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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ITA 152/2005

COMMISSIONER OF INCOME TAX DEL ..... Appellant
Through Mr. Deepak Chopra, Sr. Standing Counsel & Mr. Harpreet Singh Ajmani, Advocate.

Versus

M/S BHARATPUR NUTRITIONAL PRODUCTS LIMITED ..... Respondent
Through Mr. R.N. Mehta, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V.EASWAR

O R D E R

% 15.03.2012

By order dated 22nd November, 2005, the following substantial question of law was framed:

> "Whether on the facts and in the circumstances of the case the Tribunal was right in holding that excise duty refund received by the respondent-assessee was not assessable under Section 41(1) of the Income Tax Act, 1961?"

2. This appeal by the Revenue pertains to assessment year 1987-88 in the case of Bharatpur Nutritional Products

Limited(formerly known as Dalmia Industries Limited).

3. As a short and limited issue arises for consideration, we need not set out the facts in detail.

4. During the period relevant to the assessment year, the respondent assessee had received Rs.42,05,173/- from the Excise Department as refund of excise duty paid. The Assessing Officer included this amount in the profit and loss account and accordingly computed the taxable income. The aforesaid addition was deleted by the CIT(Appeals) and the said order has been affirmed by the impugned order passed by the Income Tax Appellate Tribunal (tribunal, for short) dated 31st May, 2004. The ground given by the tribunal for deleting the said addition is that the Excise Department had appealed against the judgment passed by the learned single Judge of this Court pursuant to which refund of Rs.42,05,173/- was granted. The tribunal has held that on the date when the Assessing Officer had made the said addition, the matter was still subjudice before the appellate forum and, therefore, there was no cessation or remission of liability in absolute terms. The tribunal relied on the decision of the Allahabad High Court in ***J.K. Synthetics Limited versus O.S. Bajpai***, (1976) 105 ITR 864

(All), which has been affirmed by the Supreme Court in the decision reported in (1993)199 ITR 14 (SC).

5. We may, at the outset, state that counsel for the parties have not been able to point out the final outcome of the appeal filed by the Excise Department before the Division Bench of this Court. Details of the said appeal are not available with us and, therefore, we cannot verify the fate of the said appeal. We will, therefore, proceed on the basis of the facts as recorded and found by the tribunal.

6. Section 41(1) of the Act, as it existed at the relevant time, was as under:-

> "**41. Profits chargeable to tax**.—(1) Where an allowance or deduction has been made in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee, and subsequently during any previous year the assessee has obtained, whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof, the amount obtained by him or the value of benefit accruing to him, shall be deemed to be profits and gains of business or profession and accordingly chargeable to income tax as the income of that previous year, whether the business or profession in respect of which the allowance or deduction has been made is in existence in that year or not."

7. The aforesaid Section was elucidated and examined by the Supreme Court in the case of ***Polyflex (India) Private Limited versus Commissioner of Income Tax,*** (2002) 257 ITR 343 (SC). The Supreme Court in the said case observed that Section 41(1) of the Act consists of two steps. Firstly, it has to be examined whether the assessee had claimed and allowed deduction in respect of any loss, expenditure or trading liability in any earlier year. This is the first step. The second step requires examination whether during the period relevant to the assessment year the assessee (i) has obtained any amount in respect of such loss or expenditure, or (ii) obtained any benefit in respect of such trading liability by way of remission or cessation thereof. It was held that the Section draws a distinction between allowance or deduction made by the assessee on account of loss and expenditure and allowance or deduction claimed by the assessee in respect of trading liability. The distinction between the two, it was held is material and relevant in view of the specific language of the Section. It was observed that the law makers have intendedly dealt with the two allied concepts; expenditure and trading liabilities separately and specifically. The expressions “remission or cessation” apply

only to the trading liability and not to cases of loss expenditure. It has been accordingly held that in case of loss or expenditure where payment has been made either in cash or by any other manner whatsoever, the amount has to be included in the taxable income of the year in which the payment is received. It does not matter whether or not there is cessation or remission of liability in such cases.

8. We may notice that the facts in the case of ***Polyflex (India) Private Limited*** (supra) are identical or similar to the facts in the present case. In the said case also there was a dispute between the assessee and the Excise Department and the duty which was paid had been refunded but the Excise Department had preferred a SLP before the Supreme Court. The fate of the SLP was not known. The dispute, therefore, was pending before the appellate forum. In the present case also, as per the facts noticed above, the dispute was pending before the appellate forum, i.e., the Division Bench but the excise duty had been refunded and paid to the assessee, subject to furnishing of the bank guarantee. In our view, the furnishing of bank guarantee itself when payment has been received, will not make any difference as the language of Section 41(1) is clear that the

amount should have been received either in cash or in any oth manner.

9. Learned counsel for the respondent assessee, during the course of hearing, had relied on decision of the Supreme Court in ***Union of India versus J.K. Synthetics Limited***, (1993) 199 ITR 14 (SC), which had approved the reasoning and the ratio in ***J.K. Synthetics Limited versus O.S. Bajpai***, (1976) 105 ITR 864 (All). We do not find any merit in the said contention. We may notice that the judgment of the Supreme Court in the case of ***J.K. Synthetics Limited*** (supra) has been specifically noticed and referred to by the Supreme Court in the case of ***Polyflex (India) Private Limited*** (supra) but distinguished. This is clear from the following observations in ***Polyflex (India) Private Limited*** (supra):-

> "Our attention has been drawn by learned counsel for the appellant to the case of Union of India v. J. K. Synthetics Ltd. [1993] 199 ITR 14 (SC). One of the points urged before the court was-whether the assessee's liability towards excise duty had ceased justifying action under section 41(1). This court, while affirming the view taken by the High Court, observed thus (page 15) :
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> > "So far as the second question is concerned, it is obvious that the liability to tax under section 41 of the Act will depend on the outcome

> of the appeal before this court. It is also stated that, as regards another part of the liability, the issue is pending before the Tribunal. It would, therefore, appear that no cessation of liability can be postulated until the Tribunal has decided the matter."

The relevant facts are not mentioned in the judgment. The question whether the latter or earlier clause of section 41(1) applies did not arise for consideration in that case. The decision of the High Court which was the subject matter of appeal in this court is reported in J. K Synthetics Ltd. v. O. S. Bajpai, ITO [1976] 105 ITR 864 (All). From the facts stated therein it appears that there was no actual payment of duty nor any refund obtained by the assessee. The assessee-company was making provision in the books of account in respect of excise duty payable while disputing the liability to pay duty. Deduction was allowed for various assessment years. The writ petition filed by the assessee-company contesting the demands relating to excise duty was allowed by the High Court. However, the Excise Department preferred a letters patent appeal against the order in the writ petition. While so, based on the decision of the High Court in the writ petition, the Income-tax Officer took steps to disallow the deduction allowed earlier and further disallowed the claim for the current year. Questioning the addition to the income of the rele- vant previous year, the assessee-company filed a writ petition which was allowed by the High Court. The facts of the case are quite close to Rameshwar Prasad's case [1983] 141 ITR 763 (All). The following observations in the judg- ment may

be noted as they clearly reveal the fact situation in that case (page 882 of [1976] 105 ITR) :

> "The company, no doubt, is still resisting the claim of the excise autho- rities, but this fact does not debar the company from claiming deduction on account of the excise duty being demanded from it and for which the com- pany had made provision in its books of accounts. The company is following the mercantile system of accounting and it can legitimately claim deduction in respect of a business liability even if such liability has not been quantified or paid."

The High Court then held that the liability of the assessee as regards the payment of excise duty cannot be said to have ceased because the judgment of the single judge of the High Court did not attain finality.

Though the conclusion of the High Court which was affirmed by this court cannot be legally faulted, we cannot, however, approve of the following analysis of the section occurring in the judgment (page 881 of [1976] 105 ITR) :

> "In short, what this provision means is that if an assessee has been allowed a deduction in the computation of its total income of any liability on account of loss or expenditure and if, subsequently, the liability of the assessee on account of such loss or

> expenditure is remitted or ceases, that part of the liability which is remitted or ceases shall be treated to be the income of the assessee of the previous year in which such remission or cessation takes place".

The High Court proceeded on the assumption that the words "remis- sion and cessation thereof" could be transposed into the first clause which speaks of obtaining any amount in respect of loss or expenditure. The High Court could have merely said that the trading liability provided for in the books of account and for which deduction was allowed earlier did not cease in view of the pendency of the dispute. Instead, the High Court referred to the expression "loss or expenditure" occurring in the first limb. As the assessee- company did not obtain any amount by way of refund on excise duty account, the first clause of section 41(1) will not be applicable ; it is only the latter part that applies in which case the remission or cessation of liability would assume importance. However, in the present case, as discussed above, it is the first clause that squarely applies but not the second one. Whether there was cessation or remission of liability would be an irrelevant line of enquiry here. The correct way of understanding section 41(1) would be to read the latter clause-"some benefit in respect of such trading liability by way of remission or cessation thereof" as a distinct and self-contained provision. To read the phrase "by way of remission or cessation thereof" as governing the previous clause as well, i.e., "obtained any amount in respect of such loss or expen- diture", would be doing violence to the language and structure

> of the provision. That apart, the operation of the provision which is designed to have widest amplitude will get constricted and truncated by reason of such interpretation."

10. We may note that the Supreme Court in the aforesaid paragraphs has noticed that it was not a case of actual payment, i.e., expenditure but only a provision was made in the books of accounts in respect of the excise duty payable while disputing the liability to pay the duty. Therefore, it was a case of the trading liability and the question of cessation or remission of liability was relevant and material for deciding whether or not Section 41(1) of the Act is applicable. We have noticed the said distinction above.

11. In view of the aforesaid legal position, we answer the question of law mentioned above in negative, i.e., in favour of the Revenue and against the assessee.

12. Learned counsel for the assessee has submitted that in case the assessee has repaid the excise duty, he may be entitled to claim it as expenditure in the year in question when the payment was made. That question does not specifically arise for consideration in the present appeal. It is obvious that the assessee may be entitled to the said claim, but it has to be

made in accordance with law.

The appeal is disposed of. No costs.

SANJIV KHANNA, J.

R.V. EASWAR, J.

MARCH 15, 2012
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