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

Decided on: 25.01.2017

\+ **ITA 37/2016**

PR. COMMISSIONER OF INCOME TAX-XVIII ..... Appellant

Through : Sh. Ashok. K. Manchanda, Sr. Standing Counsel.

versus

PRAVEEN SAXENA ..... Respondent

Through : Sh. Ajay Wadhwa and Sh. Sameep Gupta, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

1. The Revenue claims to be aggrieved by the order of the Income Tax Appellate Tribunal (ITAT) whereby it dismissed its appeal. The ITAT affirmed the order of CIT(A) who had directed that the disallowance of ₹70 lakhs paid by the assessee respondent as a condition pursuant to the order of this Court dated 01.02.2007 was liable as an expense and that it was covered by Section 43B of the Income Tax Act, 1961 [hereafter "the 1961 Act"].

2. The assessee is engaged in the business of import and export of commodities, including edible oil, through a proprietory concern, i.e. M/s. Nova International. On 22.11.2006, a search was conducted by the Customs authorities in its premises; the assessee was arrested subsequently by the Directorate of Revenue Intelligence (DRI) on 05.12.2006 on the suspicion of evasion of payment of duties to the extent of more than ₹3 crores.

3. The assessee had approached this Court; in the course of proceedings, the Customs authorities had contended that the duty element payable was in excess of ₹3 crores and that bail could be granted only if a substantial amount out of that was deposited. The Court, therefore, made an order on 01.07.2007 in Bail Application 18/2007, directing the assessee to deposit total amount of ₹70 lakhs which was to be appropriated by the Customs authorities. In addition, the assessee was also directed to furnish adequate security to the extent of ₹2 crores. For the concerned year, i.e. AY 2007-08, the assessee contended that the amount had to be allowed under Section 43B of the 1961 Act. The Assessing Officer (AO) framed the assessment, disallowing the amount amongst others. He was of the opinion firstly that the amount was a penalty and consequently, even otherwise, in the absence of an adjudication order, no amount was payable.

4. The CIT(A) was of the opinion that the amounts paid were pursuant to this Court's order and were compensatory in nature and were also liable under Section 37 of the 1961 Act. Relying on a large number of precedents, the CIT(A) took note of a Special Bench order of the ITAT in *DCIT v. Glaxo Smithkline Consumer Healthcare Ltd.* 2007 (110) TTJ 183 (Chd) and held that the expense was liable to be allowed under Section 43B. The ITAT before which the Revenue preferred an appeal [aggrieved with the findings of the CIT(A)] confirmed the CIT(A)'s order and also relied upon a ruling of the Supreme Court in *CIT v. Birla Brother Pvt. Ltd.* 1971 (82) ITR 166 (SC) and ruled as follows:

> *"28. In view of above, at the outset, we note that undisputedly the assessee made payment of Rs.70 lacs as per direction of Hon'ble High Court of Delhi given in the bail order dated 01.02.2007 which enlarged the assessee on bail in a criminal*

case of Custom Duty Evasion. At the time of payment the custom duty assessment was pending and yet to be completed in future. Obviously, when it is found that the assessee has evasioned custom duty then the penalty is obvious and leviable as per the relevant provisions of the Act but until and unless assessment is not completed the amount of custom duty/additional custom duty, interest thereon and penalty cannot be ascertained and in this situation impugned payment made by the assessee cannot be held as penalty or penal in nature at any stretch of imagination.

29. Under above facts and circumstances the ld. CIT(A) rightly hold that till the time the adjudication takes place ascertained of duty and penalty, if any, cannot be determined. The ld. CIT(A) further went to hold that as such situation takes place the amount deposited by the assessee shall first be appropriated towards the custom duty and balance shall go towards interest, if any, and the balance amount so paid, if any, shall be thereafter appropriated towards penalty, if levied, in the case of assessee. We are also in agreement with the findings of the ld. CIT(A) wherein he accepted the alternate argument of the assessee that the additional custom duty of Rs.70 lacs paid by the assessee is an allowable expenditure U/S 43B of the Act. Respectfully following the decision of Special Bench of the ITAT, Chandigarh in the case of DCIT Vs. Glaxo Smithkline Consumer Healthcare Ltd. (Supra) we hold that section 43B allow deduction of impugned payment as additional custom duty irrespective of the previous year in which the liability to pay such sum was raised against the assessee. Accordingly, we are unable to see any perversity, ambiguity or any other valid reason to interfere with the impugned order and we uphold the same."

5. It is urged by learned counsel for the Revenue rather vehemently that the liability had never arisen and that in the absence of an adjudication order, the amount was not payable by the assessee, and, therefore, was correctly disallowed under Section 43B. It was submitted that even otherwise, the

records would show that the later order of the Customs authorities substantiate the Revenue's contention in that the amounts directed to be paid were towards penalty. Learned counsel also relied upon the judgment of the Supreme Court in *Indian Smelting and Refining Company Ltd. v. CIT* 248 ITR 4 (SC).

6. This Court has carefully considered the submissions and gone through the records. The order of the Court, while enlarging the assessee on bail had categorically relied upon the Customs authorities' submissions that there was considerable evasion of duty in excess of ₹ 3 crores. Taking that into consideration, the Court had required deposit of certain amounts which were to be appropriated towards duty element. It goes without saying that the adjudication proceeded and the duty was framed subsequently at ₹ 3,76,71,175/- and ₹ 1,44,75,272/-. On this amount, a penalty of like amount, i.e. aggregating to ₹ 5,21,46,447/- was levied. This is evident from the order of the Principal Commissioner of Customs, who also directed appropriation of the sum of ₹ 70 lakhs towards the liability deposited during the course of investigation. The relevant portions of the order of the Principal Commissioner is extracted below:

> *"vi) I confirm and order recovery of Customs duty amounting to Rs.1,44,75,272/- payable on the goods imported and cleared vide 66 Bills of Entry as detailed in two Annexures, Annexure B1 & B2 to SCN, along with interest from Novus International, 301, South Plaza-II, 209, Masjid Moth, NDSE-II, New Delhi (Noticee No.1) through its Proprietor Shri Praveen Saxena under the then existing proviso to Section 28(1) of the Customs Act, 1962 read with Section 28AB ibid;*
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> *vii) I impose a penalty of Rs.5,21,46,447/- (i.e. Rs.3,76,71,175/- & Rs. 1,44,75,272/- Total Rs.5,21,46,447/-) on*

M/s. Novus International through its Proprietor, Shri Praveen Saxena under Section 114 A of the Customs Act, 1962. However, if the aforesaid duty along with interest payable under the then existing Section 26AB is paid within thirty days from the date of communication of this order, the amount of penalty under Section 114A shall be twenty five per cent of the duty evaded provided further that the benefit of reduced penalty shall be available subject to the condition that the amount of penalty so determined has also been paid within the period of thirty days referred to above;

viii) The amount of Rs.70 lakhs voluntarily deposited by M/s Novus International towards differential duty during the course of the investigation is ordered to be appropriated towards payment of duty, interest and penalty."

7. So far as the AO's assumption that the amount was a penalty goes, this Court notices that the the said official appears to have either deliberately or for whatever reasons overlooked the plain language of the Principal Commissioner's order. So too, the learned counsel who argued that what was levied was "penalty" and not "differential duty". As is evident from the order, the Principal Commissioner clearly determined the duty element at ₹ 5,21,46,447/- and an identical amount as penalty liability. In these circumstances, the rationale for the Revenue's contention is entirely misplaced. So far as the question of liability goes, we notice that the judgment in *Indian Smelting (supra)* was a case where the assessee did not admit liability and the Court had upheld the Revenue's contention that payment was only towards a contingent liability and could not constitute expenditure. The facts there were clearly different from the facts here. The assessee was accused of misdeclaration and consequential differential liability towards differential duty. If there was no such misdeclaration, the

Revenue could not have contended that the amounts duly paid constituted allowable expenditure on account of statutory liability under Section 43B. That the Assessee did not do so but was quite rightly made to do so does not in any manner detract from its basic liability which it always had to satisfy. Therefore, the contentions of the Revenue are entirely misconceived and are rejected. The appeal does not involve any substantial question of law. It is accordingly dismissed.

S. RAVINDRA BHAT
(JUDGE)

NAJMI WAZIRI
(JUDGE)

JANUARY 25, 2017/ajk