

Indian Communication Network P. Vs. Inspecting Assistant

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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Jan-28-1994

Reported in : (1994)49ITD56(Delhi)

Judge : G Krishnamurthy, O Jain, R Mehta

Appellant : Indian Communication Network P.

Respondent : inspecting Assistant

Advocate for Pet/Ap. : Mr. J. P. Shah

Judgement :

1. This appeal is directed against the order passed by the Commissioner of Income-tax (Appeals) raising for our consideration numerous grounds.

In the original memorandum of appeal ground No. 10 reads as follows : "That the learned Commissioner of Income-tax (Appeals) has erred in not deleting Rs. 27,04,579 from the total income vis-a-vis valuation of closing stock." 2. This was supplemented with a "clarification ground" dated March 20, 1993 as under ; "It is contended that the authorities below should have recast the revenue account on 'cash basis' as per the mandate provided in Section 43B of the Income-tax Act and the resultant 'processed' profits alone should have been considered for the purposes of Sections 28 to 41." 3. It was the assessee's case all along that the issue being raised was identical to the one considered by the Gujarat High Court in the case of Lakhanpal National Ltd. v. ITO [1986] 162 ITR 240 and adjudicated

in the assessee's favour whereas the Tribunal in certain decisions delivered by it had decided the matter against the assessee being of the view that the decision of the Gujarat High Court [1986] 162 ITR 240 did not apply. As the issue raised involved legal principles as also those of accountancy having far-reaching consequences, it was decided to constitute a Special Bench by the President to hear the same, accepting the suggestion made by the Division Bench by its note dated August 26, 1992.

4. At the outset, we propose to decide the main ground and the remaining grounds would be decided in their respective order.

5. A return of income showing total income of Rs. 14,22,830 was filed on August 31, 1984. In a revised return filed on December 31, 1984, the assessee "claimed deduction under Section 43B amounting to Rs. 27,04,579 on account of customs duty and excise duty paid before December 31, 1983, included in the closing stock" and which figure now stands revised to Rs. 26,98,713, vide page 59 of the assessee's compilation. It is an accepted fact between the parties that the aforesaid sum represents the customs duty and excise duty on raw material and finished goods forming part of the closing stock as under : 6. It is also the undisputed fact that the assessee has been following the system all along of including customs duty and excise duty pertaining to goods unsold as part of its closing stock and even during the year under consideration there is no change, since at the first instance the amount in question, viz., Rs. 26,98,713 was included as part of the closing stock and taken out only in the revised return filed on December 31, 1984, as referred to earlier.

7. The Assessing Officer rejected the claim made by a brief observation to the following effect : "This claim is devoid of any merit. Customs duty included in the closing stock shall be carried over to the next year in the shape of opening stock. No benefit of this nature for the year under consideration is contemplated by Section 43B. Hence this claim of the assessee cannot be allowed." 8. On further appeal before the Commissioner of Income-tax (Appeals), the assessee's case was as follows : "It is submitted that the course of action adopted by the Inspecting Assistant Commissioner (Assessment) completely defeats the clear provisions of

Section 43B of the Act The said Section 43B provides that irrespective of the method of accounting regularly employed by an assessee, deduction for taxes, duties, etc., is to be allowed only in the year of actual payment thereof. In other words, even under the mercantile system of accounting, such deduction will be allowed on cash basis. It is thus evident that Section 43B of the Act provides for a departure from the method of accounting regularly employed by an assessee. Section 43B has resulted in the creation of an imaginary state of affairs, whereby irrespective of the method of accounting otherwise employed by an assessee, taxes, duties, etc., are 'imagined' to be the expense of the year in which payment thereof is made, and deduction in respect of such duties, taxes, etc., is to be allowed only in the year of actual payment thereof." 9. The aforesaid line of argument was rejected by the Commissioner of income-tax (Appeals) following the decision of the Delhi Bench of the Tribunal in the case of Hindustan Computers Ltd. v. ITO [1987] 21 ITD 10. Learned counsel, Shri R. Ganesan, at the outset, outlined the provisions of Section 43B vis-a-vis the explanatory notes/legislative intent and the Circular of the Board thereof. [See 140 ITR (St.) 31 and 146 ITR (St.) 34]. The further detailed arguments can be summarised as under : (1) The non obstante clause with which Section 43B begins makes it abundantly clear that it overrides all other sections of the Act. A comparison was drawn to the provisions of Sections 40A(1) and 40A(7) ; (2) The effect of the said section is to disturb the regular "method of accounting" stipulated by Section 145 and which includes valuation of closing stock. To this extent the section operates as a proviso to Section 145 ; (3) That Section 43B envisages a "recasting" of the revenue account on "cash basis" and the resultant "processed" profits alone are to be considered for purposes of Sections 28 to 41 ; (4) That only a transaction of sale results in a profit and not when the goods are lying in stock ; (5) That non-allowance in one year would mean automatic deduction in the subsequent year inasmuch as closing stock of one year would become the opening stock of the next year and such a situation is not stipulated or anticipated by Section 43B ; (6) That customs and excise duties are admittedly admissible deductions for computing business income under Section 28 and under the "mercantile system" of accounting these were eligible for deduction on accrual basis ; (7) By the introduction of Section 43B deduction in respect of those stipulated items on accrual basis, was prohibited and

the same became deductible on "actual payment" basis (i.e.) mercantile system was forsaken and was converted into cash system of accounting ; (8) The Explanation to the said section ensured that an assessee did not avail of a double deduction once in the year of accrual and the other in the year of actual payment ; (9) That in the previous year under consideration the assessee paid customs duty on raw material, etc., imported by it and excise duty on finished goods and within the meaning of Section 43B deduction for the entire amount paid was available ; (10) That the inclusion of such customs and excise duties though pertaining to the closing stock as unsold items tantamounted to non-allowance of the entire amount of duties paid which turns out to be contrary to the clear provisions of Section 43B and restricting the allowance of the same only to the raw material consumed and finished products sold during the year would do offence to the clear provisions of Section 43B which enjoins allowance of such duties to the full extent of cash payments ; (11) That the provisions of Section 43B tended to interfere with the working of other sections of the Act ; and (12) That the facts of the assessee's case were on all fours with those considered by the Gujarat High Court in the case of Lakhanpal National Ltd. [1986] 162 ITR 240.

11. In concluding his arguments learned counsel urged that the element of customs duty and excise duty vis-as-vis unsold items be removed from the closing stock to provide full and effective deduction under Section 43B. In support of his arguments, he placed reliance on the following decisions in addition to the judgment of the Gujarat High Court in Lakhanpal National Ltd. v. ITO [1986] 162 ITR 240 : (i) Chainrup Sampatram v. CIT [1953] 24 ITR 481 (SC) ; (ii) CIT v. Ramgopal Kaniyalal [1960] 38 ITR 193 (MP) ; (Referred to by the Supreme Court in CIT v. Jagannath Mahadeo Prasad [1969] 71 ITR 296).

(iii) Mysore Kirloshar Ltd. v. Union of India [1986] 160 ITR 50 (Kar); 12. Learned counsel also referred to the commentary of learned authors Kanga and Palkhivala, Eighth Edition, Volume I, pages 740 and 741. He further contended that a "double deduction" was not contemplated.

13. As regards the various decisions of the Tribunal on the subject learned counsel stated that these were distinguishable since the arguments raised in the

present appeal were not raised nor dealt with in those decisions. According to him, the decision in the case of Hindustan Computers Ltd. v. ITO [1987] 21 ITD 524 (Delhi), did not deal with the question whether the regular method of accounting stood disturbed by invoking Section 43B, the main sum and substance being that closing stock could not be "tinkered" with. To the same effect were the arguments of learned counsel about the two decisions of the Madras Benches, namely, Durametallic (India) Ltd. v. IAC and Southern Asbestos Cement Ltd. v. Deputy CIT both reported in [1991] 38 ITD at pages 211 and 449, respectively, and which according to him, dealt with the question of stock valuation.

14. At this stage, we may mention that one of the interveners, namely, Shri S. E. Dastur, appearing on behalf of Food Specialities Ltd. (now known as Nestle (India) Ltd.) made a request that his appeal which involved more or less an identical issue be also heard. This request of learned counsel was accepted and we, vide our separate order, have proceeded to dispose of the cross appeals of Food Specialities Ltd., bearing I. T. A. No. 4869 (Delhi) of 1987 and I.T.A. No. 4726 (Delhi) of 1987. The arguments advanced by the parties in those appeals in so far as they relate to the issues raised in the present appeal would form part of the present order and we do not propose to repeat them.

15. Taking up for consideration the submissions made by Shri G. C.Sharma, advocate, on behalf of one of the interveners, we would like to mention that his submissions were quite akin to those tendered by Shri Dastur and these would also form part of the order in the case of Food Specialities Ltd. 16. Shri O. P. Vaish, Advocate, another intervener, advanced arguments on more or less the same lines as Shri Ganesan. These can be summarised as under : (i) That the issue under consideration was not really the method of valuing closing stock but the impact of introduction of Section 43B in the Income-tax Act for the assessment years 1984-85 onwards for purposes of computing the taxable income ; (ii) Section 43B had an overriding effect on other provisions of the Income-tax Act in so far as it disturbed the regular method of accounting followed by an assessee by allowing deduction for certain stated items on actual payment basis although prior to the insertion of the said section these were allowed on accrual basis ; (iii) The valuation of closing stock was a part of the "method of accounting" and to that

extent the provisions of Section 43B did disturb the said valuation ; (iv) That Section 43B provided for a deduction to be allowed in the computation of total income in the year of actual payment, and such deduction should be full and complete and could not be deferred to any other year ; (v) Section 43B created a legal fiction by which a deduction was available on the basis provided in the said section irrespective of the method of accounting followed by the assessee. Further, the legal fiction had to be carried to its logical conclusion ; (vi) The issue raised in the appeal was squarely covered by the decision of the Gujarat High Court in the case of Lakhanpal National Ltd. v. ITO [1986] 162 ITR 240, and this being the only decision the Tribunal was duty-bound to follow it.

17. In support of his arguments, Shri Vaish relied on the following reported decisions :All-India Lakshmi Commercial Bank Officers Union v. Union of India (vii) Hariprasad Jayantilal and Co. Ltd. v. ITO [1962] 45 ITR 294 (Guj) ; and (viii) Cambay Electric Supply Industrial Co. Ltd. v. CIT [1978] 113 ITR 84 (SC).

18. Learned counsel at this stage referred to the three decisions of the Tribunal (at p. 102) which were sought to be distinguished by Shri Ganesan. According to him, these decisions did not apply to the facts of the present assessee's case and furthermore the decision of the Gujarat High Court in the case of Lakhanpal National Ltd. [1986] 162 ITR 240, had not been examined by the various Benches in the proper perspective. It was contended that in the aforesaid decisions there crept in failure to appreciate that the provisions of Section 43B introduced an overriding effect on established principles of accounting which included valuation of closing stock. According to Shri Vaish, the inclusion of a part of the excise duty actually paid and debited to the profit and loss account in the closing stock, after introduction of Section 43B, was tantamount to allowance of partial deduction, the remaining portion of it being deferred to a subsequent assessment year although the entire amount had been paid. This aspect of the matter, according to him, required "adjustment" within the meaning of Section 43B. To the same effect were his arguments in respect of the decision of the Calcutta Bench of the Tribunal in the case of Berger Paints India Ltd. v. CIT [1993] 44 ITD 573.

19. In support of the Revenue's case, the learned Departmental Representatives, Shri A. K. Gupta and Smt. Surbhi Sinha, were heard.

They, at the outset, supported the orders passed by the tax authorities and the subsequent arguments advanced by them were a reiteration of the reasons recorded by the said authorities in rejecting the view-point canvassed on behalf of the assessee. They, however, highlighted the following arguments for our consideration : (i) That under the Income-tax Act, 1961, the profits and gains were to be computed in accordance with the normal commercial principles and within the meaning of Section 28 read with Section 145 ; (ii) Section 29 of the Act stipulated computation of the income to be made in accordance with the provisions of Sections 30 to 43C which allowed certain extra deductions or placed restrictions on certain allowances ; (iii) That the term "deduction" pre-supposed the existence of an amount which was the profit of the business as understood in the normal commercial sense and it in fact meant a subtraction to be made ; (iv) That the field of operation of Section 43B was defined and limited to deductions and it did not stipulate the recomputation of profits as was normally understood for purposes of Section 28 read with Section 145. That this was evident from the language of the section itself as also the marginal notes as well as the speech of the Finance Minister; (v) That the use of the words "..... irrespective of method of accounting only in computing the income referred to in Section 28 " by the Legislature was to qualify the deduction and. not to recompute the income under Section 28 ; (vi) While interpreting a statute the language of the section was to be strictly followed and it was only in case of doubt that the background of bringing the said provision on the statute book had to be considered. In respect of Section 43B the mischief which was proposed to be curbed was the claim of deduction vis-a-vis the unpaid amounts ; and (vii) That the interpretation on the section placed by the appellant would be tantamount to adjusting the figure of profit twice over and which was not permissible. For doing so, one would have to read "many more words" which were not there in the said section.

20. In support of the aforesaid arguments, reliance was placed on the decisions of the Tribunal in Hindustan Computers Ltd. v. ITO [1987] 21 ITD 524 (Delhi) ; Dura-metallic (India) Ltd. v. IAC [1991] 38 ITD 211 (Mad) ; Southern Asbestos Cement

Ltd. v. Deputy CJT [1991] 38 ITD 449 (Mad) and Berger Paints India Ltd. v. CIT[1995] 44 ITD 573 (Cal) as also the following : (f) CIT v. Mother India Refrigeration Industries P. Ltd. [1985] 155 ITR 711 (SC) ; 21. In reply, Shri R. Ganesan, contended that although no formal change in the method of accounting earlier followed was asked for by a formal request to that effect, the very fact of making a claim in the revised return was tantamount to a change in the method of accounting.

According to him, the original return had been filed on the basis of the audited accounts, but which came to be revised later on by claiming a deduction under Section 43B vis-a-vis the customs duty and excise duty which formed a part of the closing stock. Attention was also invited to the fact that in the return for the subsequent assessment year, viz., 1985-86, the amount which had been claimed as a deduction in the revised return for the assessment year 1984-85 had been added back and made to form a part of the assessee's taxable income. Learned counsel in concluding his arguments made an impassioned plea for grant of necessary relief to the assessee in the light of the decision of the Gujarat High Court in Lakhanpal National Ltd. v. ITO [1986] 162 ITR 240 contending in the process that all that was prayed for, was the allowance of an effective deduction under Section 43B. It was reiterated that the assessee's case was not one of reduction in the valuation of closing stock and that being the argument advanced by Shri S. E. Dastur and Shri G. C. Sharma in the course of their submissions on behalf of another appellant and intervenes respectively. In support of the aforesaid arguments, learned counsel invited our attention to the following authorities and which were in addition to those already cited :Attar Singh Gurmukh Singh v. ITO 22. A reference was also made to the Commentary of Sampath Iyengar's "Law of Income-tax", Eighth Edition, pages 2467 and 2468, to outline the scope of Section 43B. The Departmental Representative was again heard on these arguments.

23. We have examined the rival submissions and have also perused the material on record to which our attention was invited during the course of the hearing. The decisions cited at the Bar have also been duly considered.

24. Section 43B was no doubt introduced to curb the practice adopted by the assesseees to retain substantial funds by not depositing amounts into the Government account and claiming deductions at the same time, but it also brought about a change in the "method of accounting" regularly followed by an assessee. This happened due to certain deductions being allowed on "actual payment" basis although earlier the claim was allowed on "accrual" basis. The section also had an overriding effect on the other provisions of the Act since it began with a non obstante clause.

25. In the light of the aforesaid let us examine certain reported decisions. This is what their Lordships of the Karnataka High Court observed in the case of Mysore Kirloskar Ltd. v. Union of India [1986] 160 ITR 50, 66 : "Section 43B does not disallow the payments made towards taxes and contributions made to superannuation fund or gratuity fund or any other fund for the welfare of the employees but allows them as deduction only when actually made or for the very accounting year in which they are so paid and not otherwise.

That the provision to some extent interferes with the mercantile system of accounting normally adopted by business organisations can hardly be doubted."

26. The Delhi High Court in the case of Sanghi Motors v. Union of India [1991] 187 ITR 703, 705 observed : "A reading of this section clearly shows that the deduction can be claimed only in the year in which the payment is actually made. In other words, the deduction cannot be allowed as per the principles of the mercantile system of accounting, namely, when the liability arises but now it can be allowed only in the year in which the tax is actually paid." 27. The observations of the Gujarat High Court in the case of Lakhanpal National Ltd. [1986] 162 ITR 240, were to the following effect (at page 246): "On a perusal of the language of Section 43B, it is clear that it opens with a non obstante clause which means that it controls the operation of other provisions of the Act and irrespective of the other provisions, Section 43B will have overriding effect." 28. It is, thus, clear that the provisions of Section 43B disturb the existing and accepted position of an assessee's accounts. The Tribunal in the case of Hindustan Computers Ltd. [1987] 21 ITD 524 (Delhi) did not deal with this aspect of the matter and proceeded to lay stress on the "method of valuation" of closing stock employed by the assessee

and there being nothing in Section 43B to permit any "tinkering" with the said value. This is what the Tribunal had observed about the decision of the Gujarat High Court in the case of Lakhanpal National Ltd. [1986] 162 ITR 240 : "The above observations will show that somehow, the High Court got the impression that the Income-tax Officer wanted to disallow that portion of the customs and excise duties which pertain to the goods in the closing stock and the High Court held that in view of Section 43B, this could not be done when the duties had actually been paid during the relevant accounting year. The Income-tax Officer's assertions, on the other hand, had been that he is not disallowing any portion of the duties paid by the assessee which are already debited to the trading and profit and loss account and that what the assessee wanted was an extra deduction in respect of the duties pertaining to the goods in the closing stock which was not permissible as those amounts were an element of cost of the goods in the closing stock consistent with the established accounting principles. The High Court has not dealt with this question at all.

The issue that arose before the High Court was (1) Whether by including the value of duties in the value of goods in the closing stock, as per accounting practice, it can be said that the expenditure on such duties which is already debited in the trading and profit and loss account stands disallowed to that extent even though the Income-tax Officer does not disturb the expenditure finding place on the debit side of the trading account ; and (2) Whether in order to give effect to Section 43B it was permissible or necessary to disturb the valuation of the closing stock by excluding from the cost of goods the customs and excise duties paid in respect thereof. We have carefully gone through the judgment and we are unable to find any answer to these two points. From the various quotations referred to above, we find that somehow the High Court was led to the impression that the Income-tax Officer was trying to disallow that part of the duties that pertained to the goods in the closing stock and what the High Court had actually laid down is that this cannot be done.

29. On a dose scrutiny of the aforesaid ruling of the Gujarat High Court, we find that it has not laid down the principle as canvassed by the learned counsel and although in that case the result achieved by the assessee by virtue of this

judgment was the same as intended by the present assessee in the absence of any clear acceptance of the contentions raised on behalf of the assessee and in the face of some apparent confusion, we are of the view that this ruling cannot be the basis for accepting the contention of the assessee." (emphasis supplied by us).

30. The observations of the Bench underlined by us go to show rather decisively that the result achieved by the assessee before the Gujarat High Court was the same as contended for the assessee before the Tribunal, but still since there was no clear acceptance by the High Court of the contentions raised on behalf of the assessee before the Tribunal, that Bench ruled that the decision of the Gujarat High Court could not be the basis for accepting the assessee's contentions.

31. This conclusion, in our opinion, is difficult to accept inasmuch as the important aspect is the final decision of the High Court and its effect on the computation of income of the assessee and not the line of arguments or contentions taken and urged. Though the Bench was aware that the result on the computation of income of the assessee before it, was the same as that of the assessee before the Gujarat High Court, still it did not prefer to follow it on the ground that contentions similar to the ones raised before it were not raised before the High Court. This, in our opinion, is not a salutary way to appreciate the precedent of a High Court judgment.

32. Even in the case of *Durametallic (India) Ltd.* [1991] 38 ITD 211 (Mad), the Tribunal dealt with the question of stock valuation vis-a-vis inclusion of customs duty. This is what was observed while dealing with the question raised (at page 215) : "We have carefully considered the rival contentions and perused the records. Section 43B does not govern the valuation of closing stock and deals only with the disallowance of claim for deduction under Section 43B where taxes remained unpaid. The established method of claiming deduction in the mercantile system of accounting based on the provisions made in the accounts has all been disturbed by the provisions of Section 43B and the case of *Lakhanpal National Ltd.* [1986] 162 ITR 240 (Guj) cited above was more concerned with the provisions of Section 43B. The assessee has been consistently valuing the closing stock by

including the customs duty for the purpose of valuing the same. The opening stock for the year in fact contains the element of customs duty so paid and any other method which excludes the component of customs duty in the valuation of the closing stock of raw material will only result in an arbitrary and distorted valuation of the closing stock. This is against the established principles of accounting of closing stock." 33. It is seen that even in this case there is only a passing reference to the decision of the Gujarat High Court in *Lakhanpal National Ltd. v. ITO* [1986] 162 ITR 240, and no discussion as to how the ratio laid down therein is not applicable to the facts of the assessee before the Tribunal. The effect of the decision of the Gujarat High Court [1986] 162 ITR 240 was also not considered.

34. Similarly, in the case of *Southern Asbestos Cement Ltd. v. Deputy CJT* [1991] 38 ITD 449 (Mad), the question of valuation of closing stock occupied the centre stage and the other question vis-a-vis allowance of full and effective deduction under Section 43B as also the decision of the Gujarat High Court [1986] 162 ITR 240 were discussed but in brief.

This becomes apparent from the following observations (at page 460} : "As for the Gujarat case of *Lakhanpal National Ltd.* [1986] 162 ITR 240, the report does not indicate that the attention of the learned judges was drawn either to the mischief rule of construction or to the principles of valuation of closing stock as enunciated by the Supreme Court in the case of *Chainrup Sampatram* [1953] 24 ITR 481.

Therefore, with respect, we hold that the said judgment of the Gujarat High Court cannot avail the assessee." 35. In the case of *Berger Paints (India) Ltd. v. CIT* [1993] 44 ITD 573 (Cal), the Tribunal once again dealt with the question of stock valuation although it also "discussed" the question of full and effective deduction under Section 43B but choosing to distinguish the decision of the Gujarat High Court [1986] 162 ITR 240. It also agreed with the views expressed by the Delhi and Madras Benches of the Tribunal.

36. The main thrust of the assessee's arguments before us is that Section 43B stipulates full deduction in the year of payment, but by retaining a part of the amount paid as customs duty/excise duty in the closing stock the deduction is given only in part. To appreciate these arguments we find it necessary to give

some hypothetical examples as follows : Example 'A'.--Where an assessee has paid Rs. 100 as customs duty in the assessment year 1984-85 and claimed Rs. 80 as deduction and the balance Rs. 20 is reflected either in the closing stock in the balance-sheet or as pre-paid expenditure once again in the balance-sheet then by virtue of Section 43B he gets a deduction of Rs. 100 in the assessment year 1984-85 itself. No part of the deduction is carried over to the assessment year 1985-86.

Example 'B'. -Where an assessee has paid Rs. 100 as customs duty in the assessment year 1984-85 and claimed the same as a deduction, but Rs. 20 related to the goods unsold is embedded in the closing stock then he gets an effective deduction of Rs. 80 only and Rs. 20 is allowed in the assessment year 1985-86 as a part of the opening stock. This is on the interpretation of Section 43B made by the Department. In other words, an assessee who claims Rs. 80 in the trading or profit and loss account gets deduction for Rs. 100, whereas the one who claims Rs. 100, in fact, gets a deduction for Rs. 80 both within the meaning of Section 43B. In our opinion, such a result could not have been stipulated by Section 43B.37. We cannot help but lay stress on the bringing to tax of the correct income of an assessee relevant to an assessment year and this can only come about if income and expenditure pertaining to a year are duly accounted for in the said year. An assessee prior to the insertion of Section 43B could claim the entire expenditure as deduction on accrual basis and we see no reason why the same deduction cannot be made available subject to the rider that the entire amount has been paid in the year itself and that is the condition which Section 43B lays down.

38. Let us now examine the facts prevailing in the decision of Lakhanapal National Ltd. [1986] 162 ITR 240 (Guj) and those prevailing in the assessee's case. This is an extract from page 243 of the report : "The petitioner's chartered accountant thereafter wrote a letter to the respondent on December 20, 1984. Along with the said letter, he submitted a statement showing the total customs duty actually paid as Rs. 2,78,54,262 out of which the customs duty included in the valuation of the closing stock was deducted, i.e., the amount of Rs. 1,24,94,085 was deducted and the remaining amount of Rs. 1,53,60,177 was debited to the profit and loss account. Similarly, in the statement with regard to excise duty, it was pointed out that the total excise duty that was paid was Rs. 5,25,68,931 out of which the

excise duty included in the valuation of the closing stock of finished goods at various depots, i.e., Rs. 29,80,439, was deducted and the remaining amount of excise duty paid, namely, Rs. 4,95,88,492, was debited to the profit and loss account." 39. As a result of the decision of their Lordships, the element of customs and excise duties embedded in the closing stock came to be considered as an allowable deduction under Section 43B. In other words, the facts in the case of Lakhanal National Ltd. [1986] 162 ITR 240 (Guj) are identical to those in example "A".

40. On the other hand, the facts in the case of the assessee are akin to example "B" since it has paid customs duty and excise duty amounting to Rs. 79,29,930 and Rs. 32,11,740, respectively, and charged the same to the trading and profit and loss account. A part of the aforesaid amounts also finds a place in the closing stock aggregating to Rs. 26,98,713. By the aforesaid mode, the deduction to the assessee under Section 43B is given only in part ; whereas the intention of the Legislature was to allow it in full if actually paid and if otherwise found allowable. It is nobody's case that payments on account of customs duty and excise duty are not allowable deductions. In our opinion, the decision in the case of Lakhanpal National Ltd. [1986] 162 ITR 240 (Guj) and which, according to the parties, is the only decision so far rendered on the subject, meets the points raised before us on behalf of the assessee and the view-point canvassed thereto. The various Benches of the Tribunal appreciated the said decision in different perspective and held that it was a case of "stock valuation" and "tinkering of closing stock" although what in effect was intended by their Lordships was to provide full deduction within the meaning of Section 43B in the year of payment.

41. This becomes quite clear from the following observations of their Lordships (at page 247 of 162 ITR) : "There is no dispute on the point that the amount of import and excise duty are allowable deductions. What is disputed on behalf of the respondent is that the amount of customs and excise duty on the value of the closing stock of the petitioner-asses see should not be permitted in the assessment year 1984-85 (accounting year ending on December 31, 1983), though actually paid in the year 1983, because the assessment of the closing stock of the year 1983, will be in the subsequent previous year which would be in

1984 and the relevant assessment year would be 1985-86. It is true that at the time of making the assessment for the assessment year 1985-86, the respondent will have to be careful in seeing that the petitioner does not claim further deduction for the sum for which deduction is already given. In this case, it is not the contention of the respondent that any sum payable under Clause (a) of Section 43B of the Act was at any time claimed by way of deduction in any previous year prior to 1983. In fact, the raw materials were imported and the goods were manufactured in the year 1983, and they were cleared also in the year 1983. Therefore, their liability accrued in the year 1983, and they also paid the sum in the year 1983. In that view of the matter, the Explanation to Section 43B of the Act is also not attracted in the present case.

Mr. J. P. Shah, the learned advocate appearing for the petitioner, has invited our attention to the computation of the total income for the assessment year 1985-86, which is annexed to the petition as annexure 'L', wherein it has been pointed out that the amount of excise duty of Rs. 29,94,439 paid on the closing stock (in the year 1983) on finished goods lying at various depots was added to the net profit as per the profit and loss account. Similarly, the amount of Rs. 1,24,94,085 is also added. This further assures that the petitioner-assessee does not intend claiming double benefit for the same amount. The argument of Mr. S. N. Shelat that Section 43B of the Act does not enlarge the scope of deduction is correct inasmuch as it speaks about the deduction otherwise allowable under this Act, but his argument is not that the sum which is paid by way of import duty or liability to pay excise duty is not the sum given under the permissible deductions. Under the mercantile method of accounting, as stated earlier, the moment the liability is incurred, it would be an admissible deduction. What Section 43B of the Act states is that irrespective of the fact that the liability is already incurred, that would be an admissible deduction only when the actual amount in that regard is paid. Therefore, it is clear that in the year 1983, when the goods including the raw material were imported and the finished goods lying at various depots were manufactured in the year 1983 (including the one under the closing stock), the liability to pay import duty and excise duty on the said goods was incurred by the petitioner-assessee. When that is so, it is also clear that the deduction of the said excise duty and import duty even on the closing stock was allowable in the

accounting year 1983, but because of the specific language of Section 43B of the Act which has an overriding effect, it could not have been claimed by way of deduction unless payment thereof was made and here, in this case, it is not the case of the respondent that the payment of the said duty is not made and, therefore, it is not allowable. Therefore, the submission of Mr. Shelat that deduction in respect of the amounts which are not allowable under commercial principles are claimed as deductions merely because they are paid, cannot be accepted.

The last facet of Mr. Shelat's argument is that the expenditure on paying import and excise duty in respect of the closing stock does not pertain to the goods sold in the year. This argument runs counter to the mercantile method of accounting as well as the specific language of Section 43B of the Act. It is not disputed that the said goods in the closing stock were either imported or manufactured in the accounting year 1983 and as per the principles of the mercantile method of accounting, the expenditure incurred by way of import duty as well as excise duty would be a permissible deduction in the year 1983, and particularly when the payment thereof is made under Section 43B of the Act. Under the circumstances, we do not find any merit in any of the contentions raised by Mr. Shelat, and for the same reasons we accept the contentions raised by Mr. J. P. Shah, appearing for the petitioner-assessee," 42. We would like to make it absolutely clear that the removal of the amount in question from the figure of closing stock is not tantamount to a "tinkering" of the closing stock but allowing to the assessee the effective deduction to which it is entitled under Section 43B. We would also like to emphasise that in the subsequent assessment year, the assessee's opening stock would stand reduced by a corresponding figure since it cannot avail of a "double deduction".

43. A question may be raised at this stage, as to an adjustment being effected in the opening stock for the assessment year 1984-85 vis-a-vis the element of customs duty and excise duty to balance the assessee's trading results. In our opinion, such action on our part is not asked for by the parties and we refrain from expressing any views since the issue before us is one of deduction under Section 43B and not stock valuation. The decisions relied upon by the Department are not

applicable.

44. In the final analysis we, in departing from the views expressed by various Division Benches, direct a deduction to be allowed to the assessee of the amount in question, viz., Rs. 26,98,713. The opening stock for assessment year 1985-86 would stand reduced by the same figure.

45. Before we part with this ground, we cannot help feeling that the litigation between the parties could have been avoided since it was quite immaterial, whether full deduction was allowed in one year or partly in one year and partly in the next, since the assessee is a company and rate of tax is uniform. The gain to one and the loss to the other is illusory since what is deferred in one year, would have to be discharged in the next. In that sense, nobody has won and nobody has lost.

46. Taking for consideration the remaining grounds in the appeal the first issue pertains to a disallowance/addition of Rs. 1,51,154 under the provisions of Section 43B of the Act. The Assessing Officer in the course of the assessment proceedings made a disallowance/addition of Rs. 4,51,154 which represented the unpaid amounts on account of sales tax, etc. On further appeal before the Commissioner of Income-tax (Appeals), it was contended that the aforesaid figure included certain amounts brought forward from the preceding assessment year and these could not be disallowed in the assessment year under appeal because no deduction had been constructively claimed and allowed in the accounts.

The aforesaid arguments found favour with the Commissioner of Income-tax (Appeals) who proceeded to delete the addition to the extent of Rs. 3,00,000 confirming the balance.

47. Learned counsel, at the outset, was fair enough to accept that the issue was squarely covered against the assessee by the decision of the Delhi High Court in the case of Sanghi Motors v. Union of India [1991] 187 ITR 703, but hastened to add that the appeal had been filed with a view to keep the matter alive. The further submission on his part was that a sum of Rs. 34,500 pertained to the collections made in the previous year relevant to the assessment year 1983-84 and not

having been debited to the profit and loss account the provisions of Section 43B were not applicable. The Departmental Representative, on the other hand, supported the order passed by the Commissioner of Income-tax (Appeals).

48. After hearing both the parties, we are of the view that the assessee's ground must fail to the extent the collections pertained to the assessment year under appeal, but not having been paid into the Government account prior to the end of the previous year. As regards the amount of Rs. 34,500, we find that no such argument was raised before the Commissioner of Income-tax (Appeals) although he was seized of the matter and on the line of argument he proceeded to allow a relief of Rs. 3,00,000. We, however, consider it appropriate to restore the matter back to the file of the Income-tax Officer asking him to verify relevant facts and figures and allow necessary relief to the assessee, if so warranted, 49. Grounds Nos. 2 and 3 in the appeal were not pressed and these are being rejected.

50. Question No. 4 in the appeal pertains to the disallowance of the sum of Rs. 16,75,845 in respect of capital expenditure on scientific research claimed as a deduction under Section 35 of the Act. The claim was rejected by the Assessing Officer on the ground that details of the expenditure had not been furnished and no proof of any expenditure having been incurred had been made available. Before the Commissioner of Income-tax (Appeals) a note was furnished on behalf of the assessee in support of the claim contending that in the immediately preceding assessment year the assessee had incurred an expenditure of Rs. 10,68,441 on research and development and which had been allowed. The details of the expenditure pertaining to the assessment year under appeal were furnished to the Commissioner of Income-tax (Appeals). The submissions made on behalf of the assessee, however, did not find favour with the Commissioner of Income-tax (Appeals) who proceeded to confirm the disallowance made by the Assessing Officer. He also turned down the alternative submission to the effect that investment allowance and depreciation on the assets be allowed in case outright deduction was not warranted.

51. We have heard both the parties at some length in respect of the specific ground raised in the appeal. Learned counsel stated that an identical claim had

been accepted not only in the preceding assessment years, but in the succeeding assessment year as well and facts remaining identical there was no good basis on the part of the tax authorities to reject it in the intervening assessment year. According to him the assessee had complied with all the relevant provisions of law by obtaining approval for research from the notified authority and inasmuch as the expenditure had actually been incurred the claim be directed to be allowed. The alternative submission on the part of counsel was that it was in a position to satisfy the Assessing Officer about the bona fides of the claim and for which purpose the matter could be remitted back. The learned Departmental Representative although initially opposing the arguments of learned counsel was later on fair enough to accept that there would be no objection on the part of the Revenue in case the matter was restored back to the Assessing Officer for a decision de novo on the merits. In view of the aforesaid accepted position, we set aside the order passed by the Commissioner of Income-tax (Appeals) and restore the matter back to the file of the Assessing Officer for a decision de novo. In the view that we have taken to remit the matter back, it would not be necessary for us to decide ground No. 5 which is an alternative one claiming depreciation and investment allowance on the capital expenditure.

52. Grounds Nos. 6 to 9 involve an identical issue, namely, the disallowance under Section 37(3A) of the Act. These grounds are disposed of by the following common discussion : 53. The Assessing Officer in the course of the assessment proceedings worked out an aggregate expenditure of Rs. 16,97,076 under various heads falling for consideration under Section 37(3A). These included payments to hotels, sales promotion expenses, vehicle maintenance expenses as also expenditure on advertisement, brokerage, commission, etc. The Assessing Officer also added therein a sum of Rs. 1,00,000 on an estimated basis out of the travelling expenses claimed to the tune of Rs. 8,40,000. By allowing the statutory deduction of Rs. 1,00,000 out of the aggregate expenditure, he worked out a disallowance of Rs. 3,19,415.

54. Before the Commissioner of Income-tax (Appeals), it was contended on behalf of the assessee that a major part of the payment to hotels was on account of office rent as also rent for organising sales conferences, etc. It was urged that these be

excluded from the purview of the disallowance. The Commissioner of Income-tax (Appeals), however, rejected the argument advanced being of the view that no "classification" had been provided in respect of the payment to hotels and the entire amount was required to be taken into account. He also took due note of the fact that the details furnished before him did not indicate any payment having been made for office rent and even at the appellate stage there was no evidence to support this "theory". The Commissioner of Income-tax (Appeals) also upheld the action of the Assessing Officer in including a sum of Rs. 5,000 in respect of entertainment expenditure once again on the ground that no material had been brought on record to contradict the stand taken by the Assessing Officer.

55. As regards the inclusion of a sum of Rs. 5,18,270 towards conveyance expenses by the Assessing Officer the assessee contended before the Commissioner of Income-tax (Appeals) that the aforesaid figure included reimbursements on account of scooter fare, bus fare and taxi fare to the employees of the company and such expenditure by no stretch of imagination could be taken into account. This argument found favour with the Commissioner of Income-tax (Appeals) who observed that the Assessing Officer had taken a "very rigid view of the matter", but at the same time noting that the assessee did not have any break-up of the expenditure. The further argument which was advanced before him was that the estimate be suitably reduced. The latter argument found favour with the Commissioner of Income-tax (Appeals) who concluded that one-third of the expenditure be treated as reimbursement and taken out of the purview of the disallowance. He, however, upheld the inclusion of Rs. 1,00,000 out of the expenditure incurred on touring by the employees. He rejected the argument advanced by the assessee to the effect that the said expenditure was not includible. The Commissioner of Income-tax (Appeals), however, gave relief in respect of various other items such as brokerage, commission, etc., but these are not the subject-matter of the appeal before us and hence not discussed.

56. We have heard both the parties at some length in respect of the specific grounds raised by the assessee. We have also perused the material on record to which our attention was invited. In our opinion, there does not appear to be any scope for accepting the submissions of learned counsel in respect of payments to

hotels as also the sum of Rs. 5,000 pertaining to entertainment expenses. The position before us remains the same as it prevailed before the Commissioner of Income-tax (Appeals) and there is no good ground before us to take a contrary view. Grounds Nos. 6 and 7 are accordingly rejected.

57. As regards Grounds Nos. 8 and 9, however, the inclusion for purposes of disallowance under Section 37(3A) has been taken on an estimated basis which, according to us, seems to be somewhat on the higher side. In our opinion, 50 per cent. of the expenditure towards conveyance (as against two-thirds) and a sum of Rs. 50,000 (instead of Rs. 1,00,000) in respect of conveyance expenses while on tour would be a reasonable amount to be included for computing the disallowance. We order accordingly.

58. As regards ground No. 11 pertaining to the claim for deduction under Section 80-I of the Act, learned counsel stated that necessary relief had already been allowed by the Assessing Officer in the second round of proceedings and in that view of the matter, the ground was not pressed. This is accordingly rejected.

59. Ground No. 12 in the appeal pertains to the charge of interest under Sections 139(8), 215 and 217. The Commissioner of Income-tax (Appeals) refused to admit the ground following the decision of the Supreme Court in the case of Central Provinces Manganese Ore Co. Ltd. v. CIT [1986] 160 ITR 961.

60. Before us, learned counsel for the appellant placed reliance on the same decision to contend that the matter was appealable in case an assessee denied the liability altogether as was being done in the present appeal. A reference was also made in this connection to the decision of the Bombay High Court in the case of Patel Aluminium Pvt.

Ltd. v. Miss. K. M. Tawadia, ITO [1987] 165 ITR 99. The learned Department Representative, on the other hand, supported the order passed by the Commissioner of Income-tax (Appeals).

61. After hearing both the parties, we are of the view that the ground as raised by the assessee is appealable in the light of the decision of the Supreme Court in the

case of Central Provinces Manganese Ore Co.

Ltd. v. CIT [1986] 160 ITR 961. For the purposes of deciding the issue on merits, we restore the matter back to the file of the Commissioner of Income-tax (Appeals).

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