IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.03.2021

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MS.JUSTICE R.N.MANJULA

Tax Case Appeal No.282 of 2018

Principal Commissioner of Income
Tax, Central 2,
No.108, Mahatma Gandhi Road,
Chennai. ...Appellant

Vs

M/s.Kaleesuwari Refinery Pvt. Ltd.,
No.53, Rajasekaran Street,
Mylapore, Chennai - 600 004. ...Respondent
PAN AAACK6087A

APPEAL under Section 260A of the Income Tax Act, 1961 against the order dated 05.10.2017 passed by the Income Tax Appellate Tribunal, Madras 'A' Bench in I.T.A.No.2927/Mds/2016 for the assessment year 2007-08.

This Appeal preferred against the order of the Income Tax Appellate, Tribunal Madras 'A' Bench dated 05/10/2017 in IA No.2927/mds/2016 in Assessment year 2007-2008 against the Commissioner of Income Tax appeals -18, 46, Mahatma Gandhi Road, Nungambakkam, Chennai 600 034, in IA No.728/2015-16 dated 28/07/2016 GIA/PAN No.AAACK6087A in Assessment year 2007-2008. against the Deputy Commissioner of Income Tax Central Circle -II (4), Investigating Wing New No.46/ old no.108 M.G.Road Nungambakkam Chennai 600 034, in PAN No.AAACK6087A in Assessment year 2007-2008.

For Appellant : Mr.T.R.Senthil Kumar, SSC
assisted by
Ms.K.G.Usha Rani, JSC

For Respondent : Mr.G.Baskar

JUDGMENT
(Delivered by T.S.SIVAGNANAM,J)

This appeal, filed by the Revenue under Section 260A of the Income Tax Act, 1961 (for short, the Act), is directed against the order dated 05.10.2017 made in I.T.A.No.2927/Mds/2016 on the file of the Income Tax Appellate Tribunal, Madras 'A' Bench ('the Tribunal' for brevity) for the assessment year 2007-08.

2. The appeal was admitted on 28.06.2018 on the following substantial questions of law:

> "1. Whether the ITAT was justified in holding that the claim of Rs.1,83,04,644/- which is a part of opening balance in Service Tax Set Off Account (STA) made by the assessee as allowable expenditure under Income Tax Act? and
>
> 2. Whether Appellate Tribunal is justified in law in giving relief to the assessee by placing reliance on the decision of the ITAT, Hyderabad in the case of M/s.NCS Distilleries P. Ltd Vs. I.T.O. by ignoring that the facts in the present case are different and distinguishable?"

3. We have heard Mr.T.R.Senthil Kumar, learned Senior Standing Counsel assisted by Ms.K.G.Usha Rani, learned Junior Standing Counsel appearing for the appellant - Revenue and Mr.G.Baskar, learned counsel for the respondent.

4. The respondent is a manufacturer of edible oil and filed its return of income for the assessment year under consideration i.e. AY 2007-08 declaring a total income of Rs.17,56,15,534/-. During the course of scrutiny assessment proceedings under Section 143(3) read with Section 263 of the Act, the Assessing Officer observed that a sum of Rs.1,83,04,644/- represents a part of balance in the account of "Service Tax set off account" as on 31.03.2007 and the same was charged to Profit & Loss account on the presumption that this amount will not be useful for future set off against Central Excise duty payable and Service Tax payable as the Excise on edible oil was discontinued with effect from 01.03.2005.

5. The Assessing Officer, vide order dated 31.01.2014, disallowed the written off of service tax amount of Rs.1,83,04,644/- and charging the same to Profit & Loss account on the ground that it was not in order. Aggrieved by the same, the assessee preferred appeal before the Commissioner of Income Tax (Appeals) 18, Chennai [CIT(A)], whom, by order dated 28.07.2016, allowed the appeal, by taking note of the earlier decisions of the Tribunal. Aggrieved by the same, the Revenue filed appeal before the Tribunal, which has been dismissed by the impugned order.

6. On a perusal of the order passed by the CIT(A), though it

appears to be a non-speaking order, yet, the CIT(A) rightly took note of the decision of the Hyderabad Tribunal in the case of M/s.NCS Distilleries P. Ltd. Vs. ITO, Ward 16(2) Hyderabad in ITA.No.699/Hyd/2012. In the said decision, the Tribunal took note of an earlier decision of the Chandigarh Tribunal in the case of M/s.Mohan Spinning Mills Vs. ACIT in ITA.No.1212/Chd/2011 dated 25.04.2012 and also the decision of the Ahmadabad Tribunal in the case of ACIT Vs. Rangoli Industries P. Ltd. in ITA.No.1936/Ahd/2010 dated 11.01.2013. The operative portion of the order dated 11.01.2013 reads as follows:

> "6. Having heard the submissions of both the sides and considering the facts of the case as narrated before the authorities, it was observed that the aforesaid amount of the Excise Duty credit (CENVAT Credit) written off was allowable as deduction. on this issue, Coordinate Bench at Chandigarh in the case of M/s.Mohan Spinning Mills (supra) has opined as under:-
>
> "7. We have heard the rival contentions and perused the record. The issue arising in the present appeal is in respect of the deduction claimed on account of CENVAT amounting to Rs.35,94,577. The assessee was engaged in the business of manufacturing and trading of yarn and fibre. The yarn manufactured by the assessee was an excisable item. The assessee was paying excise duty on the raw material purchased i.e. acrylic yarn/fibre and polyester yarn/fibre. In turn, assessee was liable to pay duty on its manufactured items. The rate of excise duty payable on the raw material was higher and the assessee was depositing the excise duty in PLA account which in turn was adjustable against the excise duty payable on the finished products. The excise duty payable on the finished products was on the lower side and consequently over the period of years the assessee had credit of excise duty resulting in accumulation of CENVAT."
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> "10. Various tests have been laid down by various High Courts and the Apex Court in relation to the allowability of expenditure under Section 37(1) of the Act while computing the income from profits and gains of business or profession. In the facts of the present case, the assessee had paid CENVAT on purchase of raw material which was

> deposited in its PLA account for claiming the benefit of set off against the excise duty payable on the manufactured items i.e. branded yearn. The assessee was paying higher rate of excise duty on the raw material purchased by it as against the rate of excise duty applicable on the manufactured items, consequently credit of excise duty was available with the assessee. The said excise duty paid from year to year was not claimed as an expenditure but was carried forward from year to year to be adjusted against the excise duty payable by the assessee on its manufactured items. However, during the year under consideration the assessee closed down its manufacturing unit and consequently the benefit of the CENVAT credit remained un-adjusted. Once the manufacturing unit of the assessee is closed down, admittedly the benefit of CENVAT credit not availed of against the excise duty payable on manufactured items, cannot be utilized by the assessee and the said write off of CENVAT credit, is allowable as an expenditure in the year under consideration on the closure of the business. The write off of CENVAT credit by the assessee in its books of account is thus allowable as business expenditure under the provisions of section 37(1) of the Act relatable to the year, in which the manufacturing activities are closed down by the assessee.
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> Accordingly, we direct the Assessing Officer to allow the claim of the assessee in respect of write off of CENVAT credit of Rs.35,94,577/-. Ground No.1 raised by the assessee is thus allowed."

7. The CIT(A) also took note of the decision in the case of Girdhar Fibres P. Ltd. Vs. ACIT in ITA.No.2027/Ahd/2009 dated 12.10.2012, wherein, identical issue was decided in favour of the assessee. The Revenue seeks to distinguish the decision in the case of M/s.NCS Distilleries P. Ltd., by referring to certain factual aspects stating that in the said case, the unit had been closed down. However, the said contention sought to be given by the Revenue is not tenable, because the assessee could not have availed the set off on account of operation of law and from the assessment year 2007-08 onwards, Central Excise duty on edible oils were deleted.

8. In the case of M/s.NCS Distilleries P. Ltd., it appears that the union was merged with other company and therefore, the credit remained unutilized. However, this is not a feature to distinguish the said decision. In fact, the Tribunal has taken into consideration as to how the CENVAT Scheme operates and granted relief to the assessee. The Tribunal has once again re-appreciated the factual position and found that the decision in M/s.NCS Distilleries P. Ltd., would fully apply to the case on hand.

9. The Service Tax Department issued show Cause notice dated 14.06.2005 alleging wrongful availment of service tax credit on input service and this show cause notice culminated in an Order-in-Original disallowing a credit of Rs.49,00,194/-. Challenging the said disallowance, the assessee filed appeal before the Commissioner of Central Excise, Chennai, who dropped the demand to an extent of Rs.39,09,242/- Aggrieved by the same, the Revenue filed appeal before the CESTAT and the Tribunal, by Final Order No.41520-41521 of 2017 dismissed the appeal filed by the Revenue on 08.08.2017. The above order also fortifies the stand taken by the assessee before the authorities, particularly before the CIT(A) as well as the Tribunal.

10. For the above reasons, we find that there is no error in the order passed by the Tribunal. Accordingly, the appeal fails and it is dismissed. Consequently, the substantial questions of law are answered against the Revenue. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

hvk

To

1. The Income Tax Appellate Tribunal,
Madras 'A' Bench, Chennai.

2. The Principal Commissioner of Income Tax,
Central 2, No.108, Mahatma Gandhi Road,
Chennai.

3.The Commissioner of Income Tax (Appeals)18.
46, Mahatma Gandhi Road,
Nungambakkam, Chennai -600 034

4.The Deputy Commissioner of Income Tax
Central Circle II(4)
Investigating Wing, New No.46/Old No.108, MG Road
Nungambakkam, Chennai.600 034

+1 cc to M/s.T.R.Senthil kumar, Advocate Sr.No. 14409

+1 cc to M/s.G.Baskar, Advocate Sr.No. 14624

VSNII(CO)
RMP(30/03/2021)