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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of decision: 18.07.2023*

+ **ITA 913/2019**

THE PR. COMMISSIONER OF INCOME TAX -CENTRAL -1

..... Appellant
Through: Mr Aseem Chawla, Sr. Standing
Counsel with Ms Pratishtha
Chaudhary and Mr Aditya Gupta,
Advocates.

versus

VALLEY IRON & STEEL CO. LTD. Respondent
Through: Mr Abhimanyu Jhamba with Ms
Thonpinad Thangal, Ms Hatneimawi
and Mr Shivam Prashar, Advocates.

CORAM:

HON'BLE MR JUSTICE RAJIV SHAKDHER

HON'BLE MR JUSTICE GIRISH KATHPALIA

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J.: (ORAL)

1. This appeal concerns Assessment Year (AY) 2014-15.
2. *Via* this appeal the appellant/revenue seeks to assail the order dated 24.05.2019 passed by the Income Tax Appellate Tribunal [in short, "Tribunal"].
3. The Tribunal *via* the impugned order has set aside the penalty levied on the respondent/assessee under Section 271(1)(c) of the Income Tax Act, 1961 [in short, "the Act"] amounting to Rs.14,31,07,613/-. The Assessing



Officer (AO) had levied the said amount as penalty on account of disallowance under Section 43B of the Act.

4. Mr Aseem Chawla, learned senior standing counsel, who appears on behalf of the appellant/revenue, says that the order of the Tribunal is not sustainable, in view of the fact that the disallowance said to have been made “voluntarily” by the respondent/assessee under Section 43B of the Act, was triggered on account of notices issued under Section 143(2) and/or Section 142(1) of the Act.

5. On the other hand, Mr Abhimanyu Jhamba, who appears on behalf of the respondent/assessee, contends to the contrary.

6. The following facts, as found by the Tribunal, are not in dispute:

(i) On account of floods in Himachal Pradesh, the respondent/assessee incurred huge losses and had to take recourse to Corporate Debt Restructuring Scheme (“CDR”), in respect of loans received from its lenders i.e., financial institutions.

(ii) CDR led to the working capital loan being converted into Working Capital Term Loan (“WCTL”) and the interest which had accrued on the loan was converted into Fund Interest Term Loan (“FITL”).

(iii) In respect of the AY in issue, Return Of Income (“ROI”) was filed by the respondent/assessee on 30.11.2014.

(iv) The original ROI was revised by the respondent/assessee on 01.09.2016 (online filing was made on 29.08.2016).

(v) The revision in the ROI was triggered by a revision in the tax audit report, which was carried out on 26.08.2016. The tax audit report was revised by the Chartered Accountant of the respondent/assessee *suo motu*.



(vi). The initial tax audit report adverted to a disallowance under Section 43B of the Act, *albeit*, amounting to Rs.6,08,64,813/-. In the revised tax audit report, the disallowance was *suo motu* enhanced to Rs.48,18,93,419/-.

(vii) The query with regard to the issue concerning disallowance under Section 43B of the Act was raised by the AO for the first time *via* a notice dated 21.11.2016 issued under Section 142(1) of the Act.

7. Having regard to these facts, which, as indicated above, are not in dispute, the Tribunal concluded that the disallowance was enhanced, voluntarily, and therefore, this was not a case in which penalty ought to have been imposed.

8. Mr Aseem Chawla, who appears on behalf of the appellant/revenue, has vigorously argued that the Tribunal's view is unsustainable in law. In support of his submission, Mr Chawla has, *inter alia*, relied upon the following judgments:

- (i) ***Gangotri Textiles Ltd. v. Deputy Commissioner of Income-tax***, (2022) 137 taxmann.com 198 (SC).
- (ii) ***Gangotri Textiles Ltd. v. Deputy Commissioner of Income Tax, Corporate Circle 2, Coimbatore***, (2020) 121 taxmann.com 171 (Madras).
- (iii) ***Commissioner of Income-tax, Ahmedabad v. Gujarat Cypromet Ltd.***, (2019) 103 taxmann.com 346 (SC).
- (iv) ***MAK Data (P) Ltd. v. Commissioner of Income-tax-II***, (2013) 38 taxmann.com 448 (SC).

9. Mr Abhimanyu Jhamba, who appears on behalf of the respondent/assessee, on the other hand, says that the Tribunal has correctly noted that there were decisions in place which took a view that favoured the



respondent/assessee.

9.1. In this context, Mr Jhamba relied upon a short order dated 31.08.2006 passed in Tax Appeal No. 231 of 2006 titled ***Commissioner of Income Tax v. Gujarat Cypromet Ltd.*** It is pointed out that the question of law framed was decided in favour of the assessee in that case, based on an earlier judgment of the Gujarat High Court rendered in ***CIT v. Bhagwati Auto Gas Ltd.*** 261 ITR 481.

9.2 Mr Jhamba emphasized the fact that this aspect was noticed by the Tribunal and also the fact that judgment of the Gujarat High Court in ***Commissioner of Income Tax v. Gujarat Cypromet Ltd.*** was reversed by the Supreme Court only in February 2019 made it conclude the act of enhancement of disallowance under Section 43B of the Act did not lack *bona fides*.

10. It is emphasized by Mr Jhamba that the facts, as emerging from the record, would show that the enhancement of disallowance under Section 43B of the Act was *suo motu* and not triggered by way of any specific notice issued by the AO involving aspects concerning Section 43B of the Act.

11. We have heard the learned counsels for the parties at some length and have perused the record. The facts, as noticed hereinabove, are not in dispute.

12. Clearly the respondent/assessee had enhanced the disallowance under Section 43B of the Act from Rs.6,08,64,813/- to Rs.48,18,93,419/- *suo motu*.

12.1. This course-correction was carried out with the submission of a revised tax audit report on 26.08.2016, which led to a revised return being



filed *via* online mode as well as physically. The online revised ROI was filed on 29.08.2016 which was followed by a physical filing on 01.09.2016.

13. The Tribunal noted that there is no dispute about the fact that a specific query with regard to the issue concerning disallowance under Section 43B of the Act was raised by the AO for the first time *via* notice dated 21.11.2016 issued under Section 142(1) of the Act.

13.1 Therefore, as correctly argued by Mr Jhamba, it was not, as is noted by the AO, that the disallowance under Section 43B of the Act was not correctly recorded in the tax audit report and the respondent/assessee made a course-correction only thereafter.

14. Furthermore, what is not in dispute is that, at the relevant time, there were judgments of the Gujarat High Court which took the view that favoured the respondent/assessee. For the sake of convenience, the order dated 31.08.2006 passed in ***Commissioner of Income Tax v. Gujarat Cypromet Ltd.*** is extracted hereafter:

“Heard learned counsel for the appellant.

The following substantial question of law is proposed for admission of this appeal.

“Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in law and on facts in deleting the addition made u/s 43B of the Income Tax Act, 1961 on conversion of unpaid interest into a funded interest loan treating the same as interest payment?”

Admittedly the issue raised in this appeal has been considered by this Court in case of CIT vs. Bhagwati Auto Gas Ltd., 261 ITR 481, whereby the issue has been decided in favour of the assessee and the Tribunal has followed the same decision.

No case is made out for admission of this appeal.”



15. Mr Chawla does not dispute that fact that the view taken by the Gujarat High Court was reversed only on 21.02.2019 by the Supreme Court via judgment rendered in ***Commissioner of Income-tax, Ahmedabad v. Gujarat Cypromet Ltd.***, (2019) 103 taxmann.com 346 (SC).

16. Thus, given the aforesaid, it cannot be said that the enhancement of disallowance under Section 43B of the Act carried out by the respondent/assessee was not voluntarily.

17. The decision of the Madras High Court on ***Gangotri Textiles Ltd. v. Deputy Commissioner of Income Tax, Corporate Circle 2, Coimbatore***, (2020) 121 taxmann.com 171 (Madras), which was carried in appeal to the Supreme Court, on which Mr Chawla has placed reliance, according to us, is distinguishable on facts.

17.1 A perusal of Madras High Court judgment would show that it was a case where the assessee had concealed its income which accrued upon sale of subject windmills and land. The assessee, in fact, had filed a return showing capital gains as “nil”.

17.2 Furthermore, the court also noted that the assessee had never filed its revised return and, for the first time, admitted that such a sale had taken place, only when the matter was placed before the Tribunal.

18. Likewise, the decision rendered by the Supreme Court in ***MAK Data (P) Ltd. v. Commissioner of Income-tax-II***, (2013) 38 taxmann.com 448 (SC) is also distinguishable, as the documents comprising share application forms, bank statements and memorandum of association companies etcetera. emerged upon a survey being conducted under Section 133A of the Act.

19. In our view, the decisions in both ***Gangotri Textiles Ltd.*** rendered by



the Madras High Court and in *MAK Data (P) Ltd.* by the Supreme Court were passed in settings which were different from one which arises in the present case.

20. Thus, for the forgoing reasons, we are not inclined to interdict the decision of the Tribunal. According to us, no substantial question of law arises for our consideration.

21. The appeal is, accordingly, closed.

22. Parties will act based on the digitally signed copy of the order.

RAJIV SHAKDHER, J

GIRISH KATHPALIA, J

JULY 18, 2023 /tr