

Amtek Auto Ltd. Vs. Additional Commissioner of

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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Sep-14-2007

Reported in : (2007)112TTJ(Delhi)464

Judge : N Karhail, P Jagtap

Appellant : Amtek Auto Ltd.

Respondent : Additional Commissioner of

Judgement :

1. This appeal of the assessee is directed against the order dt. 21st Sept., 2004 passed by learned CIT(A), Panchkula, for the asst. yr.

2001-02.

2. The first ground of appeal states that having regard to the facts and circumstances of the case, learned CIT(A) has erred in law and on facts in confirming the disallowance of Rs. 4,75,000 on account of legal and professional charges.

3. Briefly stated, facts are that assessee company is engaged in manufacturing and trading of auto components. During the year under consideration the assessee company made payment of Rs. 4,75,000 to IL & FS Merchant Banking Services Ltd., for placement of preference shares of the company and claimed the same as business expenses under the head 'Legal and professional charges'. During the assessment proceedings the assessee was asked to explain as to why

the same should not be disallowed as non-business expenses. The assessee did not file any reply in this regard. The AO, therefore, treated the fees for placement of preference shares as capital expenses because the same had been done for procuring an enduring benefit. Accordingly, the AO added the same to the income of the assessee.

4. On appeal, the learned CIT(A) has held that since the expenditure of Rs. 4,75,000 was spent for arranging the funds for share capital, it was to be treated as capital expenditure as the capital raised gave enduring benefit to the assessee company.

5. Before us, the learned Counsel for the assessee has submitted that impugned expenses were made for raising the funds by way of preference shares capital of which was ultimately used for the purpose of the business of the assessee. Such expenses are nothing but only in the nature of legal and professional expenses payable to merchant bankers for arranging these funds which had ultimately been used for the purpose of business of the assessee. The nature of the impugned disallowance cannot be said to be capital nature. Therefore, he has urged that the impugned addition may be deleted. A reliance in this regard has been placed upon the decisions in the cases of India Cements Ltd. v. CIT , CIT v. East India Hotels Ltd. 6. We have heard the parties and perused the record of the case. The assessee company made a payment of Rs. 4,75,000 to IL and FS Merchant for placement of preference shares of the company and claimed the same as business expenses. The claim of the assessee company is that the expenses incurred for raising the funds by way of preference shares, which were intimately used for the purpose of the business of the assessee is of revenue in nature. However, we do not find any merit in the claim of the assessee. In the case of Punjab State Industrial Development Corporation Ltd. v. CIT it has been held that the fee paid to the Registrar of the Companies for expansion of the capital base of a company is directly related to the capital expenditure incurred by the company and although incidentally that would certainly help in the business of the company and may also help in profit making, it still retains the character of capital expenditure since the expenditure is directly related to the expansion of the capital base of the company. In view of the above, we hold that the payment of Rs.

4,75,000 made to IL&FS are of capital nature. Hence, we uphold the order passed by the learned CIT(A).

7. Second ground of appeal states that having regard to the facts and circumstances of the case, learned CIT(A) has erred in law and on facts in confirming the disallowance of Rs. 4,79,016 made on account of foreign travelling expenses.

8. Briefly stated, facts are that during the year the assessee company had claimed foreign travel expenses on account of foreign travel of Mr.

Kireevshikh Louri and Dr. Reazoldary amounting to Rs. 5,36,216 out of which fare for journey came to Rs. 57,200. However, no details with regard to rest of the payments made were submitted. Therefore, Rs. 4,79,016 claimed under the head 'foreign travel expense' was disallowed by the AO for want of evidence and added the same to the income of the assessee company.

9. Learned CIT(A) after having considered the submissions of the assessee as well as the remand report of the AO has held thus: 10.5 I have carefully considered the facts and submissions made. I have also verified the assessment records. I have perused the order-sheet entries in the assessment record. Order-sheet entry dt.

29th Dec., 2003 at Sl. No. (z) clearly shows the details of foreign travel expenses for the year, were asked for by the AO. The AO had also asked how these expenses related to the business of the company. Then again, on 22nd Feb., 2004, the AO had asked for the same details, since obviously, the assessee had not produced the details even till then or for that matter even thereafter.

Therefore, the assessee's contention is not correct that such details were not asked for.

10.6 However, I am unable to accept the AO's contention that such fresh evidences filed during the appellate stage cannot be entertained. When a matter regarding an allowability of an expense has to be decided, it is always fair and reasonable to go through the evidences so that whatsoever allowable is due to

assessee should not be denied to the assessee, merely because the details were not produced earlier. In fact, the AO could have examined those details at the stage when remand report was called for.

10.7 The details are available at pp. 25, 26 and 27 of the paper book (copy of these were sent to the AO also when report was called for). After perusing the details, it is seen that at p. 25 is only a chart indicating the total expenses incurred for a foreign travel during the year. At p. 26 is the copy of the bill showing the net payable amount of Rs. 57,200 relating to the fare, which had already been allowed by the AO. At p. 27 is the detail of currency purchased of Rs. 4,79,016 (equivalent to US\$ 1,070 at Rs. 48,666 and US\$ 9,500 at Rs. 4,30,350, totalling Rs. 4,79,016). But, the currency purchased by itself does not prove that these amounts were spent on the boarding and lodging of the concerned. There is no evidence to show how this amount was spent. Therefore, in spite of giving opportunity at the assessment stage, and also at the appellate stage, the assessee has not been able to give corroborative evidence to show that Rs. 4,79,016 was spent for boarding and lodging of Mr.

Kireevskikh Louri and Dr. Fedzolotarev. In fact, copy of the money changer's vouchers at p. 27 shows only purchase of foreign exchange by Mr. Kireevskikh Louri. No details are available for visit of Dr.

Fedzolotarev. 10.8 In view of the above discussion, the addition of Rs. 4,79,016 is sustained.

10. We have heard the parties and perused the record of the case.

Learned Counsel for the assessee has reiterated the submissions as were made before the learned CIT(A) that no details with regard to the foreign travelling expenses were asked for" Therefore, the matter may be set aside to enable the assessee to furnish the necessary details with reference to foreign travelling expenses. However, in view of the specific findings of the learned CIT(A) that as per order-sheet entry dt. 29th Dec, 2003, the details of foreign travel expenses were asked, we find no merit in the submission of the learned Counsel for the assessee. Further, assessee has not placed any material on record to rebut the

finding of learned CIT(A) that there is no evidence to show that the purchased currency amounting to Rs. 4,79,016 was spent on boarding and lodging of these two persons. Therefore, we see no reason to interfere with the order passed by the learned CIT(A). Hence, the same is upheld.¹¹ Third ground of appeal states that having regard to the facts and circumstances of the case, learned CIT(A) has erred in law and on facts in confirming the disallowance of Rs. 31,381 out of ESI contribution.

12. Briefly stated, facts are that AO disallowed Rs. 36,337 being the employer's contributions to PF and ESI as the same were not made within the due date prescribed by statutes.

Thus, after perusing the provisions of Section 43B r/w Section 36(1)(va), it is seen that every month's contribution is to be paid by 20th of the following month (including grace period). However, after seeing the details of payments made of the Unit-I, it is seen that all were made late. The ESI contribution for the month of December should have been paid by 20th Jan., 2001 (including grace period). Similarly, the ESI contribution for January, 2001 should have been paid by 20th Feb. 2001, ESI contribution for the month of February should have been paid by 20th March, 2001 and ESI contribution for the month of March should have been paid by 20th April, 2001.

In view of the above, the disallowance of ESI contribution to the extent of Rs. 31,381 is sustained.

14. Before us, the learned Counsel for the assessee has submitted that this issue is covered in favour of the assessee by the decision of Hon'ble jurisdictional High Court in the case of CIT v. Avery Cycle Industries (P) Ltd. , wherein the question had arisen in respect of the asst. yr. 1987-88 as to whether on the facts and circumstances of the case, the 'Tribunal was right in law in holding that the liability of Rs. 94,759 is allowable if the payment is made before the due date prescribed under Section 139(1) and that the first proviso to Section 43B has retrospective application though it came into being w.e.f. 1st April, 1988.

15. In this case the AO disallowed the claim of the assessee on account of sales-tax/Central sales-tax and PF shown in the books of account as payable on the ground that the assessee had not actually paid the said amount before the due date prescribed under Section 139(1) of the IT Act, 1961 and that first proviso to Section 43B was not retrospective, which came into force w.e.f. 1st April, 1988. The learned CIT(A) affirmed the view taken by the AC). However, on further appeal, the Tribunal reversed the said view and held that the proviso in question was retrospective and was applicable to the asst. yr. 1984-85 onwards, 16. The Hon'ble High Court has observed that proviso to the Section 43B of IT Act, 1961 clarifying that sum paid after the accounting year but before the due date prescribed under Section 139(1) is deductible has to be read into Section 43B from its inception along with Expln. 2. The amendment made to this effect was remedial in nature and held to be retrospective being curative and declaratory. The Hon'ble High Court has, thus held that the Tribunal was right in holding that liability of Rs. 94,759 was allowable if the payment was made before the due date prescribed under Section 139(1) and that the first proviso to Section 43B has retrospective application though it came into being w.e.f. 1st April, 1998. Accordingly, the matter was remitted back to the AO to determine whether payment had been made before due date prescribed under Section 139(1) of the Act. Learned Counsel for the assessee therefore urged that since the payments have been made before the due date for filing the return under Section 139(1) of the Act, the same is allowable. He has further submitted that similar view has been expressed by the Hon'ble Gauhati High Court in case of CIT v. George Williamson (Assam) Ltd. , wherein it has been held that contributions made towards provident fund, etc. after the close of accounting period but before the due date of filing of the return of income for the asst. yr. 1.992-93 are entitled to relief under Section 43B(b) of the IT Act, 1961. Learned Counsel for the assessee has however pointed out that only decision of the Madras High Court in the case of CIT v. Synergy Financial Exchange Ltd. is against the assessee. Therefore, he urged that since there are two views on the issue the decision which is in favour of the assessee may be followed and the relief may be allowed to the assessee. On the other hand, the learned Departmental Representative has argued in support of the impugned order and has placed reliance on the decision in the case of Synergy

Financial Exchange Ltd. (supra).

17. We have heard the parties and perused the record of the case. In view of the decision of jurisdictional High Court of Punjab and Haryana in the case of Avery Cycle Industries (P) Ltd. (supra) given also in relation to the payment of provident fund [which fall under Section 43B(b)] for asst. yr. 1987-88, we hold that since the payments have been made towards ESI before the due date for filing the return under Section 139(1) of the Act, the same is allowable deduction. Hence we direct to delete the same.

18. The fourth ground of appeal relates to the order confirming levy of interest under Sections 234A and 234B.

19. Briefly stated, facts are that while computing the income of the assessee for the year under consideration the AO worked out the tax liability on the basis of book profit under Section 115J of the Act.

Accordingly, he levied the interest under Sections 234A and 234B of the IT Act.

13.5 It may be pertinent to mention here that Sections 234A, 234B and 234C in clear terms impose a mandate to collect interest at the rates stipulated therein. The expression 'shall' used in the said sections cannot by any stretch of imagination be construed as 'may'.

This is clear from the fact that prior to the amendment brought about by the Finance Act, 1987, the legislature in the corresponding section pertaining to imposition of interest used the expression 'may' thereby giving a discretion to the authorities concerned to either reduce or waive interest. The change brought about by the Amending Act (Finance Act, 1987) is a clear indication of the fact that the intention of the legislature was to make the collection of statutory interest mandatory CIT v. Anjum M.H. Ghaswala and Ors. .

13.6 In view of the above discussion, the apex Court's decision in the case of Anjum M.H. Ghaswala. (supra) clinches the issue that charging of interest is mandatory, therefore, the assessee's reliance on Hon'ble Supreme Court's decision in the cases of Vegetable Products (supra) and Onkar S. Kanwai (supra)

is misplaced.

13.7 Therefore, there is no merit in the contention of the assessee.

The charging of interest under Sections 234A and 234B is consequential to the order.

21. We have heard the parties and have perused the record of the case as well as the cases referred to above. The issue involved is about the applicability of the provisions of Sections 234B and 234C in relation to assessment of income finalized in terms of deeming provisions of Section 115JA. Section 234B and Section 234C provide for payment of interest in cases where assessee fails to pay the advance taxes under Section 208 or fails to pay tax in accordance with the instalments prescribed in the said section. Section 208 contemplates the liability for payment of advance tax during a year where the amount of final tax exceeds a specified amount. Section 209 of the Act provides for the manner of computation of advance tax. Similarly, Section 211 provides for the manner of payment of instalments and the due dates for such payments.

22. Section 115J provides that where total income of the assessee being a company is less than 30 per cent of the book profit, the total income of the assessee is chargeable for tax for the relevant previous year shall be an amount equal to 30 per cent of such book profits.

Sub-section (2) of Section 115JA provides that every assessee being a company, shall, for the purpose of this section prepares its P&L a/c in accordance with the provisions of Part n and Part III of Schedule VI to Companies Act, 1956. In the Explanation to Section 115JA(2) it is provided that for the purpose of this section book profit means the net profit as shown in the P&L a/c for the relevant previous year prepared under Sub-section (2) as increased and reduced by the amounts given in this section. Thus, for the purpose of assessing tax under Section 115JA, firstly, the profit as computed under the IT Act has to be prepared. Thereafter, the book profits as contemplated by the provisions of Section 115JA are to be determined, then the tax is to be levied. The liability of the assessee for payment of tax under Section 115JA arises only after the end of financial year and the book

profits are known to the assessee only after the close of the accounting year.

As for the purpose of this section, the P&L a/c for the relevant previous year has to be prepared in accordance with the provisions of Part n and Part III of Schedule VI to Companies Act. The liability to pay tax in terms of Section 115J is based on legal fiction created by this section by way of which a percentage of book profits is deemed to be the income. After having computed the income under normal provisions of the Act, the liability for payment of tax under Section 115J will be attracted only if the income computed under the provisions of the Act is less than 30 per cent of its book profits computed in the manner laid down under Section 115J. The Hon'ble Karnataka High Court in the case of Kwaliti Biscuits Ltd. v. CIT was seized with the similar dispute but in relation to the provisions of Section 115J. The provisions of Sections 115JA and 115J do not have any material difference inasmuch as both the sections provide for legal fiction by way of which a specified percentage of the book profits, as computed under the Companies Act, 1956, is deemed as income of the assessee on certain events. The Hon'ble Karnataka High Court held that having regard to the provisions of Section 115J, since the entire exercise of computing the income or in other words the book profit can be made only at the end of financial year, the provisions of Sections 207, 208, 209 or 210 dealing with the liability to advance tax could not be made applicable. The reasoning which weighed with the Hon'ble High Court to come to the aforesaid conclusion was that having regard to the operating mechanics of Section 115J, unless and until the accounts are audited and balance sheet prepared, the assessee would not be in a position to know the applicability of the provisions of Section 115J because the liability can only be ascertained in accordance with the Companies Act, 1956. The following observations of the Hon'ble High Court are worthy of notice: Since the entire exercise of computing or that of book profit could be only at the end of the financial year, the provisions of Sections 207, 208, 209 or 210 cannot be made applicable, until and unless the accounts are audited and the balance sheet is prepared because till then even the assessee may not know whether the provisions of Section 115J would be applicable or not. The liability would be after the book profits are determined in accordance with the Companies Act, The words-'for the purposes of this section' in the Explanation to Section 115J(IA) are relevant and cannot be construed to extend beyond the computation

of liability of tax. Hence, interest cannot be charged under Sections 234B and 234C.²³ It may be mentioned that the decision of Karnataka High Court in the case of Kwaliti Biscuits Ltd. (supra) has been affirmed by the Hon'ble Supreme Court in the case of CIT v. Kwaliti Biscuits Ltd. . Thus, the question before us is whether the rationale enunciated by the Hon'ble Karnataka High Court as has been affirmed by the Hon'ble Supreme Court in the aforesaid case would also govern the provisions of Section 115JA read with relevant advance tax provisions under the IT Act. We have also discussed in the foregoing paras the scheme of Section 115JA. We do not find it different from the provisions of Section 115J inasmuch as both the sections referred to (A) the book profit under the Companies Act, (B) preparation of P&L a/c in accordance with Part II and Part IV of the Sen. VI to the Companies Act; and (C) deeming a specified percentage of book profit as income subject to certain conditions. However, the stand of the Revenue is that insertion of Sub-section (4) in Section 115J makes a difference inasmuch as the said provisions were not contained in Section 115J. Thus, in terms of Sub-section (4) of Section 115JA all other provisions of the Act have now been made applicable to an assessee suffering tax in terms of Section 115JA. The Hon'ble Punjab & Haryana High Court in the case of CIT v. Upper India Steel Manufacturing Engineering Co. Ltd. (supra) while dissenting with the decision of Karnataka High Court in the case of Kwality Biscuits Ltd. (supra) has observed as under: All the assesseees including companies are required to make an estimate of their current income. Even before the introduction of the provisions of Section 115J, companies had been estimating their total income after providing for deductions admissible under the Act. In fact, all assesseees who maintain books of account have to undertake this exercise for the purpose of payment of advance tax.

If a P&L a/c can be drawn up on estimate basis for the purpose of the IT Act, 1961, then a similar P&L a/c can also be drawn up on estimate basis under the Companies Act, 1956. The expression 'current income', on which advance tax is payable under the provisions of Section 207, does not exclude the income computed under the provisions of Section 115J. While processing the returns of the assessee for the asst. yrs.

1997-98 and 1998-99 declaring the income computed under the provisions of Section 115J, the AO charged interest under Sections 234B and 234C. The assessee contended before the CIT(A) that until the books of account were completed and the book profits determined, it would not know as to whether they were liable to pay tax under Section 115JA or not, and this fact could only be known after the close of the financial year. The CIT(A) accepted the contention and deleted the levy of interest. The Tribunal held in the appeals by the Department, that Section 143(1)(a) did not empower the AO to make substantial adjustments which would require examination of any evidence or which would require a hearing to be given to the assessee. According to the Tribunal, the issue about levability of interest under Sections 234B and 234C being debatable, fell outside the scope of the provisions of Section 143(1)(a). The Tribunal also accepted the other contention that even on the merits interest under Sections 234B and 234C could not be levied in cases where the taxable income was computed under Section 115JA. On further appeal by the Revenue to the High Court: Held, that the Tribunal was required to resolve the issue solely on the merits and could not have granted the relief on the ground that the issue was debatable. If the explanation of the assessee that the profits under Section 115J could only be determined after the close of the year were to be accepted, then no assessee who maintains regular books of account, would be liable to pay advance tax as in those cases also, income could only be determined after the close of the books of account at the end of the year. The Tribunal had wrongly equated the AO's action in levying interest under Sections 234B and 234C with an adjustment referred to in Section 143(1)(a).

Thus, the tests applicable to examine the validity of adjustments permissible under Section 143(1)(a) had been wrongly applied by the Tribunal for quashing the levy of interest under Sections 234B and 234C.²⁴ In the case of Lumax Industries Ltd. (supra), Tribunal, Delhi Bench, has held thus: We have considered the rival submissions in the light of the material available on record and the various judicial pronouncements cited by the learned Representatives of both the sides. The position which is not in dispute is that in a case where the income is computed under Section 115JA on the basis of book profit and the assessee company has failed to pay the advance tax in respect of such income, it is liable to pay interest

under Sections 234B and 234C in view of the provisions of Sub-section (4) of Section 115JA. Even as regards the debatability of this issue, the Delhi 'F' Bench of the Tribunal in a case of *Insilco Ltd. v. Jt. CIT* (2004) 85 TTJ 538 (Del) cited by the learned Departmental Representative has held that the issue relating to charging of interest under Section 234B while determining the income of the assessee under Section 115JA on the basis of the book profit is not a debatable issue and the AC) was right in making prima facie adjustment in respect of such interest under Section 143(1)(a). To the similar effect is the decision of the Delhi "K" Bench of Tribunal in the case of *Som Distilleries & Breweries Ltd. v. Jt. CIT* (ITA No. 4047/Delhi/2000, dt. 1st June, 2004) to which one of us (AM) is party wherein it was held that it was incumbent upon the assessee company to estimate its total income under the IT Act or its book profit for the purpose of computation of its income under Section 115JA and to pay advance tax of such income and having failed to do the same, interest under Sections 234B and 234C which is automatic and mandatory, was rightly levied by the AO in the intimation issued Section 143(1)(a).

25. It would, thus, appear that view expressed by the Hon'ble Punjab & Haryana High Court in the case of *Upper India Steel Manufacturing Engineering Co. Ltd.* (supra) would be contrary to the view of the Hon'ble Supreme Court as the order of Karnataka High Court since has been merged with the order of Hon'ble Supreme Court as has been held in the case of *V.M. Salgacat* (supra). Hence, the view of Karnataka High Court as confirmed by the Supreme Court would prevail on this issue.

26. In our considered view, the rationale laid down by the Karnataka High Court and as affirmed by the Hon'ble Supreme Court is clearly attracted in cases involving the calculation of liability of advance tax where the income has been determined in terms of Section 115JA. The exigibility for payment of tax under Section 115JA should have been ascertained only after the closing of the year and not earlier.

Therefore, the reasoning which weighed with the Karnataka High Court while dealing with the Section 115J still holds the field in respect of the Section 115JA

inasmuch as the scheme of taxation in both these sections remain the same. The insertion of Sub-section (4) seeks to make the other provisions of the Act applicable even in cases governed by Section 115JA. However, it cannot be construed to hold that the provisions of the Act which cannot be made operational in view of the scheme of taxation envisaged under Section 115JA would also be liable to be complied with by the assessee. If it were to be held so it would be an unworkable proposition once it is held that the assessee cannot anticipate its income for the purpose of advance tax before the end of the previous year, it cannot be penalized for levy of interest under Sections 234B and 234C. Therefore, in our view, the reasoning for non-charging of interest as has been laid down by the Karnataka High Court and since approved by the Supreme Court equally attracts Section 115JA.²⁷ It may be mentioned that the Tribunal, Delhi ('E' Bench), New Delhi, in Dy. CIT v. K.D. Dairy & Food Ltd. ITA No. 3030/Del/2002 has upheld the order of CIT(A) deleting the interest charged under Sections 234B and 234C on the total income computed under Section 115JA of the Act. Similarly, in the case of Bhushan Steels & Strips Ltd. v. Dy. CIT (2004) 91 TTJ 108 (Del) it has been held that when income is computed under Section 115JA, the interest under Sections 234B and 234C of the Act is not leviable.

28. Thus, there are two views on the issue; one is in favour of the Revenue and the other in favour of the assessee. We find guidance from the judgment of Hon'ble Supreme Court in the matter of CIT v. Vegetable Products Ltd. . Hon'ble Supreme Court has laid down a principle that "if two reasonable constructions of a taxing provision are possible, that construction which favours the assessee must be adopted." This principle has been consistently followed by the various authorities as also by the Hon'ble Supreme Court itself. Therefore, looking to the nature of the provisions with which we are presently concerned, we are inclined to adopt the interpretation which is in favour of the assessee. We, therefore, reverse the order of the lower authority and hold that no interest under Sections 234B and 234C is chargeable while computing the income of the assessee in terms of Section 115J of the Act.