assessees used to defer payment thereof despite claiming deductions there against under the guise of the mercantile system of accounting. Resultantly, irrespective of the category of liability, such deductions were regulated by law under the aegis of Section 43B, keeping in mind the peculiar exigencies of fiscal affairs and underlying concerns of public Revenue.”

14. Even on an earlier occasion, the Court affirmed the view of the Revenue that furnishing of a Bank Guarantee is not the same as making payment stipulated under Section 43B of the Act [**Commissioner of Income Tax, Udaipur, Rajasthan vs. Mcdowell and Company Limited, (2009) 10 SCC 755**].

15. Hence on both counts, we see no reason to accept the contentions of the petitioner- (a) Constitutional validity of the Act already stands affirmed by the Hon’ble Apex Court in **Exide Industries Limited (supra).** (b) On the second submission, undisputedly, petitioner had not deposited the amount deducted as STT with the authorities, and it is not his case that the same stood paid back/returned to the person from whom it stood deducted. It is the admitted case of the petitioner that since the petitioner was adopting the mercantile system of accounting; he was not

supposed to take any action. Even on this count, given law discussed above, more so **Exide Industries Limited (supra). (supra)** and **Mcdowell (supra),** the orders cannot be said to be perverse and illegal warranting interference by this Court.

16. Given binding precedents of Hon'ble the Apex Court, we need not refer to the binding effect of the decisions rendered by different High Courts cited by the learned counsel for the petitioner.

17. The writ petition stands dismissed.

18. No order as to costs.

19. Interlocutory Application, if any, shall stand disposed of.

(Sanjay Karol, CJ)

S. Kumar, J: I agree

(S. Kumar, J)

K.C.Jha/-

AFR/NAFR	AFR
CAV DATE	21.08.2020
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