

Sequeira

*IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION*

INCOME TAX APPEAL NO. 809 OF 2017

Pr. Commissioner of Income Tax 3-Mumbai .. Appellant
Vs
M/s. M. J. Exports Pvt. Ltd. .. Respondent

Mr. Sham Walve a/w Prithish Chatterjee, for the Appellant.
Mr.K.Shivram, Senior Advocate with Mr.Rahul Hakani and Shashank
Dundu, for the Respondent.

*CORAM : M.S.SANKLECHA &
NITIN JAMDAR, JJ.
Date : 27 August, 2019.*

P.C. :

On 20 August 2019, we passed the following order :-

‘This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act), challenges the order dated 17th May, 2016 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order dated 17th May, 2016 is in respect of Assessment Year 2007-08.

2 Revenue urges the following questions of law, for our consideration:

“(a) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in allowing the claim of the Assessee for on account of payment of interest on delayed payment of Custom Duty and Penalty without

appreciating the fact that such interest was penal in nature and hence not allowable u/s. 37 of the I.T. Act?

(b) Whether on the facts and in the circumstances of the present case and in law, the Tribunal was justified in allowing the claim of the Assessee for on account of payment of interest on delayed payment of Custom Duty and Penalty without appreciating the fact that such interest was not allowable u/s. 43B of the I.T. Act as the same did not form part of Tax Duty Cess or Fees as stipulated u/s. 43B of the I.T. Act?"

3 The impugned order of the Tribunal allowed the Respondent-Assessee's appeal by holding that the Respondent is entitled to claim expenditure in respect of interest paid on delayed payment of customs duty under Section 37 of the Act. This by placing reliance upon the decision of Supreme Court in Mahalaxmi Sugar Mills Co., v/s. CIT 123 ITR 429. The impugned order dated 17th May, 2016 also placed reliance upon Section 43B of the Act and held that even under the above provision, the Respondent would be entitled to claim the expenditure. In spite of having so held, the impugned order records that there are contrary decisions which have taken a view that the interest on delayed payment can not allowed. None of the contrary decisions have been referred to in the impugned order.

4 In the above view, Mr. Walve, learned Counsel for the Revenue seeks time to examine whether there are any decisions contrary to the view taken by the Apex Court in Mahalaxmi Sugar Mills Co. (supra) and various High Courts referred to in the order of the Tribunal.'

2. Regarding Question (a).

(a) Mr. Walve learned counsel appearing for the Revenue states that he was not able to file any decisions contrary to the view taken by the Honble Supreme Court in Mahalaxmi Sugar Mills (supra) and various High Court decisions relied upon in the impugned order.

(b) We find that the impugned order of the Tribunal after recording that the issue stands covered by various decisions of the Supreme Court and the various High Courts cases observes “admittedly, there are contrary decisions where it is held that interest paid on delayed payments cannot be allowed as deduction in the assessment proceedings.” The above statement in the impugned order led us to direct the counsel appearing for the parties to examine the law on this issue and to bring to our attention any decision contrary to the view taken by the Supreme Court in Mahalaxmi Sugar Mills (supra) and other High Courts decisions. We are now informed by Counsel for both sides that there are no decisions contrary to the view taken by the Hon’ble Supreme Court in Mahalaxmi Sugar Mills (supra) and the various High Court decisions referred to in the impugned order of the Tribunal. All this effort and time would have been saved if the Tribunal had made specific reference to contrary decisions or not stated so in the absence of referring to the citations. Therefore, we would request the Tribunal to be specific about the

decisions and make a mention of the citation in the order and not make general observations as in this case.

(c) Thus this Question does not give rise to any substantial question of law as it follows the decisions of the Apex Court in Mahalaxmi Sugar Mills (supra). Thus not entertained.

3. Regarding Question No.(b).

(a) It is undisputed by the parties, that in view of our answer to Question (a) above, no substantial question (b) arises for our consideration.

(b) Thus not entertained.

4. Accordingly, appeal dismissed.

(NITIN JAMDAR, J.)

(M.S.SANKLECHA, J.)

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, बी, मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL

MUMBAI BENCHES "B", MUMBAI

श्री जोगिन्दर सिंह, न्यायिक सदस्य एवं

श्री अश्वनी तनेजा, लेखा सदस्य, के समक्ष

**Before Shri Joginder Singh, Judicial Member, and
Shri Ashwani Taneja, Accountant Member**

**ITA NOs.4874 & 4937/Mum/2012
Assessment Years: 2007-08 & 2008-09**

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| M/s M.J. Exports Pvt. Ltd. C/o- H.N. Motiwalla & Co. 508 Sharda Chambers, 33, New Marine Lines, Mumbai-400020 | बनाम/ Vs. | DCIT-3(2), Mumbai |
| (निर्धारिती / Assessee) | | (राजस्व /Revenue) |
| PAN. No.AADCM7712M | | |

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|-----------------------------------|---------------------|
| निर्धारिती की ओर से / Assessee by | Shri H.N. Motiwalla |
| राजस्व की ओर से / Revenue by | Shri Rajguru-DR |

| | |
|--|-------------------|
| सुनवाई की तारीख / Date of Hearing : | 28/04/2016 |
| आदेश की तारीख /Date of Order: | 17/05/2016 |

आदेश / O R D E R

Per Joginder Singh (Judicial Member)

Both appeals are by the assessee against the impugned order both dated 23/05/2012 for A.Y. 2007-08 and 2008-09 of the First Appellate Authority, Mumbai.

2 First we shall take up the appeal in ITA No. 4874/Mum/2012 for A.Y. 2007-08, wherein first ground raised by the assessee pertains to confirming rental income of Rs.30,29,390/- from M/s. Choradia Fashions Pvt. Ltd., in respect of Shiv Sagar Estate particularly when that income was taxed in the hands of Shri J M Shah as the property was already transferred by the assessee to him on 1st Jan. 2005 in pursuance of permission of the appropriate authority under section 269UL(3) of the Act dated 4th March 1995.

3. During hearing our attention was invited by the learned counsel for the assessee to an declaration under section 158A(1) of the Income Tax Act, 1961 (hereinafter the Act) (form No.8) claiming that identical question of law is pending before the Hon'ble High Court. The learned DR contended

that this issue has already been decided against the assessee by the Tribunal. The claim of the learned DR was contended to be corrected by the learned counsel for the assessee by adding that whatever will be the decision from the Hon'ble High Court will be binding on both sides.

4. We have considered the rival submissions and perused the material available on record. In view of the admission of substantial question of law on the issue in hand, by the Hon'ble High Court we allow the declaration of the assessee filed u/s. 158A(1) of the Act and direct that whatever will be the decision from the Hon'ble Jurisdictional High Court will be binding upon the respective parties. However, since the issue has been decided against the assessee, for the time being (till the outcome from the Hon'ble High Court) the issue is decided against the assessee.

5. Ground nos. 2 to 4 raised by the assessee pertains to confirming in respect of disallowance of interest on customs duty amounting to Rs.3,88,04,315/- without appreciating various decisions. More specifically when the Assessing

Officer admitted that payment of interest on custom duty was for delayed payment of custom duty therefore, the same forms part and parcel of liability of customs duty. The learned counsel for the assessee advanced identical arguments by placing reliance upon the decision from Hon'ble Apex court in Mahalaxmi Sugar Mills Co. vs. CIT (123 ITR 429) (SC). It was also pleaded that the decision from Hon'ble Calcutta High Court in Hindustan Motors Ltd. vs. CIT (1996)(218 ITR 450) (Cal) is not applicable being on different facts by explaining that liability crystallized in A Y 2007-08 and demand was raised on 18.09.2006. Our attention was invited to a certificate from Canara Bank dated 20.09.1997 by claiming that either the same can be allowed u/s. 37 of the Act for which reliance was placed upon the decision in 250 ITR 279 (Madras) or alternatively u/s. 43B for which reliance was placed in 203 ITR 375 (Cal.); 77 Taxman 628 (Cal). On the other hand, the learned DR defended the conclusion arrived at in the impugned order.

6. We have considered the rival submissions and perused the material available on record. The facts in brief are that

the Collector of customs levied customs duty and penalty on the goods imported by the assessee in F.Y. 1988-89 vide order dated 28th January 1994 and subsequently, levied interest for not paying the customs duty and penalty in time. The assessee charged Rs.3,88,05,315/- as interest to profit and loss account by claiming that the liability crystallized in the year under appeal since the payment of interest was made on various dates between 12.12.2006 to 28.08.2007. The learned Assessing Officer disallowed the amount of Rs.3,88,05,315/-, which was paid to the customs authorities, on the ground that the interest liability crystallized in F.Y. 2001-02. The assessee disputed the levy of customs duty and penalty. Finally, the Hon'ble Apex Court upheld the levy of customs duty and penalty vide order dated 14.08.2001. In view of this factual matrix the learned Assessing Officer held that liability of paying interest also crystallized in F.Y. 2001-02 itself as payment of interest is mandatory u/s. 28AA of the Customs Act 1962. The assessee disputed the levy of interest before the Hon'ble High Court. It is noted that the assessee challenged the interest payment before various

authorities and ultimately against the interest demand a Writ Petition was filed before the Hon'ble Bombay High Court (WP No. 338/2006) order dated 28th March 2006 (pages 9 to 23 of the Paper-book). The stand of the Revenue is that the levy of interest is applicable from the date when the Hon'ble Apex Court confirmed the liability of customs duty and penalty. The issue before us whether the interest on delayed payment is allowable expenditure or not. There is no dispute to the fact that the assessee made the payment of the interest also. In such a situation, we are of the view that the payment of interest is an allowable deduction u/s. 37(1) of the Income Tax Act. The Hon'ble Apex Court in *Mahalaxmi Sugar Mills Co. vs. CIT* (1980) 123 ITR 429 (SC), reversing (1972) 85 ITR 320 (Delhi) held that interest paid for delayed payment of such taxes is a deductible item of expenditure. The ratio laid down in *Kamlapat Motilal vs. CIT* (104 ITR 783) (Allahabad) and *Russel Properties Pvt. Ltd.* (1982) 137 ITR 358 (Cal). In view of the decision from Hon'ble Apex Court in *Mahalaxmi Sugar Mills case* (supra), the following decisions were impliedly overruled on the point:-

- i) Vishnu Sugar Mills Ltd. vs. CIT 113 ITR 583 (Cal)
- ii) Saraya Sugar Mills P. Ltd. vs. CIT 116 ITR 387 (Allahabad) (FB)
- iii) CIT vs. L H Sugar Factories & Oil Mills Pvt. Ltd. (123 ITR 596) (Allahabad)
- iv) CIT vs. Lachhmandas Mathuradas 124 ITR 411 (Allahabad)

7. On the issue of interest for delayed payments reference may be made to Triveni Engineering Works Ltd. vs. CIT (1983) 144 ITR 732 (Allahabad) (FB); CIT vs. Laxmidevi Sugar Mills Pvt. Ltd. (2000) 241 ITR 131, 132 (Allahabad); Raj Narayan Agarwal vs. CIT (2003) 259 ITR 720, 722 (Del); CIT vs. Delhi Automobiles (2005) 272 ITR 381, 382 (Del) wherein interest paid on delay in paying sales tax was held to be deductible. Admittedly, there are contrary decisions also wherein it was held that interest on delayed payments is not an allowable deduction. The ratio laid down in CIT vs. J K Synthetics Ltd. (2009) 309 ITR 371 (Del) further supports the case of the assessee.

8. If this issue is analyzed with respect to section 43B of the Act, the scope and effect of the amendment made in the

first proviso to section 43B, by the Finance (No.2) Act 1998, have been elaborated in departmental Circular No. 772 dated 23rd December 1998, wherein certain expenses were held to be allowable only on actual payment. There is no dispute, in the present appeal that interest was paid by the assessee. It is different matter that the assessee carried the matter in appeal before the Hon'ble High Court or before the Hon'ble Apex Court and contested a legal battle, though failed, but fact remains that the customs duty as well as interest on delayed payments was made by the assessee. Demand was raised by the department on 18.09.2006 therefore liability arose in the present assessment year. Thus, the deduction has to be allowed either u/s. 37 or u/s. 43B of the Act. Therefore, this ground of the assessee is allowed.

9. Thus, the appeal of the assessee is partly allowed and disposed off in terms indicated hereinabove.

10. Now we shall take up the appeal for A.Y. 2008-09 (ITA No. 4937/Mum/2012), wherein, the only ground raised pertains to confirming the rental income of Rs.33,93,939/-

from M/s Choradia Fashions Pvt. Ltd, in respect of Shiv Sagar Estate was taxed in the hands of the assessee as the property had already transferred. The ld. counsel for the assessee advanced arguments, which is identical to the ground raised. On the other hand, the ld. DR defended the conclusion arrived at in the impugned order. However, it was also pointed out that the assessee has filed declaration u/s 158A(1) of the Act, by claiming that identical question of law is pending before the Hon'ble High Court.

10.1. Considering the totality of facts and the order of the Tribunal (ground no.4)(ITA No.6618/Mum/2009)(para-13), we find that an elaborate discussion has been made by the Tribunal and finally the order of the Commissioner of Income Tax (Appeal) was affirmed, confirming the rental receipts by the assessee as its income. Thus, this ground of the assessee is dismissed. However, in view of the application/declaration, filed by the assessee, u/s 158A(1) of the Act, the outcome from the Hon'ble High Court will be applicable on both the parties.

Finally, the appeal of the assessee (ITA No.4874/Mum/2012) is partly allowed, whereas, appeal in (ITA No.4937/Mum/2013) is dismissed.

This order was pronounced in the open court in the presence of ld. representative from both sides at the conclusion of the hearing on 28/04/2016.

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| Sd/- (Ashwani Taneja) | Sd/- (Joginder Singh) |
| लेखा सदस्य / ACCOUNTANT MEMBER | न्यायिक सदस्य / JUDICIAL MEMBER |

मुंबई Mumbai; दिनांक Dated : 17/05/2016

Shekhar, P.S./नि.स.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai