THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 20.01.2012

\+ **ITA No. 144/2000**

SHANKAR TRADING CO P. LTD **...** Appellant

versus

CIT ... Respondent

Advocates who appeared in this case:
For the Appellant : Mr Ajay Vohra, Ms Kavita Jha, Mr Somnath Shukla, Mr Vijay Punna.
For the Respondent : Mr Deepak Chopra

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE V.K. JAIN

BADAR DURREZ AHMED, J (ORAL)

1. This appeal by the assessee under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as 'the said Act') has been preferred against the decision of the Income Tax Appellate Tribunal dated 31.03.2000 in ITA No. 4662/Del/93 which pertains to the assessment year 1989-90. The question of law which we have to answer is as under:-

> "Whether the tribunal was justified in holding the assessee was not entitled to deduction under section 43B of the Income-tax Act, 1961 in respect of interest actually paid on additional sales-tax?"

2. Section 43B (a) of the said Act, to the extent relevant, is as under:-

> "**43B.** Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of –
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> (a) Any sum payable by the assessee by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force, or
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> (b) xxxx xxxx xxxx xxxx
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> (c) xxxx xxxx xxxx xxxx
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> (d) xxxx xxxx xxxx xxxx
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> (e) xxxx xxxx xxxx xxxx
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> (f) xxxx xxxx xxxx xxxx
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> shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in section 28 of that previous year in which such sum is actually paid by him:
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> xxxx xxxx xxxx xxxx"

3. The facts of the present case are set out in paragraph 3 of the impugned judgment, which reads as under:-

> "3. The assessee is a Private Limited Company engaged in the manufacture of Katha and Cutch under the name and style of M/s Mahesh Katha Udyog. Its previous year relevant to the Asst. Year order consideration, consisted of 21 months from 1.7.87 to 31.3.1989. Briefly stated, the facts concerning the matter are that during the year, the assessee had claimed deduction of Rs. 16,82,371/- on account of Sales Tax and interest thereon amounting to Rs. 10,04,409/-. It was explained before the AO that the assessee had purchased

> forest produce i.e. wood from the Forest Department of Himachal Pradesh Government. As per agreement, the assessee was liable to pay besides the agreed price of the product, Sales Tax, if any payable by the Forest Department in respect of sale of product to the assessee. The Forest Department initially charged Sales Tax at lower rates from the assessee but in the previous year relevant to asst. Year 1984-85, it was asked by the Forest Department to make payment of Rs. 31,82,371/-. The assessee disputed charging of this additional Sales Tax but made payment of an amount of Rs. 15 lakhs during the previous years relevant to asstt. Years 1984-85 and 1985-86. Simultaneously, the assessee challenged the demand in the H.P. High Court. However, the balance payment of Rs. 16,82,371/- was made during the year under consideration. It was also submitted that payment of interest amounting to Rs. 10,04,408/- was due to the Forest Department for the period 1.7.1987 to 31.3.1989. The case of the assessee before the AO was that deduction for both Sales Tax (Rs. 16,82,371/-) and interest (Rs. 10,04,408/- was allowable in the year under consideration. The Assessing Officer observed that, "the deduction claimed on account of interest payment amounting to Rs. 10,04,408/- does not seem to be for period under assessment". He held that the amount payable for the period 1.7.1987 to 31.3.1989 worked out to Rs. 5,29,946/- and on this basis, he disallowed the balance amount. Further, the claim for payment towards Sales Tax demand was disallowed without ascribing any reason in this behalf."

4. In the present case, we are only concerned with the question of interest. We may point out that insofar as the claim for deduction of interest is concerned, the Commissioner of Income Tax (Appeals) enhanced the disallowance by Rs. 5,29,946/-. As such the entire amount of Rs. 10,04,408/- stood disallowed by the Commissioner of Income Tax (Appeals). Being aggrieved thereby the appellant preferred the appeal before the Tribunal which agreed with the findings returned by the Commissioner of Income Tax (Appeals). However, the reasoning adopted by the Tribunal was that the claim of deduction of Rs. 10,04,408/- could not be

allowed in view of the fact that the expression used in the 43B (a) was – "any sum payable". According to the Tribunal, the interest amount of Rs.10,04,408/-, although it was paid in the year in question, could not be allowed as a deduction as it was not a 'sum payable'. The Tribunal came to the conclusion as indicated in paragraphs 9.3 and 9.4 thereof which read as under:-

> "9.3 Insofar as the assessee's claim for deduction of interest of Rs. 10,04,408/- is concerned, it may be pointed out that in view of the expression "any sum payable" used in Clause (a) of Sec. 43B, read with its definition contained in Explanation (2), there should exist a legal liability by way of tax, duty etc. However, the assessee in this case has not brought on record any material mention to show that any sum was payable by it by way of interest on delayed payment of sales tax. On the other hand, from the assessee's letter dated 16.3.1992 filed before the AO, copy placed at pages 15 to 19 of the Paper Book, extracted below, it is evidence that it merely anticipated the liability but no demand as such was created against it:-
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> > 'This interest was due to Forest department of Himachal Pradesh Government for the period from 1.7.87 to 31.3.89(accounting period under assessment) for delayed payment of Sales-tax @ 18% p.a. The department of forest vide their letter had purposed to refer the matter to High Court for seeking their orders regarding these above matters. On such an occasion the assessee might have been ordered to pay interest for the period from 1.4.86 to 31.3.89, which would have been enormous and till the decision of High Court, they could have stopped issuance of permits for sending finished products outside the State of Himachal Pradesh for Sale. To avoid all such situations and putting the company to heavy losses, the assessee company considered it fit to pay off the

interest for the above period (emphasis provided by us).'

9.4 The ld. CIT (A) has recorded a categorical finding, extracted in para 5.2 above, to the effect that no demand for interest was created by the Forest Department and that the assessee has suo moto worked out such demand. The assessee has not in any way rebutted this finding of the ld. CIT (A). Therefore, even if the assessee has made actual payment of the interest amount, it is not entitled to the grant of deduction for said sum u/s 43B of the I.T. Act."

5. The learned counsel for the assessee, however, pointed out that the moment there was a demand for additional sales tax, if it was not paid within the stipulated time interest became automatically payable on account of the provisions of section 17-A of the Himachal Pradesh General Sales Tax Act, 1968. The said provisions, to the extent relevant, read as under:-

"17-A (1) xxxx xxxx xxxx xxxx

(2) If the amount of tax or penalty due from a dealer is not paid by him within the period specified in the notice of demand or, if no period is specified within thirty days from the service of such notice, the dealer shall, in addition to the amount of tax or penalty, be liable to pay simple interest on such amount at the rate of one percentum per month from the date immediately following the date on which the period specified in the notice or the period of thirty days, as the case may be, expires, for a period of one month and thereafter at the rate of one and a half percentum till the default continues:

Provided that where the recovery of any tax or penalty is stayed by an order of any court, the amount of tax or penalty shall, after the order of stay is vacated, be recoverable along with interest at the aforesaid rate on the amount

ultimately found to be due and such interest shall be payable from the date the tax or penalty first become due.

3. The amount of interest payable under this section shall-

(i) be calculated by considering if a part of a month is more than fifteen days as one month and any amount if more than fifty rupees but less than one hundred rupees as one hundred rupees;

(ii) for the purpose of collection and recovery, be deemed to be tax under this act;

(iii) be in addition to the penalty, if any, imposed under this Act."

6. The learned counsel for the appellant/assessee also drew our attention to the decision of the Supreme Court in the case of ***Mahalakshmi Sugar Mills v. CIT:*** **123 ITR 429 SC** in support of his contention that the interest payable on a tax would also be part of the tax. On the other hand, the learned counsel for the respondent submitted that as there was no demand for interest, the interest of Rs. 10,04,408/- was not a sum payable and that the Tribunal's decision in this regard ought not to be interfered with.

7. Having considered the arguments advanced by the learned counsel for the parties, we find that the Income Tax Appellate Tribunal has rejected the claim of the assessee only on the ground that the amount of interest of Rs. 10,04,408/- did not fall within the expression "any sum payable" used in Section 43B of the said Act. However, we find that Section 17-A (2) of the Himachal Pradesh General Sales Tax Act, 1968 specifically provides that if the amount of tax or penalty due from a dealer is not paid by him within the period specified in the notice of

demand or, if no period is specified within thirty days from the service of such notice, the dealer shall, in addition to the amount of tax or penalty, as the case may be, be liable to pay simple interest on such amount at the rate of one percentum per month for the first thirty days and for the period subsequent thereto at the rate of one and a half percentum per month. It is, therefore, clear that when there is a demand of the tax and that is not paid within the period specified in the demand or within thirty days if no period is specified in the said demand notice, interest is automatically payable by the dealer. The present case is clearly covered by the said provision. It is clear that once there is a notice of demand for the tax and the same is not paid, as indicated above, than interest becomes automatically payable. In this regard, we find that the Tribunal, not having considered the provisions of 17-A (2) of the Himachal Pradesh General Sales Tax Act, 1968, has committed an error in law. We also note that the computation of 18% of sales tax is based on the provisions of section 17-A (2) which requires the rate of interest to be one and a half percentum per month.

8. Consequently, we answer the question in the negative, that is, in favour of the assessee and against the revenue.

9. The appeal stands disposed of.

BADAR DURREZ AHMED, J

V.K. JAIN, J

JANUARY 20, 2012
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