

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.02.2020

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE R.SURESH KUMAR

Tax Case (Appeal) No.231 of 2011

The Commissioner of Income Tax
Chennai Appellant/Respondent
Vs.

T.T.K.Health Care Limited
No.6, Cathedral Road
Chennai 600 086. Respondent/Appellant

Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal 'D' Bench, Chennai dated 16.12.2010 in ITA No.474/Mds/2010 for the assessment year 2005-06 against the commissioner of Income Tax Chennai-1, Chennai dated 26/02/2010 made in C.No.218(18)/CIT-1/263/09-10 for the assessment year 2005-06 against the Assistant Commissioner of Income Tax Company Circle III(4) Chennai dated 31/12/2007 made in GIR.No.PAN:AABCT3312J/875-V for the assessment year 2005-06.

For Appellant : Mrs.V.Pushpa
Senior Standing Counsel

For Respondent : Mr.R.Venkatnarayanan
for M/s.Subbaraya Iyer Padmanabhan

J U D G M E N T
सत्यमेव जयते

(Judgment of the Court was delivered by DR.VINEET KOTHARI,J)

The Revenue has filed the present appeal under Section 260A of the Income Tax Act, against the order of the learned Income Tax Appellate Tribunal 'D' Bench, Chennai dated 16.12.2010 for Assessment Year 2005-06, whereby the learned Tribunal allowed the appeal of the Assessee and set aside the order passed by the learned Income Tax Commissioner under Section 263 of the Act on 26.02.2010.

2. A Coordinate Bench of this Court admitted the present

appeal on the following substantial question of law on 15.06.2011.

"Whether on the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in setting aside the order of the Commissioner of Income Tax under Section 263 of the Income Tax Act?"

3. The Assessee in the present case availed the benefit of deferred sales tax payment under the Scheme announced by the State of Maharashtra and under the Scheme made a premature payment at NPV (Net Present Value) of the deferred amount of sales tax collected by it for the year in question. The Assessing Authority allowed the said benefit to the Assessee and did not invoke Section 41(1) of the Income Tax Act, treating the remaining part of the deferred sales tax as neither remission nor cessation of sales tax liability of the Assessee.

4. However, the learned Commissioner passed the impugned order under Section 263 of the Act treating the said Assessment Order as erroneous and prejudicial to the interest of the Revenue and refused the same under Section 263 of the Act vide order dated 26.02.2010.

5. The Assessee took up the matter to the learned Tribunal, which however allowed the appeal of the Assessee with the following observations.

"We have considered the rival submissions and the material available on record. Both the parties have taken similar stand as was taken before the ld.CIT(A) in support of its case. The ld.AR has placed before us for our perusal a copy of the decision of the ITAT, Mumbai 'E' Special Bench in the cases of Sulzer India Ltd., -Vs- Jt.CIT and Others, order dated 10.11.2020. It is a lengthy order and supports the version taken by the assessee. To controvert the above decision, it was stated by the ld.DR that there are other decisions which have been mentioned in the order of the ld.CIT which settled the law that sales tax forms part of the trading result of the assessee. Be that as it may, all these factors were considered by the Assessing Officer at the time of assessment proceedings and undoubtedly two opinions were available in this regard, out of which one possible view has been adopted by the Assessing Officer. However, the Assessing Officer has considered a particular aspect

of income and has adopted one of the possible view on the subject point, therefore, his order cannot be said to be erroneous on that particular point. To revise any order u/s 263, the twin conditions of erroneous plus prejudicial to the interests of Revenue to that extent must co-exist. In this case, when the order is not erroneous, even if it is prejudicial to the interests of the Revenue, the same cannot be revised. Hence, we set aside the impugned order and uphold the assessment order."

6. Learned counsel for the parties fairly submit that the controversy is no longer res integra as the Hon'ble Supreme Court, in the case of "Commissioner of Income Tax, Mumbai -Vs- Balkrishna Industries Ltd" reported in [2017] 88 taxmann.com 273 (SC), has decided that Section 41(1) of the Act does not apply in such circumstances and the Hon'ble Supreme Court has affirmed the view taken by the Bombay High Court with the following observations.

"7. A glimpse of the facts taken note of, shows that the assessee herein had collected the sales tax in the sum of Rs.7,52,01,378/-. As per the Scheme floated by the Government of Maharashtra, for those assesseees who set up their industries in the backward area, the sales tax liability was deferred for a period of 7 years and, thereafter, it can be paid over a period of 7 years under the Deferral Scheme of 1983 and over a period of 6 years under the Deferral Scheme of 1988. However, under the C.A. NO. 19587/ 2017 etc. (@ SLP (C) No. 30896/ 2015 etc.) Scheme of 1988, the Government of Maharashtra promoted premature or payment of deferral sales tax at Net Present Value (NPV) .

8. In the meantime, section 38 of the Sales Tax Act was amended which provides that where the NPV of deferred tax as may be prescribed was paid, the deferred tax was deemed to have been paid. Taking advantage of this Scheme, the assessee made repayment of Rs.3,37,13,393/- against the total liability of Rs.7,52,01,378/-. In this manner, the assessee could save a sum of Rs.4,14,87,985/-. The issue is as to whether this amount, which the assessee could save, is to be treated as 'income' by applying the provisions of Section 41 of the Act. The Assessing Officer

treated it as the revenue receipt and thereby income. Contention of the assessee is that it is a capital receipt, which is accepted by the High Court.

9. In a very detailed and exhaustive judgment rendered by the High Court, it has discussed the view taken by the Assessing Officer, which was confirmed by the Commissioner of Income Tax (Appeals). Thereafter, the High Court noted in detail the manner in which the Tribunal has dealt with the issue. A perusal of the judgment would show that the High Court took into consideration the provisions of Section 41 of the Act and the conditions which are required to be satisfied for bringing a particular receipt as "income" within the ambit thereof and found that those conditions are not satisfied in the present case. The High Court also repelled the contention of the Revenue that the assessee obtained the benefit of reduction of sales tax liability under Section 43B of the Act as per the CBDT Circular No. 496 dated 25th September, 1987. The relevant portion of the discussion in this behalf reads as under:

"It is not possible to agree with Mr. Gupta. Because, premature payment of Sales Tax already collected but its remittance to the Government, as Mr. Gupta envisages, is not covered by this provision else the subsections and particularly section 43B(1) would have been worded accordingly. Therefore Section 43B has no application. Insofar as applicability of section 41(1) (a), there also the applicability is to be considered in the light of the liability. It is a loss, expenditure or trading liability. In this case, the scheme under which the Sales Tax liability was deferred enables the Assessee to remit the Sales Tax collected from the customers or consumers to the Government not immediately but as agreed after 7 to 12 years. If the amount is not to be immediately paid to the Government upon collection but can be remitted later on in terms of the Scheme, then, we are of the opinion that the exercise undertaken by the Government of Maharashtra in terms of the amendment made to the Bombay Sales Tax Act

and noted above, may relieve the Assessee of his obligation, but that is not by way of obtaining remission. The worth of the amount which has to be remitted after 7 to 12 years has been determined prematurely. That has been done by find out its NPV. If that is the value of the money that the State Government would be entitled to receive after the end of 7 to 12 years, then, we do not see how ingredients of sub section (1) of section 41 can be said to be fulfilled. The obligation to remit to the Government the Sales Tax amount already recovered and collected from the customers is in no way wiped out or diluted.

The obligation remains. All that has happened is an option is given to the Assessee to approach the SICOM and request it to consider the application of the Assessee of premature payment and discharge of the liability by finding out its NPV. If that was a permissible exercise and in terms of the settled law, then, we do not see how the Assessee can be said to have been benefited and as claimed by the Revenue. The argument of Mr. Gupta is not that the Assessee having paid Rs.3.37 crores has obtained for himself anything in terms of section 41(1), but the Assessee is deemed to have received the sum of Rs.4.14 crores, which is the difference between the original amount to be remitted with the payment made. Mr. Gupta terms this as deemed payment and by the State to the Assessee. We are unable to agree with him. The Tribunal has found that the first requirement of section 41(1) is that the allowance or deduction is made in respect of the loss, expenditure or a trading liability incurred by the Assessee and the other requirement is the Assessee has subsequently obtained any amount in respect of such loss and expenditure or obtained a benefit in respect of such trading liability by way of a remission or cessation thereof. As rightly noted by the Tribunal, the Sales Tax collected by the Assessee during the relevant year amounting

to Rs.7,52,01,378/- was treated by the State Government as loan liability payable after 12 years in 6 annual/equal installments. Subsequently and pursuant to the amendment made to the 4th proviso to section 38 of the Bombay Sales Tax Act, 1959, the Assessee accepted the offer of SICOM, the implementing agency of the State Government, paid an amount of Rs.3,37,13,393/- to SICOM, which, according to the Assessee, represented the NPV of the future sum as determined and prescribed by the SICOM. In other words, what the Assessee was required to pay after 12 years in 6 equal installments was paid by the Assessee prematurely in terms of the NPV of the same. That the State may have received a higher sum after the period of 12 years and in installments. However, the statutory arrangement and vide section 38, 4th proviso does not amount to remission or cessation of the Assessee's liability assuming the same to be a trading one. Rather that obtains a payment to the State prematurely and in terms of the correct value of the debt due to it. There is no evidence to show that there has been any remission or cessation of the liability by the State Government. We agree with the Tribunal that one of the requirement of section 41(1)(a) has not been fulfilled in the facts of the present case."

10. After hearing the counsel for the parties at length, C.A. NO. 19587/ 2017 etc. (@ SLP (C) No. 30896/ 2015 etc.) we are of the view that the aforesaid approach of the High Court is without any blemish, inasmuch as all the requirements of Section 41(1) of the Act could not be fulfilled in this case.

11. We, therefore, do not find any merit in these appeals which are accordingly, dismissed."

7. Following the said decision of the Hon'ble Supreme Court, a Coordinate Bench of this Court also dismissed a similar appeal filed by the Revenue in the case of "Commissioner of Income Tax -Vs- M/s.Wheels India Limited" (T.C.A.No.285 of 2018) on 11.06.2019.

8. In view of the aforesaid submissions made at Bar, the present appeal filed by the Revenue in the present case also deserves to be dismissed and the question of law framed above deserves to be answered in favour of the Assessee and against the Revenue. We hereby do so.

9. The Tax Appeal is accordingly dismissed. No costs.

Sd/-
Asst.Registrar (CCC)

/true copy/
Sub Asst. Registrar

KST

To
Income Tax Appellate Tribunal
'D' Bench, Chennai.

2.The Commissioner of Income Tax
Chennai

3.The Assistant Commissioner
of Income tax Company Circle III(4)
Chennai

+1 cc to Mr.M.Swaminathan Advocate sr15023
+1 cc to Mr.Subbraya Aiyar Advocate sr15396

T.C.(A) No.231 of 2011

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