IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : F : NEW DELHI

BEFORE SHRI R.S. SYAL, AM AND SHRI C.M. GARG, JM

ITA No.3134/Del/2010
Assessment Year : 2003-04

Rollatainers Ltd., Lower Ground Floor, Lotus Tower, New Friends Colony, Mathura Road, New Delhi.	Vs.	ACIT, Circle 15(1), New Delhi.
PAN: AAACR0344K		
(Appellant)		(Respondent)

Assessee By : Shri Gaurav Jain, Advocate
Department By : Shri Vikram Sahay, Sr. DR

Date of Hearing : 03.08.2015
Date of Pronouncement : 06.08.2015

ORDER

PER R.S. SYAL, AM:

This appeal by the assessee arises out of the order passed by the CIT(A) on 17.03.2010 in relation to the assessment year 2003-04.

2. The first ground is against the initiation of reassessment proceedings. Succinctly, the factual matrix of this case is that the assessee filed its return declaring loss of Rs.12,48,92,067/-. The assessment was completed u/s 143(3) of the Income-tax Act, 1961 (hereinafter also called `the Act') on 24.03.2006 determining loss at Rs.11,32,76,728/-. On the basis of audit objection regarding excess allowance of deduction of Rs.2,45,01,117/- towards interest paid u/s 43B of the Act, the case was reopened by means of notice u/s 148 of the Act. The AO has reproduced the gist of audit objection on page 1 of the assessment order by noticing that there was unpaid interest of Rs.5,01,38,035/- which was not allowed in earlier assessment years, out of which the assessee claimed deduction for a sum of Rs.3,61,75,597/- u/s 43B by claiming it as discharged/paid. This amount of Rs.3.61 crore included a sum of Rs.2.45 crore which was transferred to a wholly owned subsidiary company. Since such interest of Rs.2.45 crore was not actually paid, but, only transferred to a subsidiary company, the AO reopened the assessment by noticing that the same was not allowable. After entertaining objections from the assessee, the AO denied

deduction of Rs.2.45 crore. The assessee objected to the initiation of re-assessment proceedings before the ld. CIT(A) on certain counts but without any success. Eventually, the assessment order was upheld on merits as well. The assessee is now in appeal before us.

3. We have heard the rival submissions and perused the relevant material on record. The first issue before us through ground no. 1 is challenge to the initiation of re-assessment proceedings. The ld. AR assailed the initiation of re-assessment proceedings on three counts viz., Change of opinion; Reasons not supplied by the AO; and Audit objection cannot lead to reassessment. We shall deal with these objections, one by one.

Change of opinion

4.1. The ld. AR contended that that the annual accounts of the assessee thoroughly elaborated about the transfer of its paper board unit to M/s RT Paper Board Ltd., and, as such, the presumption should be that the AO did consider and apply his mind on the deductibility of interest of

Rs.2.45 crore. Initiation of re-assessment proceedings on this basis, in the opinion of the AR, amounted to change of opinion.

4.2. In order to appreciate the rival contentions, it is firstly relevant to understand the controversy raised in this appeal on merits. The assessee transferred one of its units with all assets and liabilities to M/s RT Paper Board Ltd., which is its wholly owned subsidiary company. Apart from other assets and liabilities of this unit transferred by the assessee, there was unpaid interest amounting to Rs.5.01 crore payable to banks and financial institutions coming from the earlier years which was not paid and no deduction was also claimed in such earlier years. Out of this interest payable to financial institutions amounting to Rs.5.01 crore, the assessee claimed deduction for a sum of Rs.3.65 crore against the income for the current year. This sum of Rs.3.65 crore has two components, viz., interest of Rs.1.16 crore which was waived off by the banks/financial institutions and the remaining interest of Rs.2.45 crore which was transferred by the assessee to M/s RT Paper Board Ltd., without there being any waiver. That is how, the assessee claimed

deduction for a sum of Rs.3.65 crore on this count u/s 43B of the Act. There is no dispute before us on the deductibility of interest of Rs.1.16 crore, which was waived off by the banks/financial institutions and allowed by the AO in the original proceedings. The only controversy is about the remaining amount of Rs.2.45 crore, which the AO allowed in the original assessment proceedings, for which the instant reassessment proceedings have been initiated. The case of the assessee is that transfer of such interest to M/s RT Paper Board Ltd. amounted to discharge of interest liability in its hands and hence is rightly deductible. On the other hand, the Revenue is contending that this is not deductible as the transfer of interest to another company cannot constitute payment of interest, so as to be eligible for deduction.

4.3. Coming back to the question of change of opinion, the assessee has canvassed a view that since the AO examined this issue during the course of original assessment proceedings, the initiation of reassessment proceedings on the same count amounts to change of opinion, which is not permissible u/s 147. Now the primary question is whether the AO

formed any opinion in the original assessment proceedings on the deductibility of this interest amount. It is noticed that during the course of original assessment proceedings, there is some discussion in the assessment order about the 'Miscellaneous balances written back.' On page 2 of the assessment order dated 24.3.2006 passed u/s 143(3) in the first round, there is reference to the amount of Rs.1.16 crore, being the amount of interest waived off by the institutions. There is no discussion whatsoever on the amount of interest of Rs.2.45 crore claimed as deduction by way of its transfer to M/s RT Paper Board Ltd. What to talk of discussing this issue, there is not even a whisper about the entire issue of transfer of unpaid interest of Rs.2.45 crore to M/s RT Paper Board Ltd., and the deductibility of this amount in terms of section 43B of the Act. Under such circumstances, the question arises as to whether a mere disclosure of the factual aspects of transfer of undertaking in the annual accounts would satisfy the condition of formation of view by the AO on the subject, so as to eclipse his power from initiating the reassessment proceedings. In this regard, it is relevant to note Explanation 2 to section 147, the relevant part of which reads as under:-

"*Explanation 2.*—For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely :—

…….

(*c*) where an assessment has been made, but—

(*i*) income chargeable to tax has been underassessed ; or

(*ii*) such income has been assessed at too low a rate ; or

(*iii*) such income has been made the subject of excessive relief under this Act ; or

(*iv*) excessive loss or depreciation allowance or any other allowance under this Act has been computed;

…….".

4.4. Clause (c) of Explanation 2 to section 147 clearly stipulates that where an assessment has been made, but, income chargeable to tax has been under-assessed or excessive allowance has been allowed, it would be deemed to be a case where income chargeable to tax has escaped assessment within the meaning of section 147 of the Act. This Explanation clearly mandates that despite the assessment having been originally completed, where, *inter alia,* some excessive deduction has been allowed resulting into income still remaining under-assessed, it will be deemed as a case of escapement of income. However, it is

pertinent to mention that a mere fact of underassessment cannot clothe the AO with the power to initiate reassessment. If in the original assessment proceedings, the AO considered and examined a particular deduction and then formed his view on its deductibility, he cannot later on turn around to initiate reassessment proceedings on the same issue. The crux of the matter is that reassessment is impermissible on change of opinion even in the light of the above Explanation to section 147. However, the significant thing is that in order to bring a case within the four corners of 'change of opinion,' it is foremost important that there should be some material to indicate that the AO applied his mind on the deductibility of any item of expense and then formed opinion about deduction. Unless some material is brought on record to demonstrate the formation of opinion, the assessee cannot argue in the reassessment proceedings that it is a case of initiation of reassessment on change of opinion. The Hon'ble Supreme Court in *ACIT vs. Rajesh Jhaveri Stock Brokers (2007) 291 ITR 500 (SC)* has held that unless the formation of opinion is shown, there can be no question of arguing about the change of opinion. Similar view has been reiterated by the Hon'ble Supreme

Court in the case of *DCIT vs. Zuari Asset Development and Investment Company Ltd., (2015) 373 ITR 661 (SC).* The Full Bench of the Hon'ble Delhi High Court in *CIT vs. Usha International Ltd., (2012) 348 ITR 485 (Del)* has also held that there is no scope for arguing about the change of opinion when no opinion has been formed. It has been laid down by Their Lordships that : `The expression "change of opinion" postulates formation of opinion and then a change thereof. In the context of Section 147 of the Act *it implies that the Assessing Officer should have formed an opinion at the first instance, i.e., in the proceedings under Section 143(3) and now by initiation of the reassessment proceeding, the Assessing Officer proposes or wants to take a different view.* ..... The word "opinion" as per the Blacks Law Dictionary means a statement by a Judge or a court of a decision reached by him incorporating cause tried or argued before them, expounding the law as applied to the case and, detailing the reasons upon which the judgment is based. *In the context of assessment proceedings, it means formation of belief by an Assessing Officer resulting from what he thinks on a particular question.* It is a result of understanding, experience and

reflection to use the words in Law Lexicon by P. Ramanatha Aiyar. *Question of change of opinion arises when an Assessing Officer forms an opinion and decides not to make an addition or holds that the assessee is correct and accepts his position or stand.* Though the Hon'ble Apex Court judgments have been rendered in the context of intimation u/s 143(1)(a), *vis-à-vis* formation of opinion, the same logic applies when the assessment is completed u/s 143(3) of the Act without any application of mind by the AO on a particular aspect of the matter which is sought to be reopened by way of notice u/s 148, as has been the position in the case of *Usha International (supra).* The nitty gritty of the matter is that the argument about the change of opinion can be entertained only when it is shown that the AO in the first instance formed his opinion on the point. Unless the formation of opinion is discernible from the assessment order or the other connected records of assessment, the assessee cannot contend that the opinion was formed by the AO on a point which is sought to be reopened u/s 148 of the Act.

4.5. Adverting to the facts of the instant case, we find that there is no discussion worth the name in the original assessment order about the deductibility of interest of Rs.2.45 crore out of unpaid interest which was transferred to a wholly owned subsidiary company u/s 43B of the Act. In our considered opinion, it is farfetched to argue that the AO formed opinion on this issue during the course of original assessment proceedings and, hence, his hands are tied for initiating re-assessment proceedings. Since the AO did not form any opinion on the deductibility of such interest in the original assessment proceedings, the contention of the ld. AR about the change of opinion falls flat on the ground. The same is ergo repelled.

Reasons not supplied by the AO

5.1. The ld. AR contended that the AO did not supply reasons for initiation of re-assessment proceedings and, as such, the reassessment order be declared a nullity. To buttress this contention, the ld. AR relied on the judgment of the Hon'ble Supreme Court in the case of

GKN Driveshafts (India) Ltd. Vs. ITO and Ors. (2003) 259 ITR 90 (SC). The ld. DR strongly opposed this contention.

5.2. After considering the rival submissions and perusing the relevant material on record, we find that it is, no doubt, true that the Hon'ble Supreme Court in the case of *GKN Driveshaft (India) Ltd. (supra)* has held that the AO is obliged to supply reasons to the assessee before taking up the reassessment proceedings. The logic behind this exercise is to give an opportunity to the assessee to raise objections before the AO against the initiation of reassessment proceedings. When such objections are raised, it become obligatory on the part of the AO to firstly deal with and pass an order on the objections raised by the assessee against the initiation of re-assessment proceedings. Only thereafter, he can proceed to take the reassessment on merits. If no reasons are demanded by the assessee during the course of re-assessment proceedings, then, there is no obligation nor there can be such obligation on the part of the AO to supply the reasons. Adverting to the facts of the instant case, we find that there is no reference whatsoever in the

assessment order about the assessee seeking a copy of reasons for reassessment. In fact, a gist of the audit objection, which formed the bedrock for the initiation of reassessment, has been reproduced in the assessment order itself. Further, no such issue was taken up by the assessee before the ld. CIT(A) that despite the assessee's request for supply of reasons leading to initiation of reassessment proceedings, the AO did not supply such reasons and framed the assessment u/s 147. No such ground was taken by the assessee in the Memorandum of Appeal filed before the ld. CIT(A).

5.3. Be that as it may, we find that the extant factual position is somewhat contrary to what has been sought to be argued before us. Page 13 of the impugned order indicates that the assessee in its written submissions dated 30.10.09 has referred to the 'reasons' recorded by the AO for reopening of the assessment which were submitted before the ld. CIT(A) and reproduced on the same page. Thereafter, there is a mention about the 'copy of reasons' claimed by the assessee to have been recorded by the AO for initiating the reassessment proceedings. The

assessee filed a scanned copy of such reasons, which has been reproduced on page 14 of the impugned order. On perusal of such 'copy of reasons' furnished by the assessee, the ld. CIT(A) found that the said 'scanned copy of the reasons' purportedly recorded by the AO did not contain any date or name and designation of the AO and his signature. To verify the matter further, the ld. CIT(A) called for the assessment record. On verification, it was found that the so called 'copy of the reasons' furnished by the ld. AR as part of the paper book before him did not form part of the assessment record. The actual reasons recorded by the AO on 31.8.2007 found in the assessment folder were found to be in variance with the scanned copy of the reasons furnished by the assessee. The ld. CIT(A) then reproduced a scanned copy of the actual reasons recorded by the AO on page 15 of his order. The above sequence of events amply demonstrates that the assessee attempted to distort the actual reasons with the ulterior motive of playing foul with the CIT(A). This completely belies the contention of the ld. AR that the assessee was not supplied with the reasons. Leaving this issue at this stage only, it suffices to say that the assessee was promptly supplied the

reasons leading to the initiation of reassessment proceedings. This contention is, therefore, rejected.

Audit objection cannot lead to reassessment

6.1. The ld. AR submitted that the AO initiated reassessment proceedings simply on the basis of audit objection, which is not permissible under the law. He relied on certain judgments including that of the Hon'ble Supreme Court in *Indian and Eastern Newspaper Society vs. CIT (1979)119 ITR 996 (SC)* to claim that initiation of re-assessment proceedings on the basis of internal audit report, was not sustainable. On the contrary, the ld. DR relied on the judgment of the Hon'ble Supreme Court in the case of *CIT vs. PVS Beedis Pvt. Ltd. (1999) 237 ITR 13 (SC)* in which the initiation of re-assessment proceedings on the basis of audit objection has been held to be valid.

6.2. We have heard the rival submissions on the point in the light of the judgments relied on by both the sides. In view of the above referred judgments of the Hon'ble Summit Court on the point, we need to examine as to whether the assessee's case falls within the *ratio* laid down

in *PVS Beedis Pvt. Ltd. (supra)* or in *Indian and Eastern Newspapers Society (supra)* and further *CIT vs. Lucas T.V.S. Ltd. (1998) 249 ITR 306 (SC)*

6.3. In the case of *Indian and Eastern Newspapers Society (supra),* the assessee received some amount on account of occupation of its conference hall and rooms which was assessed by the AO as 'Business income.' The audit party of the Department formed an opinion that the amount should have been taxed under the head 'Income from house property.' It was in this backdrop of the facts that the Hon'ble Supreme Court held that the opinion of the internal audit party on a point of law cannot be a ground for initiation of re-assessment proceedings. Similar is the position in the case of *Lucas TVS Ltd. (supra)*. In that case, the original assessment was completed by allowing deduction for a sum of Rs.6,37,003/- u/s 37(2) of the Act. The audit party pointed out that only a sum of Rs.2,95,131/- was incurred during the year and the balance amount related to earlier years and hence could not be allowed. The AO in the assessment made u/s 147, restricted the claim of deduction to

Rs.2,95,135/-. It is on the basis of such facts that the Hon'ble Supreme Court held that the opinion of the audit party on a question of law, could not constitute an information justifying the initiation of re-assessment proceedings. In the case of *PVS Beedis Pvt. Ltd. (supra),* the original assessment was completed allowing deduction u/s 80G. The audit party observed that the payment made to the trust, for which deduction was allowed, was not a recognized charitable trust as its recognition had expired and, hence, no deduction should be allowed u/s 80G. The Hon'ble Apex Court upheld the initiation of re-assessment proceedings on the basis of factual error pointed out by internal audit party.

6.4. The logic in not sustaining the initiation of reassessment on the basis of interpretation of law by the audit party is that the internal auditor cannot be allowed to perform functions of judicial supervision over the Income-tax authorities by suggesting to the Assessing Officer about how a provision should be interpreted and whether the interpretation so given by the AO to a particular provision of the Act is right or wrong. An interpretation to a provision given by the internal

audit party cannot be construed as a declaration of law binding on the AO. When an internal audit party objects to the interpretation given by the AO to a provision and proposes substitution of such interpretation with the one it feels right, it crosses its jurisdiction and enters into the realm of judicial supervision, which it is not authorized to do. In such circumstances, the initiation of reassessment, based on the substituted interpretation of a provision by the internal audit party, cannot be sustained. It has been categorically held by the Hon'ble Supreme Court in *Indian & Eastern Newspaper Society (supra)* that the internal audit party of the IT Department 'performs essentially administrative or executive functions and cannot be attributed the powers of judicial supervision over the quasi-judicial acts of IT authorities. The IT Act does not contemplate such power in any internal audit organisation of the IT Department .... The statute supports the conclusion that an audit party can't pronounce on the law, and that such pronouncement does not amount to "information" within the meaning of s. 147(b) of the IT Act, 1961'. Having made the above observations in para 6 of its judgment, the Hon'ble Summit Court then made an exception in the same para to

the effect that : `*But although an audit party does not possess the power to so pronounce on the law, it nevertheless may draw the attention of the ITO to it. Law is one thing, and its communication another. If the distinction between the source of the law and the communicator of the law is carefully maintained, the confusion which often results in applying s. 147(b) may be avoided.* While the law may be enacted or laid down only by a person or body with authority in that behalf, the knowledge or awareness of the law may be communicated by anyone. No authority is required for the purpose'. When we read the judgment in *Indian & Eastern Newspaper Society (supra)* in entirety, what unfolds is that albeit the audit party is not entitled to judicially interpret a provision, but at the same time, it can communicate the law to the AO, which he omitted to consider. This position has been aptly explained in *CIT vs. First Leasing Co. of India Ltd. (2000) 241 ITR 248 (Mad)* by holding that : `The Supreme Court in Indian and Eastern (supra), has made a distinction between the interpretation of the law and bringing to the attention of the ITO the relevant provision of law and if the audit party interpreted the law, then the report by the audit party cannot be

regarded as "information" for the purpose of reopening an assessment under s. 147(b) of the Act. *However, if the audit party has merely drawn the attention of the ITO to the existence of the law, the opinion of the audit party would be regarded as information and the Supreme Court has made a distinction between the communication of law and interpretation of law.'* That is how, the Hon'ble Madras High Court held that the audit report should be regarded as a communication of law and there is no interpretation of law involved in the matter. The tribunal order, holding that the audit party had interpreted the relevant provisions relating to the granting of extra depreciation allowance and thus the AO had no jurisdiction under s. 147(b) of the Act to reopen the assessment, was set aside.

6.5. It is discernible from a close look at the above three judgments rendered by the Hon'ble Apex Court that where the audit party interprets the provision of law in a manner contrary to what the AO had done, it does not lay down a valid foundation for the initiation of re-assessment proceedings. If however, the audit party does not offer its own

interpretation to the provisions and simply communicates the existence of law to the AO or any other factual inaccuracy, then the initiation of reassessment proceedings on such basis cannot be faulted with. It can be seen that in the case of *Indian and Eastern Newspapers Society (supra),* the otherwise taxability of receipt from occupation of conference hall and rooms was not disputed. Whereas the AO held such amount to be taxable as 'Business income', the audit party held it to be taxable as 'Income from house property.' It was this adoption of a different interpretation by the internal audit party to the existing factual position, which was not approved by the Hon'ble Supreme Court as a good ground to initiate a valid re-assessment. Similarly, in the case of *Lucas TVS Ltd. (supra)*, the AO allowed deduction u/s 35(2) for the amounts spent in this year as well as the earlier years and the internal audit party opined that only the amount spent during the year was allowable as deduction u/s 35(2). It is obvious that in both these cases, the AO's opinion on the interpretation of the relevant provision was overruled by the internal audit party. In contrast, in the case of *PVS Beedis Pvt. Ltd. (supra),* the assessee claimed deduction u/s 80G and the internal audit

party pointed out that such deduction was not permissible because the registration of the trust to which contribution was made, had already expired. It is manifest that in the case of *PVS Beedis Pvt. Ltd. (supra)*, the audit party did not interpret section 80G in a different manner, but, simply drew the attention of the AO to the existence of law. The Hon'ble Supreme Court in *Indian and Eastern Newspapers Society (supra)* having held that the interpretation of the internal audit party on a point of law does not constitute 'information' u/s 147, drew a line of *distinction between the cases of interpretation of law and communication of existence of law.* If the audit party merely draws the attention of the AO to the existence of law, the opinion of the audit party can be regarded as 'information' leading to a valid initiation of reassessment. In a nutshell, whereas the initiation of re-assessment proceedings on the basis of an interpretation to the provisions of law by the audit party is forbidden, the communication of law or the factual inconsistencies by the internal audit party, do not operate as a hindrance in the initiation of re-assessment proceedings.

6.6. Now, let us examine whether the facts of instant case fall on this side or that side of the dividing line. At this juncture, it is relevant to note the gist of audit objection which has been reproduced on page 1 of the assessment order, as under:-

> "The assessment of M/s Rollatainers Ltd. for the assessment year 2003-04 was completed u/s 143(3) in March 2006 determining at a loss of Rs.11,32,76,728. Audit scrutiny revealed that the assessee had claimed a deduction of Rs.361,75,597/- u/s 43B on account of interest paid or set off during previous year out of unpaid interest of Rs.5,01,38,035 which was not allowed in the assessment year of any preceding previous year. The interest of Rs.2,45,01,117/- was transferred to a wholly owned subsidiary company. As the interest of Rs.2,45,01,117 was not actually paid but only transferred to a subsidiary company, it should have been disallowed. The omission resulted in over assessment of loss of Rs.2,45,01,117/- involving potential tax effect of Rs.90,01,60/-. "

6.7. A close look at the above audit objection divulges that the audit party simply suggested that the interest of Rs.2.54 crore was

not actually paid, but, only transferred to a subsidiary company and the same should have been disallowed and this omission on the part of the AO resulted in over assessment of loss of Rs.2.45 crore. This shows that the AO was simply informed about the fact which had escaped his attention during the course of assessment proceedings to the effect that a sum of Rs.2.45 crore was not allowable u/s 43B of the Act which is nothing, but, a communication of law to the AO. We are not confronted with a situation in which the AO, after due consideration of the matter in the original assessment proceedings interpreted section 43B as allowing deduction for a sum of Rs.2.45 crore in respect of interest not paid to the financial institutions, but, transferred to the assessee's wholly owned subsidiary company, but, the audit party interpreted this provision in a different manner from the way in which it was interpreted by the AO and then suggested that the amount ought to have been charged to tax. The instant case is fully covered by the *ratio* of the judgment in the case of *PVS Beedis Pvt. Ltd. (supra)* read with the exception carved out by the Hon'ble Supreme Court in *Indian & Eastern Newspapers Society*

(supra) drawing a line of distinction between communication of law and interpretation of law. The argument of the ld. AR on this issue, being devoid of any merit, is hereby jettisoned. It is, therefore, held that the audit objection in the instant case constituted an `information' about the escapement of income to the AO, thereby justifying the initiation of reassessment.

7. Ground no. 2 is on the merits of sustenance of addition. The ld. AR argued that when the assessee transferred all the assets and liabilities of its paper board unit to M/s RT Paper Board Ltd., and the liabilities also included interest payable to financial institutions at Rs.2.45 crore, such transfer of interest liability should be considered as discharge of the interest obligation. He relied on certain decisions to contend that effective discharge of liability be construed as payment u/s 43B of the Act. He mainly relied on the judgment of the Hon'ble Supreme Court in the case of *W.T. Suren & Company Ltd. vs. CIT (1998) 230 ITR 643 (SC)* and other decisions to buttress his contention that the transfer of interest to M/s RT Paper Board Ltd., is nothing, but, an effective

discharge of the interest obligation and, hence, the amount is allowable u/s 43B of the Act. *Au contraire,* the ld. DR strongly relied on the impugned order on this score.

8. In order to appreciate the controversy in the right perspective, it would be fruitful to consider the mandate of the relevant part of section 43B, which is as under :-

> "43B. Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of—
>
> …..
>
> (d) any sum payable by the assessee as interest on any loan or borrowing from any public financial institution or a State financial corporation or a State industrial investment corporation], in accordance with the terms and conditions of the agreement governing such loan or borrowing, or
>
> (*e*) any sum payable by the assessee as interest on any loan or advances from a scheduled bank in accordance with the terms and conditions of the agreement governing such loan or advances, or
>
> ……
>
> 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 :
>
> …….".

9. A bare perusal of clauses (d) & (e) of section 43B divulges that a deduction for any sum payable by the assessee as interest on any loan or borrowing from any public financial institutions or scheduled banks etc., is allowable as deduction in computing the income referred to in section 28 only of that previous year in which such sum is *actually paid* by him. This mandate of allowing deduction in the year in which such interest is actually paid by the assessee irrespective of the year in which liability to pay such interest was incurred. We are accentuating on the expression '*actually paid*' from the prescription of section 43B, which leaves nothing to doubt that the deduction on account of interest to scheduled banks and financial institutions, etc., can be allowed only in the year in which it is actually paid. The term 'actually paid' is to be seen in contradistinction to the term 'constructive payment', which has been coined by the ld. AR in the context of this provision. We fail to appreciate any logic in substituting actual payment with the so-called constructive delivery, when the legislature has provided in unambiguous terms that interest must be actually paid. By no stretch of imagination the actual payment of interest can be equated with the so-called

constructive payment of interest. Further, we are unable to comprehend as to how the transfer of interest to the transferee company, at all, amounts to constructive payment in the instant case. The assessee has simply transferred all its assets and liabilities to its wholly owned subsidiary company and one of the liabilities is interest payable. Now, it is the obligation of the transferee company to discharge the interest liability to this extent by making payment to banks/financial institutions. Simply transferring interest liability by the assessee to its subsidiary company can, under no circumstances, be considered as a substitute of actual payment of interest. If we interpret the provisions of section 43B in the manner as suggested by the ld. AR, then, every transfer of liability by the assessee to another person would amount to discharge of liability making the assessee eligible for deduction, thereby throwing to winds the very concept of actual payment, which is the essence of section 43B. In normal circumstances, the actual payment can be made by payment of money or by some other consideration. The crux of the matter is that after such discharge of liability, the amount of interest receivable by the banks or financial institutions etc. should get obliterated as an item of

asset from their books. Transfer of liability by the assessee to its wholly owned subsidiary company, to whom this paper board unit was transferred, simply means transfer of liability from one assessee to another and not the discharge of this liability to the banks/financial institutions. It is so for the reason that the amount of such interest is still receivable by such banks and financial institutions etc. and there is no erosion of asset of `Interest receivable' from their books of account.

10. The judgment of the Hon'ble Supreme Court in the case of *W.T. Suren (supra)* has no significance inasmuch as the issue in that case was about the deductibility or otherwise of gratuity of certain employees deductible u/s 37(1) of the Act. Section 37(1), unlike section 43B, does not contain any stipulation of actual payment as a condition precedent for allowing deduction. We are concerned with a case in which section 43B is under consideration and the deduction can be allowed only when the amount is `actually paid' to the banks/financial institutions. In our considered opinion, this judgment is of no assistance to the assessee.

11. It is further noticed that the legislature has put the position beyond any shadow of doubt by inserting Explanations 3C and 3D by the Finance Act, 2006 with retrospective effect covering the assessment year under consideration, which read as under : -

> *" Explanation 3C.*—For the removal of doubts, it is hereby declared that a deduction of any sum, being interest payable under clause (*d*) of this section, shall be allowed *if such interest has been actually paid* and any *interest* referred to in that clause *which has been converted into a loan or borrowing shall not be deemed to have been actually paid.*
>
> *Explanation 3D.*—For the removal of doubts, it is hereby declared that a deduction of any sum, being interest payable under clause (*e*) of this section, shall be allowed *if such interest has been actually paid* and *any interest* referred to in that clause *which has been converted into a loan or advance shall not be deemed to have been actually paid.*"

12. Two things are palpable from the prescription of Explanations 3C and 3D. First is that the interest payable to banks and other financial institutions can be allowed as deduction only 'if such interest has been actually paid' and second is that where such interest 'has been converted into loan or borrowing/advance, (it) shall not be deemed to have been actually paid.' In the light of the main provisions of section 43B read with Explanations 3C and 3D, it is crystal clear that deduction of interest u/s 43B cannot be allowed in the present case because such interest has

not been actually paid by the assessee to the banks/financial institutions. This ground is not allowed.

13. In the result, the appeal is dismissed.

The order pronounced in the open court on 06.08.2015.

Sd/-	Sd/-
[C.M. GARG] JUDICIAL MEMBER	[R.S. SYAL] ACCOUNTANT MEMBER

Dated, 06th August, 2015.

dk

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT (A)
5. DR, ITAT

AR, ITAT, NEW DELHI.