

Assistant Commissioner of Vs. Cutch Oil and Allied Industries

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Court : Income Tax Appellate Tribunal ITAT Ahmedabad

Decided On : Dec-27-1995

Reported in : (1996)58ITD1(Ahd.)

Judge : B Chhibber, P Singh

Appellant : Assistant Commissioner of

Respondent : Cutch Oil and Allied Industries

Judgement :

1. The only ground raised in this appeal by the Revenue reads as under :- The learned CIT(A) erred in law and on facts in directing to delete the addition of Rs. 1,60,171 under Section 41(1).

2. The assessee is a Private Limited Company engaged in the purchase and sale of copra cake and also manufactures Bentonite Powder. The assessee company had made a provision for electricity duty during the previous year relevant to assessment years 1976-77 to 1979-80 as per the details given below: 2.1 The above provisions were claimed as deductions during the relevant assessment years. During the year under appeal, the assessee wrote back the amount of Rs. 1,60,171.39 in its books of account. In the statement of income, the assessee-company placed a note as under :- Rs. 1,60,171 being brought forward in the account of Gujarat Electricity Board for electricity duty is written back during the previous year relevant to Assessment Year 1988-89. The provision was created and allowed as deduction in following years :Accounting Assessment Amount The

foresaid sum of Rs. 1,60,171 is not included in total income in the above statement of income as the same is not taxable in Assessment Year 1988-89. It is submitted that there is neither cessation nor remission of liability in view of the fact that subsequent order of Collector of electricity duty has established that on the basis of the facts of the case there could not have been additional demand on account of difference of rate of electricity duty and therefore, provision under Section 41(1) is not applicable.

2.2 During the course of assessment proceedings the assessee-company filed written submissions dated 26-12-1988 (pages 11 to 13 of the paper book) before the Assessing Officer. The assessee-company pointed out that in view of the fact that the assessee-company was an Industrial Unit since inception and considering that this fact was subsequently accepted by the concerned authority, it was clear that the liability never existed. It was contended that Section 41 was not applicable as there was no remission or cessation of liability. The Assessing Officer was not satisfied with the submissions made. He noted that during the assessment years 1976-77 to 1979-80 the assessee-company was allowed electricity expenses as deductions in the computation of income. Hence in the subsequent previous year ending on 30-9-1987 relevant to the assessment year 1988-89, due to the order of the Collector of Electricity Duty the assessee obtained remission of the liability. He, therefore, held that the assessee's case was covered by the provisions of Section 41(1) and subjected the amount of Rs. 1,60,171.39 to income-tax.

3. In the first appeal, the learned CIT(A) accepted the contentions of the assessee-company and held as under :- (a) There cannot be either remission or cessation of liability in respect of a liability which never existed. Therefore, in view of the fact that electricity duty was not leviable there can neither be remission nor cessation of liability.

(b) The remission or cessation of liability is one of the two conditions for applicability of provision under Section 41(1). In this case as held in para (a) above, there can be neither cessation nor remission of liability.

(c) In view of (a) and (b) above, the provision of electricity duty can not be added to total income of Assessment Year 1988-89 under Section 41(1). The provision

was on facts of the case wrongly allowed as deduction in earlier years and, therefore, it can be withdrawn in the relevant years in which deduction was allowed by invoking appropriate provisions for such action under the Income-tax Act, 1961.

4. Shri R.K. Chaudhary, the learned D.R. submitted that the assessee had claimed deduction in respect of electricity duty aggregating to Rs. 1,60,171 in the assessment years 1976-77 to 1979-80 and the same was allowed by the Assessing Officer. During the year under appeal due to the order of the Collector of Electricity Duty, the assessee was under no obligation to pay such amount and it clearly amounted to cessation of liability and the Assessing Officer rightly invoked the provisions of Section 41(1). In support of his contentions he relied upon the following authorities : (v) Panyam Cements and Mineral Industries Ltd. v. Addl. CIT [1979] 117 ITR 770 (AP) 5. Shri Dilip Vadodaria, the learned counsel for the assessee submitted that Section 41(1) applies only in cases of loss, expenditure or trading liability incurred by the assessee. In the present case, the assessee has always been an industrial company and this fact has subsequently been accepted by the concerned authority. Therefore, the electricity duty leviable on a non-industrial company was never a loss, expenditure or trading liability incurred by the assessee-company.

Therefore, Section 41(1) has no applicability to the facts of the assessee's case. According to the learned counsel, Section 41(1) is not meant to charge tax on amount wrongly claimed or allowed as deduction in the earlier year. In support of his contentions, he relied upon the judgement of the Madras High Court in the case of CIT v. India Cements Ltd. [1975] 98 ITR 69 and the decision of the I.T.A.T. Delhi Bench in the case of General Industries Corporation v. ITO [1990] 33 ITD 524 wherein it was held that if an expenditure was not deductible under provisions of the Act and had been wrongly allowed, provisions of Section 41(1) would not apply in respect of that amount. The learned counsel for the assessee further submitted as under :- Under the Income-tax Act, each year is a separate self-contained period. Each previous year is a distinct unit of time for the purposes of assessment.

As observed by Lord Russel while delivering the judgment of the Privy Council in the case of CIT v. Chitnavis 6 ITC 453, 457, 'what are chargeable to income-tax are the profits and gains of a year.

For the purpose of computing yearly profits and gains, each year is a separate, self-contained period of time, in regard to which profits earned or losses sustained before its commencement are irrelevant.

Thus, the deduction wrongly claimed and allowed in the earlier years cannot be charged to tax in the subsequent year, particularly when Section 41(1) does not apply to the facts of the case'.

Without prejudice to the above contentions, the learned counsel for the assessee submitted that as per the provisions of Section 41(1)(c) the amount in question is deemed to be the profits and gains of business and chargeable to income-tax as income of that previous year in which the assessee has obtained the amount in respect of loss or expenditure or has obtained the amount in respect of trading liability by way of remission or cessation and in the present case, the assessee-company has not obtained any amount or benefit in the year under appeal in which it has only written back the liability which was not required and which was 'unnecessarily getting carried forward in the books of account'. The clarification by the Collector of Electricity Duty that the assessee-company is an industrial undertaking and hence the higher rate of electricity duty is not leviable was also not received during the year but in fact was received in the year 1981. The learned counsel therefore concluded that the Assessing Officer has without enquiring into the facts, merely on the basis of the book entry, taxed the amount in question in the year under appeal, which is not correct. On the facts, the amount in question even if deemed to be profits and gains under Section 41(1), cannot be considered as profits and gains of the year under appeal.

6. We have considered the rival submissions and perused the facts on record. From the facts of the case as reproduced (supra) it is evident that the assessee-company did make provisions aggregating to Rs. 1,60,171.39 for the assessment years 1976-77 to 1979-80 and the same amount was allowed as deduction by the Assessing Officer. At the same time, the assessee contested the levy of electricity

duty before the Collector of Electricity Duty and the Collector of Electricity Duty vide his order dated 29-12-1981 (placed at page 13-A of the paper book), after taking into consideration the contentions made by the assessee-company and the facts and circumstances of the case, held as under: Electricity duty on the energy consumed by the above industrial undertaking should be levied @ 1.6 paise per unit for the period from 1-1-1969 to 31-3-1976 and from 1-4-1976 to 11-8-1977 @ 2 paise per unit and from 11-8-1977 onwards @ 6 per cent on consumption charges.

The order of the Collector of Electricity Duty is clear and vide this order the Collector has given concession to the assessee-company in respect of the consumption charges per unit of electricity consumed. As a result of this order, the assessee-company was not required to pay sums aggregating to Rs. 1,60,171 which it had provided in its books of account as liability in the assessment years 1976-77 to 1979-80 and claimed deduction in respect thereof and which was allowed by the Assessing Officer in the respective assessment year. It is not a case of mistaken payment or mistake in calculation as made out by the learned counsel for the assessee. We do not also subscribe to the contention of the learned counsel that the order of the Collector of Electricity Duty is clarificatory in nature because it is a full-fledged order passed by him "after seeing all the documents produced by the party and hearing given in person". The question, therefore, remains to be answered is whether or not in such facts and circumstances there was a cessation of liability. In our considered opinion, there is surely a cessation of liability and the Assessing Officer was justified in invoking the provisions of Section 41(1) of the Act. We are fortified in taking this view by the following judgments: In Motilal Ambaidas' case (supra), the Hon'ble Gujarat High Court was dealing with a case of refund of sales-tax. The High Court explained the provisions of Section 41(1) as under : What has been enacted in Section 41(1) is that if a deduction has been made in a previous year and the assessee has benefited by such deduction in the past, if by chance some amount is refunded to him or comes back to him, the amount so got back should be brought to tax. It cannot be contended that Section 41(1) is a charging section and, therefore, should be strictly construed. The position is now well-recognised that it is only Section 3 read with Section 4 of the Act of 1922 and Section 4 read with Section 5

of the Act of 1961, which are the charging sections. The rest of the sections in the respective Acts constitute the machinery for computation and levying of tax and should be so read as to effectuate the intention of the Legislature, which is to make the charge effective and, further, the provisions should be so read as to make the machinery of assessment workable. As Section 41(1) is not a charging section, it has to be construed in such a manner so as to make the levy of the tax effective and to make the machinery of assessment workable.

Ikrahnandi Coal Ltd. Co. v. CIT 1968] 69 ITR 488 (Cal.) and *CIT v. Saraswati Industrial Syndicate Ltd.* [1973] 91 ITR 501 (Punj.) relied on.

Under the circumstances, the amounts of sales-tax collections which the assessee firm was bound to show on the credit side when received and was entitled to claim as deduction when sales-tax was paid, must be treated as deductions which ought to have been made. The words at the commencement of Section 41(1) 'Where an allowance or deduction has been made in the assessment for any year' should be read as 'Where an allowance or deduction ought to have been made in the assessment for any year' so far as the facts of this case are concerned and, so reading that provision, it must be held that the provisions of Section 41(1) apply to the facts of this case. It is, therefore, clear that the first condition regarding the applicability of Section 41(1) is completely satisfied in this case and the refund of sales-tax obtained by the assessee as a result of the decision of the Supreme Court is clearly an amount obtained in cash or in any other manner falling within Section 41(1).

In *K.V. Moosa Koya and Co.'s case* (supra), the Government of Kerala levied administrative surcharge on export of tapioca in exercise of the power vested in it under the Kerala Tapioca (Manufacture and Export Control) Order, 1966. The assessee collected administrative surcharge on tapioca during the accounting periods and the amount so collected were remitted into the Government treasury and were allowed as expenditure in the assessments of the relevant years. The said levy of administrative surcharge by the Government was challenged by innumerable dealers in the High Court. The levy was annulled and refund of amounts remitted by the dealers was ordered by the High Court. The State took

the matter in appeal before the Supreme Court and the Supreme Court concurred with the view of the High Court. The ITO invoked Section 41(1) of the Act and included the refund obtained by the assessee in its total income. The matter went up to the High Court and the High Court held as under :- Held, that the assessee was absolved of the liability only by the decision of the Supreme Court and only then, could the liability be said to have ceased. So, the benefit in respect of deductions already made in the assessments for the earlier years, by way of cessation of the liability arose or accrued to the assessee only when the Supreme Court rendered its judgment on November 7, 1974 and that would fall during the assessment year 1975-76. Therefore, the ITO acted illegally and without jurisdiction in including the amount of refund received by the assessee in the total income of the assessee for the assessment year 1974-75.

In Banswara Electric Supply Co.'s case (supra), the assessee firm carried on business of generation and distribution of electricity since 1947 and was licensee of the Government of Rajasthan. In respect of the period up to March 31, 1960, the assessee claimed that a sum of Rs. 84,121 was payable by it to the Government as royalty. As no actual payment in respect of this amount was made, the assessee made a provision for this liability by debiting its profit and loss account and by making a contra credit entry in the royalty reserve account.

Subsequently, the Government of Rajasthan by its order dated 2-2-1962 reduced the amount of royalty payable by the assessee to a sum of Rs. 17,976. On these facts, the Rajasthan High Court held that reduction in the amount of liability i.e. royalty amounted to cessation of liability and the provisions of Section 41(1) were attracted. The case of the assessee is on all fours with the case decided by the Rajasthan High Court.

There is a direct case of remission of electricity charges decided by the Hon'ble Andhra Pradesh High Court in the case of Panyam Cements & Minerals Industries Ltd. (supra). The assessee, engaged in the manufacture of cement, had claimed deduction in respect of electrical charges paid by it. Thereafter, the State Government issued an order approving the recommendation of the Committee constituted by it, directing that concession should be granted on power tariff in

respect of certain industries, including the assessee's industry, which were to be entitled to concessional rate of power tariff (ranging between 25 to 50%) up to March 31,1966 from the date of commencement of production.

The assessee was granted 20% rebate in respect of its second plant. In accordance with the said scheme, the assessee received a sum of Rs. 1,54,561 and Rs. 51,821 for two years. Rejecting the plea of the assessee that it was a windfall and not a rebate in tariff, the ITO included the same in the income of the assessee. The matter travelled up to the High Court and the High Court has held as under : Held, (i) that a perusal of the G.Os issued by the Government indicate that the subsidy in respect of power tariff was granted to the assessee by the Government as a matter of well defined policy.

The assessee got the benefit because the screening Committee constituted for the purposes recommended the assessee for grant of the concession and the same was approved by the Government by a G.O. Hence, the concession granted by the Government in respect of power tariff cannot be said to be either a windfall income or a casual or a non-recurring receipt. Even assuming that it is a casual and non-recurring receipt under Section 10(3), if such a receipt arises from business, then it can be included in the income of the assessee. The assessee would not have got the concessional rate of tariff but for the fact that it was carrying on the business of manufacture of cement. Therefore, the rebate in power charges received by the assessee is exigible to tax as profits and gains of business under Section 41(1) of the Income-tax Act.

The case of the assessee before us is on all fours with that decided by the Hon'ble Andhra Pradesh High Court.

In Baropharn Chemicals Ltd. 's case (supra) the ITAT Ahmedabad Bench 'A' to which one of us (the Accountant Member) was a party, was dealing with a case of cessation of interest liability. The assessee-company provided interest in its accounts from 1976 to 1983 to the tune of Rs. 22 lacs and was allowed as business deduction. Interest was not paid to the lenders. The assessee wrote back the amount to its P & L Account in the year 1984. The Tribunal held that the conduct of the assessee in writing back the amount to its P & L Account

tantamounted to admission of cessation of liability and accordingly the provisions of Section 41(1) were attracted. In the case before us one thing very clearly and transparently emerges from the facts of this case is that the assessee's liability by its own conduct ceased and it was no longer obliged to pay any amount as and towards electricity duty to the Collector of Electricity Duty.

7. Now, we take up the judgments relied upon by the assessee's counsel i.e. the judgments in the cases of India Cements Ltd. (supra) and General Industries Corporation (supra). We find that the facts in those judgments are distinguishable from the facts of the case before us. In India Cements Ltd.'s case (supra) in calculating the remuneration payable to the managing agent of the assessee-company for the year ended March 31, 1960, depreciation on the basis of the rules in force on that date was deducted from the total profits. The amount arrived at on that basis was actually paid to the managing agent. However, by a subsequent notification issued on September 23, 1960, the rules relating to the calculation of depreciation were amended with retrospective effect from 1-4-1960. In the assessment proceedings for the assessment year 1960-61, the Assessing Officer took note of the amended rules and held that on the basis of the amended rules a higher amount of depreciation will have to be deducted from the total profits to arrive at the net profits for calculating the amount of remuneration payable to the managing agents. Accordingly he was of the view that a sum of Rs. 73,272 was paid to the managing agent over and above what they were entitled to under the agreement and disallowed the same. On appeal, the AAC held that the amount was allowable and the Appellate Tribunal also agreed with the view. On a reference, made to the High Court at the instance of the Revenue it was held by the High Court that the amount overpaid to the managing agent was not an allowable deduction under Section 10(2)(xv) of the Act. It was further held by their Lordships of the Madras High Court that Section 10(2A) of the Income-tax Act, 1922 (which corresponds to Section 41(1) of the Act, 1961) does not cover a mistaken payment or mistake in calculation. As pointed out above, the case of the assessee is not that of mistaken payment or a mistaken calculation and hence the ratio laid down by the Madras High Court is not applicable to the facts of the case before us.

The order of the ITAT Delhi Bench 'A' in the case of General Industries Corporation. (supra) has been passed following the judgment of the Madras High Court in the case of India Cements Ltd. (supra).

8. Since the facts of the case before us are distinguishable from the facts of the cases decided by the Madras High Court, the order of ITAT Delhi Bench, has no binding effect on us.

9. Now, we turn to the alternative contention of the assessee's counsel i.e. the year of taxability of the amount of Rs. 1,60,171. The contention of the assessee's counsel is that since the decision of the Collector of Electricity Duty was received in the year 1981, the amount if at all ought to have been assessed in the year 1982-83. We do not find any merit in this contention. Such a plea has obviously been raised because assessment for Assessment Year 1982-83 has become time barred. In all fairness the assessee ought to have made the book entries soon after the receipt of the order of the Collector of Electricity Duty but it chose to postpone and made the book entries in the accounting year relevant to assessment year 1988-89. The book entries regarding the remission of liability having been made in the assessment year under appeal and the assessee admittedly having followed mercantile system of accounting we hold that the year of assessment of the remission of liability is the year under appeal. We accordingly reject the contention of the assessee's counsel.

10. In the light of the above discussion, we reverse the findings of the CIT(A) and restore those of the Assessing Officer.

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