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

% **Date of Decision : 25th March, 2019**

+ **ITA 658/2018 & CM Nos.23732-34/2018**

COMMISSIONER OF INCOME TAX ..... Appellant
Through : Mr. Ashok K. Manchanda, Sr. Standing Counsel.

versus

SH. JAGDISH PRASAD GUPTA ..... Respondent
Through : Dr. Shashwat Bajpai and Mr.Sharad Agarwal, Advs.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE PRATEEK JALAN

S. RAVINDRA BHAT, J. (ORAL)

1. The Revenue in this appeal under Section 260A of the Income Tax Act questions the decision of the ITAT for Assessment Years 2007-08. The Revenue contends especially that the sum of Rs.2.60 crores claimed by the assessee and ultimately allowed, as enhanced licence fee for the relevant year, was impermissible and ought not to have been allowed deduction in view of Section 43B(a) of the Income Tax Act. The facts of the present case are identical to the batch of appeals decided by this court and applicable to A.Y. 1997-98; 2002-03; 2004-05 and 2009-10 [*Jagdish Prasad Gupta v. Commissioner of Income Tax, (2017) 397 ITR 578 (Del)*].

2. The necessary facts of the case are that the assessee was allotted

lands by the Northern Railways in 1975; the Railways revised the licence fee on various dates and in periodical intervals – for instance 08.02.1980; 23.03.1988; 28.03.1990 and subsequently again on 20.01.1999 and even on later dates. The Northern Railways also resorted to enhancing of licence fee and also claiming damages, unilaterally on retrospective basis applicable from anterior dates. These led to disputes. In the meanwhile, for the relevant assessment years, the assessee kept making provisions in its returns for the amounts which were deemed payable by the Northern Railways (but which were disputed by it and ultimately became subject matter of arbitration proceedings). These became the bone of contention with the Revenue stating that the deductions properly fell within the purview of Section 43B and were therefore, not permissible and were rather to be disallowed. The broad arguments made by the Revenue in this regard were that by virtue of various conditions spelt out in Section 43B(1), especially Clauses (a) and (b), the licence fee, payable periodically, and the damages as well, could not have been allowed as deductions since they were not paid within that year, in accordance with the said provision. The assessee however, contended that these amounts were not payable as exaction by law and that they were merely contractual. In other words, they did not fall within the description of "duty, cess or fee" payable "under law for the time being in force" or any payments made by virtue of Section 43B(1)(b). The assessee did not meet with success before the Revenue authorities and lower appellate authorities. Ultimately, all these batch of appeals were decided by a common judgment [*Jagdish Prasad Gupta*

(supra)].

3. The issue of Section 43B was never raised in the previous batch of appeals. This court notices that in that batch, in addition, the reassessment proceedings were the subject matter of inquiry which means that at the AOs level as well as before the lower appellate authorities, in the first round, Section 43B was never invoked. Likewise, that provision was not invoked even in re-assessment proceedings. On an application of principles generally, which controlled Section 41(1), the court adjudicated as follows :

> *"41. Turning to the facts of the present case, the undisputed fact is that the Assessee is following the mercantile system of accounting. It has to book the liability in the year in which it arises irrespective of whether it in fact discharges the liability in that year. In that sense, the liability to pay the enhanced licence fee would arise in the year in which demand is made or to which it relates irrespective of when the enhanced fee is actually paid by the Assessee. As explained in* ***Shree Chamundi Mopeds Ltd. v. Church of South India Trust Association*** *(supra), the mere grant of stay of an order by a Court would not wipe away the liability.*
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> *42. In the present case, the liability of the Assessee to pay the enhanced licence fee has, far from being excused, sought to be enforced by the Northern Railway by repeated demands notwithstanding the EO's order dated 28th March 1990. As noted earlier, the Northern Railway has preferred claim for arrears of enhanced licence fees and damages to the tune of over Rs.45 crores against the Assessee before the sole Arbitrator appointed by it. The demand is therefore very much alive and is subject matter of adjudication in arbitration proceedings.*
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> *43. The order dated 29th March, 1990 of the EO no doubt*

holds the termination notice dated 23rd March, 1988 and the claim for enhanced licence fee to be bad in law. However, it does not hold that there is no liability on the Assessee to pay the enhanced licence fees as and when that is determined in accordance with law. The EO has in fact observed that the Northern Railway "should form a definite policy in revising the licence fee for a considerable period on uniform basis by incorporating the law of principles of natural justice to avoid unnecessary litigation thereby not causing losses of revenue to the railway administration under these circumstances and ensuring prompt and regular payment of licence fee by licencees." Also the EO ends the order by stating: "The applicant is free to revise the licence fee in accordance with the provisions of law and as per terms of agreement."

44. The order of the EO read in the correct perspective, requires the Northern Railway to follow the due process of law by giving a hearing to those adversely affected by the upward enhancement of liability before a decision is taken. Mr. Manchanda's characterisation of the said order, as negating the liability to pay the enhanced licence fee for all times to come does not flow on the above reading of the said order. On the other hand, it is more consistent with the plea of the Assessee that while he is not denying the liability to pay the licence fee he is only questioning the procedure involved in its revision which, according to him, is not in accordance with law. Consequently, the Court is also not able to agree with Mr. Manchanda that the Assessee has sought to mislead this Court by contending that he is not questioning the liability to pay licence fee but is only questioning the quantification or the quantum of the licence fee.

45. The facts of the present case are more or less similar to the facts in ***Aggarwal and Modi Enterprises (Cinema Project) Co. Pvt. Ltd. v. CIT*** *(supra) where it was held that the fact that there may have been a stay of the enhanced*

demand by a judicial order as an interim measure pending the final decision in the proceedings challenging the revision. That, however, would not amount to wiping out the liability itself.

46. While Mr. Manchanda may be right in pointing out that for AYs 2002- 03 to 2005-06, the Assessee claimed only Rs. 35,37,300/- as deduction on the ground of enhanced licence fee although it could have claimed the further enhancement which had taken place by then, the fact remains that the enhanced liability claimed by the Railways by its letter dated 20th January 1999 and later by the letter dated 29th July 1999 subsisted and was being demanded. The explanation offered by the Assessee for this inconsistency in its claim is a plausible one. It does not deter from the position that being an accrued liability the enhanced licence fee can be claimed by it as a deduction in the year in which such liability arose.

47. In the arbitration proceedings, the claim of the Railways includes the claim for the enhanced licence fee as well as the arrears. The arbitration proceedings could end either in favour of the Railways or the Assessee. If it goes in favour of the Assessee it would then have no liability to pay such enhanced licence fee and in the year in which such final decision is rendered, the corresponding reversal of entries will have to take place in terms of Section 41(3) of the Act. All of this, in no way, extinguishes the liability of the Assessee to pay the licence fee. The Assessee would be justified in claiming the enhanced licence fee as deduction in the year in which such enhancement has accrued even though the Assessee has not paid such enhanced licence fee in that year. This legal proposition is well settled."

4. It is thus clear that the court previously stated that the assessee/respondent's liability was not in any manner crystallized, when it claimed the expenditure, as it did at the relevant assessment years, in the absence of final decision of the arbitration proceedings

with respect to the question of proper licence fee or even damages.

5. Mr. Ashok Manchanda, learned counsel for the Revenue in the background of these circumstances sought to urge that Section 43B applies squarely to the facts of this case. He relied upon the order of this court dated 26.09.2018 supporting Revenue's submission that such question needs to be examined as it is a pure question of law and also citing a Supreme Court decision in *National Thermal Power Company Ltd. v. Commissioner of Income Tax*, (1998) 229 ITR 383 (SC). The learned counsel also relied upon the additional grounds urged in this regard as well as the documents placed on the record. According to him, on a plain reading of Section 43B(1)(a), the licence fee as well as damages clearly fell within the purview of the provision as the amounts were claimed by government authority i.e. Indian Railways in respect of public property owned by it. He also submitted that Section 43B(1)(g) – inserted w.e.f. 01.04.2017 was in truth by way of a clarification and ought to have been read as part of the statute in the beginning itself. The amendment provision was an amplification of the existing Section 43B(1)(a). This court is of the opinion that given the reasoning in the main judgment in *Jagdish Prasad Gupta (supra)*, no question of law can be said to arise at all. As far as the so called additional ground sought to be urged is concerned, the court is frankly taken aback by the cavalier approach by the appellant/Revenue. We say this consciously because as noticed earlier in all the previous proceedings for the previous years, Section 43B was not pressed into service as a disallowed provision. If permission to raise such question of law or additional grounds, as are sought to be

urged by the Revenue is granted, the express provisions of the Act, which bind the authorities to confine the scrutiny and inquiry within strict timelines (Sections 143; 263; 147/148; etc.), would be in fact given a complete go by and at any stage of the proceedings, the Revenue would be at liberty to raise any ground – leading to complete uncertainty, as far as the assessee is concerned.

6. This Court is also of the opinion that even otherwise, having regard to the facts of this case, the arguments with respect to the applicability of Section 43B is untenable. A clear finding of the ITAT as well as the main judgment of this court is that the assessee follows a mercantile system of accounting where such entries are made on contingent basis. This consistent practice was recognized and the only question was whether the existence of a dispute in any manner implicated the accountancy practices adopted by the asseessees in treating an unascertained liability to unquantified liability. Furthermore, Section 43B, either in Clauses (a) and (b) of sub-section (1), do not in the opinion of this court, cover the kind of licence fee that is under consideration. The reference to "fee" has to be always read along with the expression "law in force". The documents placed on record – even along with the additional grounds, make it clear that the transactions between the parties was plain and simple, a commercial one, while the land was allotted for a certain licence fee. The central issue in dispute was a retrospective increase in licence fee and claim for damages. Learned counsel for the assessee has relied on notes of clauses to the bill which interprets Section 43B(1)(g). It states that this amendment takes effect from 01.04.2017 and would

accordingly apply to the assessment year 2017-18 and the subsequent assessment years. Thus, it is clear beyond any shade of doubt that notions of clarificatory amendment, etc. would not be applicable herein.

7. In view of the foregoing reasons, there is no merit in this appeal which is accordingly dismissed.

S. RAVINDRA BHAT, J

PRATEEK JALAN, J

MARCH 25, 2019
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