IN THE HIGH COURT OF ORISSA AT CUTTACK

I.T.A. No.20 of 2014

AFR

M/s. Indian Metal and Ferro Alloys Ltd. .... ***Appellant***

Mr. Sachit Jolly, Advocate

-versus-

Commissioner of Income Tax, Bhubaneswar .... ***Respondent***

Mr. T.K. Satapathy, Senior Standing Counsel

CORAM:
THE CHIEF JUSTICE
JUSTICE R.K. PATTANAIK

ORDER
04.03.2022

Order No.

Dr. S. Muralidhar, CJ.

12. 1. This appeal by the Assessee is directed against an order dated 13th June 2014 passed by the Income Tax Appellate Tribunal, Cuttack Bench, Cuttack (ITAT) in ITA No.521/CTK/2013 for the Assessment Year (AY) 2009-10.

2. While admitting this appeal, on 8th February 2016, the following questions of law were framed by this Court for consideration:

> (i) Whether on facts and circumstances of the case and in law, the ITAT was right in confirming the action of the AO and CIT (A) in disallowing deduction of payment of electricity duty by erroneously invoking Section 43B of the Act without appreciating that the said sum is a crystallized liability and deposited in a 'no lien' account pursuant to the directions of the Hon'ble Orissa High Court?
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> (ii) Whether on facts and circumstances of the case and in law, the ITAT erred in confirming the action

of the AO and the CIT (A) in disallowing expenditure incurred on foreign travel of Directors of the Appellant without appreciating that the same has been undertaken wholly and exclusively for the business of Appellant Company?

Background facts

3. The background facts are that the Appellant is a company engaged in the business of manufacture and sale of ferro alloys like ferro silicon and charge chrome. For the AY in question, the Assessee filed its return of income on 30th September 2009 declaring a total income of Rs.1,91,79,42,344/-. Subsequently, return of income was revised on 24th September 2010 declaring the same total income.

4. The Assessee paid electricity duty to the Government of Odisha at the rate of 6 paise per unit. This was enhanced to 20 paise per unit by the Government of Odisha and a demand was raised on that basis. Challenging the increase in the rate of the electricity duty and the consequent demand, the Assessee filed W.P.(C) No.5413 of 2005 in this Court. By an interim order dated 21st April 2005 passed in the said writ petition, this Court directed the Assessee to continue to pay electricity duty at the rate of 6 paise per unit to the Government of Odisha and to deposit the differential duty of 14 paise per unit in a separate 'no-lien' account till the disposal of the case.

5. Subsequently, the writ petition was dismissed by this Court by a judgment dated 6th May 2010. The Assessee then filed a Special Leave Petition (Civil) No.16689 of 2010 in the Supreme Court of India against the said judgment. By an interim order dated 7th

February 2011, the Supreme Court directed the Assessee to continue paying the admitted amount of demand and as regards the disputed amount, it was directed to be deposited in an escrow account till further orders. The said SLP is stated to be pending in the Supreme Court. The Assessee states that it has been complying with the aforementioned interim order till date.

6. During the AY 2009-10, the Assessee debited Rs.11,42,61,000/- in the profit and loss (P&L) account on account of electricity duty. Of this, a sum of Rs.6,29,11,949/- was shown to have been deposited in a designated escrow/'no-lien' account with the State Bank of India in terms of the directions issued by the Supreme Court. Thus, the Assessee claimed the entire amount of electricity duty as deduction from its income for the purposes of calculating profit and gains of the business.

7. Additionally, the Assessee claimed export promotion expenses in the form of foreign travelling expenditure of its Directors under the broad head of "selling expenses" in its P & L account, in the sum of Rs.1,55,80,882/-. The Assessee claimed that this was the expense on account of the foreign travel of four of its Directors for the purposes of carrying out import and export activities and for attracting new customers. The names of the Directors who had travelled and the amount incurred as regards each of them was furnished.

8. By the assessment order dated 30th December 2011, the Assessing Officer (AO) disallowed the payment of electricity

duty in the sum of Rs.6,29,11,949/- by holding that in terms of Section 43 B of the Income Tax Act, 1961 (Act), deposit of a sum in a no-lien account cannot be regarded as actual payment of electricity duty. As regards the foreign travel expenses, 20% thereof was disallowed on the ground that no details were furnished by the Assessee regarding the foreign travels undertaken by the Directors for business purposes.

9. Aggrieved by the above two additions, the Assessee appealed to the Commissioner of Income Tax (Appeals) [(CIT (A)] who by an order dated 26th June 2013 confirmed the order of the AO. The Assessee then went in further appeal to the ITAT which, by the impugned order dated 13th June 2014, concurred with the AO as well as the CIT (A).

Submissions of counsel for the Appellant

10. Mr. Sachit Jolly, learned counsel appearing for the Appellant-Assessee, submits that the requirement of Section 43B (1) of the Act was only that the Assessee should have "actually paid" the electricity duty amount and not that the amount should have been received by the Government of Odisha. He accordingly submits that the AO was in error in disallowing deduction in respect of Rs.6,29,11,949/- which had been deposited by the Assessee in a no-lien/escrow account in compliance with the interim direction of this Court, to begin with, and then the Supreme Court. Mr. Jolly emphasizes that as far as the Assessee is concerned, it had no control over the said sum after it had parted with it. If in the future the Assessee succeeded in the appeal before the Supreme Court of India, then in the event of the amount being returned to

it with interest, the sum would be offered for tax under Section 41 (1) of the Act. Therefore, there was no loss to the Revenue. Mr. Jolly submits that the decision of the Rajasthan High Court in ***Mugat Dyeing and Printing Mills v. ACIT (2007) 290 ITR 282 (Guj)*** was distinguishable on facts. In that case, the Gujarat High Court had negatived the plea that furnishing of a bank guarantee would amount to actual payment for the purposes of Section 43B of the Act, whereas here the Assessee had actually parted with the amount. Mr. Jolly submits that the AO, CIT (A) and the ITAT had erred in reading into Section 43 B of the Act a requirement was not specified therein viz., that not only the amount would have to be actually paid but the payee had to also receive the amount.

11. On the second issue, Mr. Jolly submits that there was no occasion for the AO, CIT (A) and the ITAT to disbelieve the Assessee's contention that it had spent the aforementioned amount on the foreign travelling and tour expenses of its four Directors which was obviously for business purposes. He submits that there was no requirement that the complete tour programme and every detail of the activity of the touring Directors had to be furnished to the Income Tax authority. He accordingly submits that the authorities were not justified in disallowing 20% of the expenditure claimed on this account.

Submissions of counsel for the Department

12. Mr. T.K. Satapathy, learned Senior Standing Counsel for the Department, on the other hand defends the impugned order of the ITAT. He submits that the expression "actually paid" connotes

that the Assessee should have nothing to do with the amount after it is paid. In the present case, however, the depositing of the amount by the Assessee in a no-lien/escrow account did not mean that the Assessee did not have chance of receiving it back. It was not an 'actual' payment in the sense envisaged in Section 43 B of the Act since the intended recipient had no access to the amount. What would happen to the amount depended on the outcome of the case pending in the Supreme Court of India. At this stage, therefore, placing of the amount in the no-lien/escrow account will not amount to 'actual' payment for the purposes of Section 43 B of the Act.

13. As regards Issue No.(ii), Mr. Satapathy submits that it was not enough for the Assessee to have simply given the names of the Directors who travelled and the amount spent on each of their travel, or even just the cities to which they travelled, without giving a break-up of the expenses on travel, stay, entertainment and so on. He accordingly submits that disallowing 20% of the expenses claimed on this account was not unreasonable.

Decision on Question (i)

14. The above submissions have been considered. The relevant portion of Section 43 B of the Act reads as under:

> "43-B. Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of -
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> (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) - (f).....

shall be allowed (irrespective of the previous year 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 sum is actually paid by him :

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."

15. The scope of Section 43 B of the Act was elaborated in a Department circular dated 8th December 1983, where it was explained as under:

"35.1. Under Section 145 of the Income-Tax Act, 1961, profits and gains of business or 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 expenditure are accounted for on the basis of accrual and not on the basis of actual receipts or disbursements. For the purposes of computation of profits and gains of business or profession, Section 43(2) of 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.

35.2. Several cases have come to notice where taxpayers 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 periods 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.
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> 35.3. To curb this practice, the Finance Act, 1983, has inserted a new Section 43B to provide that deduction for any sum payable by the assessee by way of tax or duty under any law for the time being in force 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 employees shall, irrespective of the previous year in which the liability to pay such sum was incurred, be allowed only in computing the income of that previous year in which such sum is actually paid by the assessee."

16. The purpose of Section 43 B of the Act was to ensure that a liability could be claimed as deduction only if the Assessee has actually parted with the sum without any recourse to it thereafter. In the present case, the interim stay granted in favour of the Assessee was only to ensure that the disputed amount of electricity duty did not go to the State Government. Short of such 'actual' payment, the Assessee was permitted, first by the High Court and then by the Supreme Court, to deposit the disputed amount of duty in a 'no-lien'/escrow account. The very nature of the stay was to prevent the State Government from having access to the amount placed in such no-lien/escrow account. Therefore, while it may be correct to say that the Assessee 'paid' the amount in dispute, it paid it only into an account from which the State Government could not withdraw the amount. In other words, under the orders of this Court as well as the Supreme Court, the

State Government was prevented from having access to the sum in the said account.

17. The question then arises is whether the above kind of payment will satisfy the requirement that the Assessee should have 'actually paid' the electricity duty amount. In interpreting the provision, emphasis has to be placed on the expression 'actually'. A payment envisages a payer and a payee. If only one part is fulfilled viz., the payer has made the payment, but the payee has not received it, then it cannot be said that the sum has been 'actually' paid. While the Assessee as payer may have parted with the amount, it has not totally lost control over it. The payment has been made conditional and it has been ensured that if the Assessee ultimately succeeds in the litigation, the amount will not be actually paid to the State Government. Therefore, a via media has been put in place whereby the Assessee does not fully lose control of the money or has no recourse to it after having paid it. The sum has been paid into a no-lien/escrow account, and the State Government does not have access to it. In the considered view of the Court, such payment of the disputed amount of electricity duty this will not satisfy the requirement of the amount having been 'actually paid' for the purposes of claiming deduction under Section 43 B of the Act.

18. In ***Mugat Dyeing and Printing Mills v. ACIT*** *(supra)*, the question that arose was whether furnishing of a bank guarantee by the Assessee for the disputed amount of excise duty would satisfy the requirement under Section 43 B of the Act of the Assessee having actually paid the disputed amount of excise duty. The

Gujarat High Court answered the question in the negative. It held, following the decision of the Supreme Court of India in ***Somaiya Organics (India) Ltd. v. State of Uttar Pradesh [2001] 123 STC 623 (SC)***, that a bank guarantee is only a promise by the bank to pay to the beneficiary the amount under certain circumstances as indicated in the bank guarantee. It was held that furnishing of a bank guarantee will not tantamount to making payment as it was to avoid making payment of the excise duty that the bank guarantee was issued.

19. The decision of the Rajasthan High Court in ***CIT v. Rajasthan Patrika (P) Limited (2002) 258 ITR 300 (Raj.)***, is to the same effect. There the question was "whether furnishing of bank guarantee by the assessee against customs duty amounts to actual payment of customs duty" for the purposes of Section 43 B of the Act and it was answered by that High Court too in the negative.

20. In the present case, while the Assessee may not have furnished a bank guarantee, its deposit of the disputed electricity duty amount in a no-lien/escrow account was only to ensure that during the pendency of the litigation the said disputed amount is not in fact paid directly to the State Government. Therefore, the net result is no different from the kind of payment made by the Assessee in the aforementioned two cases by furnishing bank guarantees in lieu of such disputed payment of duty. In all three instances, therefore, the requirement of Section 43 B of the Act is not satisfied.

21. Accordingly, question (i) framed by this Court is answered in the affirmative i.e. in favour of the Department and against the Assessee.

Decision on Question (ii)

22. The admitted facts are that a claim of Rs.1,55,80,882/- was made by the Assessee as deduction under the head 'Export Promotion Expenses'. The sum pertained to the travel of its Chairman, Vice-Chairman, Managing Director and Director (Corporate) to various cities in the world. While the names of the cities, the names of the Directors and the amount spent on each of them were specified there were no further details furnished to indicate that the expense was for purely business purposes. The AO was not, in the considered view of this Court, acting unreasonably in concluding that in the absence of better particulars to substantiate the claim that it was only for business purposes, it could not be wholly allowed. In the circumstances, disallowing 20% thereof cannot be held to be improper or legally impermissible.

23. Since the claim of the Assessee was that the expenses of 'wholly and exclusively' for the business of the Assessee, and for no other purpose, it was incumbent on the Assessee to discharge the burden of substantiating that fact. In the considered view of the Court, the Assessee cannot be said to have discharged said burden satisfactorily.

24. Consequently, question (ii) answered in the negative i.e. in favour of the Department and against the Assessee.

25. For the aforementioned reasons, the appeal is dismissed, but in the circumstances, with no order as to costs.

26. An urgent certified copy of this order be issued as per rules.

(Dr. S. Muralidhar)
Chief Justice

(R.K. Pattanaik)
Judge

S.K. Guin