IN THE HIGH COURT OF KARNATAKA AT BANGALORE

Dated this the 2nd day of September, 2014

PRESENT

THE HON'BLE MR. JUSTICE N KUMAR

AND

THE HON'BLE MRS. JUSTICE RATHNAKALA

INCOME TAX APPEAL No. 899/2008

BETWEEN:

1. THE COMMISSIONER OF INCOME TAX
CENTRAL CIRCLE
C R BUILDING, QUEENS ROAD
BANGALORE

2. THE DEPUTY COMMISSIONER
OF INCOME TAX
CENTRAL CIRCLE 2(3)
C R BUILDING, QUEENS ROAD
BANGALORE ...APPELLANTS

(By Sri K V ARAVIND – ADVOCATE)

AND

M/S McDOWELL & CO LTD
NOW KNOWN AS UNITED SPIRITS LTD
NO.52, RICHMOND ROAD
BANGALORE ...RESPONDENT

(By Smt. S R ANURADHA – ADVOCATE)

THIS ITA IS FILED U/S.260-A OF I.T.ACT, 1961 ARISING OUT OF ORDER DATED 23-05-2008 PASSED IN ITA NO. 853/BNG/2007 FOR THE ASSESSMENT YEAR 2004-05 PRAYING TO: FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED THEREIN, ALLOW THE APPEAL AND SET ASIDE THE ORDER PASSED BY THE ITAT, BANGALORE IN ITA NO. 853/BNG/2007,DATED 23-05-2008, CONFIRM THE ORDERS OF THE DEPUTY COMMISSIONER OF INCOME TAX, CENTRAL CIRCLE-2(3), BANGALORE IN THE INTEREST OF JUSTICE AND EQUITY.

THIS ITA COMING ON FOR HEARING THIS DAY, N.KUMAR J., DELIVERED THE FOLLOWING:

J U D G M E N T

The Revenue has preferred this appeal against the order passed by the Tribunal holding that the deferred tax can be taxed neither under Section 41(1) nor under Section 28(4) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

2. The assessee is a listed Public Company. The assessee filed return of income for the assessment year

2004-05 on 29.10.2004 declaring total income of Rs.42,16,81,790/-. In the computation of income for income tax purposes filed along with the return of income, the assessee has deducted an amount of Rs.9,52.61,916/- from the book profit as the amount representing Sales Tax deferral Loan Incentive Scheme and has not offered the same as tax. As per the provisions of Section 43B of the Act, the Sales Tax collected and not paid before the due date for filing the return of income should have been offered for tax as a part of total income for the assessment year 2003-04. The assessee did not offer the same for the assessment year 2003-04. The stand of the assessee was as per the circulars 496 dated 25.9.1987 and 612 dated 29.12.1993, such deferment of tax is considered as deemed to have been paid and therefore, provisions of Section 43B would not be applicable. In March, 2004 during the previous assessment year 2004-05 assessee opted for a Scheme under the Bombay Sales Tax Act wherein it could pay the net present value against premature payment of the amount of the

deferred tax under an incentive scheme and settled the amount. Accordingly, an amount of Rs.4,25,79,684/- was paid to the Sales Tax Department on 29.3.2004 and the amount got settled. According to the Incentive Scheme balance amount of deferred sales tax was waived. In other words, liability to pay deferred sales tax ceased to exist. Therefore, the assessee while finalizing the account recognized this waiver of Rs.9,52,61,916/- as revenue and in the computation of income has deducted the same as not taxable. However, the Assessing Authority did not accept the said contention. Therefore, the Assessing Authority held the alleged subsidy is relatable to Sales Tax collected and not paid, being revenue in nature even without applying the provisions of Section 41(1) of the Act, the amount would be taxable as revenue as per the decision of the Supreme Court.

3. Aggrieved by the said order the assessee preferred an appeal before the Commissioner of Income tax (Appeals). The Appellate Authority held presuming, but not accepting

that it is a loan independent of it originally being deferred Sales Tax, then also provisions of Section 41(1) would be applicable since it is a benefit arising out of an item on which expenditure has already been allowed. He confirmed the order of the Assessing Authority. Considering the alternative argument of the assessee, the Appellate Authority held that, if it is treated as Revenue in nature, the same can be taxed only in the year 2017. He held that a sum of Rs.952.6 lakhs as reduction in loan liability is liable to tax, but not in one year and only a proportion of it. As the benefit accrues over a period upto the year 2017, only a proportion as applicable to the year concerned is to be considered.

4. Aggrieved by the said order both the assessee as well as the Revenue preferred appeals before the Tribunal. The Tribunal on consideration of the rival contentions taking note of the statutory provisions and the several decisions on which reliance was placed held, when the deferred sales tax

have been deemed to have been paid, there cannot be a remission in respect of the deferred tax. Hence, Section 41(1) cannot be applied. When the net value of deferred sales tax has been paid, then the benefit is not arising from the business, but is arising on account of the statutory provisions. The payment of net present value is to be treated as value of deferred tax. It is to be seen that the deferred tax was to be paid in the year 2017. The State Government itself determined the present value of the amount which was receivable in 2017 and collected the same and treated the same as payment of deferred tax. When the quantum of deferred tax is treated as paid on the basis of the present value, there is no case of remission or benefit accruing to the assessee. The entire amount of deferred tax cannot be taxed neither under Section 41(1) nor under Section 28(4) of the Act. Therefore, the Tribunal allowed the appeal of the assessee and dismissed the appeal preferred by the Revenue. Aggrieved by this order the Revenue is in appeal.

5. Learned counsel for the Revenue assailing the impugned order contended the deferred tax of sales tax was not taxed under Section 43B of the Act. In fact, benefit of non-deduction of tax was given to the assessee. When the entire liability of deferred tax in a sum of Rs.13,78,41,600/- were discharged on payment of Rs.4,25,79,684/-, a sum of Rs.9,52,62,000/- partakes the character of income in the hands of the assessee and by virtue of Section 41(1) of the Act, the assessee is liable to pay tax. However the Tribunal was in error in holding it otherwise and therefore he submits a case for interference is made out.

6. Per contra, the learned counsel for the assessee submitted the entire case has to be looked into in the background of an incentive scheme introduced by the State of Maharashtra encouraging entrepreneurs to establish industries in rural areas. Viewed from that angle the sales tax collected was deemed to have been paid by the assessee and the said amount was considered as the loan to be repaid

after a period of 15 years. However, a provision was made for premature payment by yet another incentive scheme and when the assessee took advantage of the said incentive scheme and made premature payment, that extinguishes the entire liability to repay the loan. In the process the assessee did not get any income and therefore, the Tribunal was justified in passing the impugned order and no case for interference is made out.

7. In the light of the said rival contentions the substantial question of law that arises for our consideration is,

> *"Whether the Tribunal was correct in holding that the assessee is not liable to pay tax in respect of the amount of Rs.9,52,61,916/- which was collected as BST and CST on behalf of Maharashtra State and allowed as a deduction during the assessment year 2003-04 which was waived during the current assessment year 2004-05 and had been brought to tax under Section 41 of the Act?'*

8. As per the incentive scheme announced by the Government of Maharashtra, the assessee entered into an agreement with the Governor of Maharashtra to avail the benefits under deferral/1993 scheme which provides for deferment of payment of taxes. This agreement not only determines the eligibility of the assessee but also lays down the terms and conditions under which the agreement exists. The quantification of this deferment was made by Sicom Limited, a Government of Maharashtra Undertaking, which was an agent for the package scheme of incentives. M/s Sicom Limited quantified the entitlement of deferral of sales tax to the assessee. As against the total amount of Rs.20,21,64,149/- collected by the assessee towards Bombay Sales Tax and Central Sales Tax, the maximum entitlement of sales tax incentives by way of deferment was determined at Rs.13,78,41,600/-. The validity period of the deferral was determined as 1.4.2002 to 31.3.2017, thereby the assessee could retain the amount of sales tax collected to

the extent of Rs.13,78,41,600/- up to 31.3.2017. Accordingly, a certificate of entitlement was issued by the Deputy Commissioner of Sales Tax (Incentives and Enforcement) dated 1.4.2002. Consequent to the assessee opting for the scheme of deferment of sales tax, an amount of Rs.13,78,41,600/- was deemed to have been paid for the purpose of Section 43B of the Act and, therefore, while concluding the assessment for the assessment year 2003-04, the same was allowed as a deduction. The Maharashtra Government by way of Maharashtra Tax Laws (Levy and Amendment) Act, 2002 substituted the proviso to Section 38 of the Bombay Sales Tax Act, 1959 which came into effect from 1.5.2002. The proviso provided that notwithstanding anything to the contrary contained in the Act or in the Rules or in any of the package scheme of the incentives or in the Power Generation Promotion Policy 1998, the eligible unit to whom the entitlement certificate has been granted for availing of the incentives by way of deferment of sales tax, purchase tax, additional tax, turn over tax or surcharge as

the case may be, may, in respect of any of the periods during which, the said certificate is valid, at its option, prematurely in place of the amount of tax deferred by it an amount, equal to the net present value of the deferred tax as may be prescribed and on making such payments, in the public interest, the deferred tax shall be deemed to have been paid.

9. In view of the proviso to Section 38 of the Bombay Sales Tax Act, 1959, the net present value was determined at Rs.4,25,79,684/- . It was paid on 2.4.2004 in Form No. 25. Consequent to the payment of the net present value, the Deputy Commissioner of Sales Tax has issued a certificate on 14.4.2004 waiving the balance of the amount payable. It is thereafter the assessee did not offer Rs.9,52,61,916/- for tax.

10. The revenue relies on Section 41 (1) of the Act to levy tax on the aforesaid amount. The said provision reads as under:-

"41. Profits chargeable to tax. *1) Where an allowance or deduction has been made in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee (hereinafter referred to as the first-mentioned person) and subsequently during any previous year –*

(a) the first-mentioned person has obtained, whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof, the amount obtained by such person or the value of benefit accruing to him shall be deemed to be profits and gains of business or profession and accordingly chargeable to income-tax as the income of that previous year, whether the business or profession in respect of which the allowance or deduction has been made is in existence in that year or not; or

(b) the successor in business has obtained, whether in cash or in any other manner whatsoever, any amount in respect of which

loss or expenditure was incurred by the first-mentioned person or some benefit in respect of the trading liability referred to in clause (a) by way of remission or cessation thereof, the amount obtained by the successor in business or the value of benefit accruing to the successor in business shall be deemed to be profits and gains of the business or profession, and accordingly chargeable to income-tax as the income of that previous year.

Explanation 1 *- For the purposes of this subsection, the expression "loss or expenditure or some benefit in respect of any such trading liability by way of remission or cessation thereof" shall include the remission or cessation of any liability by a unilateral act by the first mentioned person under clause (a) or the successor in business under clause (b) of that sub-section by way of writing off such liability in his accounts.*

Explanation 2 *- For the purposes of this subsection, "successor in business" means –*

(i). where there has been an amalgamation of a company with another company, the amalgamated company;

(ii). where the first-mentioned person is succeeded by any other person in that business or profession, the other person;

(iii). where a firm carrying on a business or profession is succeeded by another firm, the other firm;

(iv). where there has been a demerger, the resulting company."

11. As could be seen from the aforesaid provision, if the assessee obtains, whether in cash or in any other manner in respect of such loss or expenditure or some benefit in respect of trading liability by way of remission or cessation thereof, the amount obtained by such person or the value of benefit accruing to him shall be deemed to be profits and gains of business or profession and accordingly chargeable to income tax as the income of the previous year.

Therefore, the assessee should obtain benefit, before it is deemed to be profits and gains of business or profession.

12. In the instant case, as per the scheme he was allowed to retain the sales tax as determined by the competent authority and pay the same 15 years thereafter. The tax collected was deemed to have been paid and, therefore, the tax so collected cannot be construed as income in the hands of the assessee. The tax so retained by the assessee is in the nature of a loan given by the Government as an incentive for setting up the industrial unit in a rural area. The said loan had to be repaid after 15 years. Again it is an incentive. However, by a subsequent scheme, a provision was made for premature payment. When the assessee had the benefit of making the payment after 15 years, if he is making a premature payment, the said amount equal to the net present value of the deferred tax was determined at Rs. 4,25,79,684/- and on such payment the entire liability to pay tax/loan stood discharged. Again it

is not a benefit conferred on an assessee. Therefore, Section 41 (1) of the Act is not attracted to the facts of this case. Hence, the Tribunal was justified in holding that there is no liability to pay tax. Under these circumstances, we do not see any error committed by the Tribunal in passing the impugned order. The substantial question of law is answered in favour of the assessee and against the revenue.

Sd/-
JUDGE

Sd/-
JUDGE

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