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

Date of Decision: September 01, 2014

\+ **ITA 233/2013**

COMMISSIONER OF INCOME TAX-II

..... Appellant

Through: Mr.Kamal Sawhney, Sr.Standing Counsel with Mr.Sanjay Kumar, Advocate

versus

M/S. LAKSHMI SUGAR MILLS CO. LIMITED

..... Respondent

Through: Mr.Rahul Chaudhary, Advocate

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE V. KAMESWAR RAO

SANJIV KHANNA, J (ORAL)

1. By order dated 09.10.2013, the following substantial question of law was framed in this appeal, which pertains to the Assessment Year 2008-09 and arises out of the order dated 17.07.2012 passed by the Income Tax Appellate Tribunal (Tribunal, in short):-

> *"Whether the Income Tax Appellate Tribunal was right in holding that excise duty of Rs. 70,87,357/- shown as payable but not paid can be allowed as an expenditure under Section 43B read with Section 145A of the Income Tax Act, 1961?"*

2. The respondent-assessee was engaged in the business of manufacture and sale of sugar. It was also having income from house property.

3. The Assessing Officer disallowed amount of Rs. 70,87,357/- by invoking Section 43B of the Income Tax Act, 1961 (Act, in short), relying upon the audit report wherein, this amount was shown as Excise Duty payable. He observed that similar treatment was given to the excise duty payable in the Assessment Year 2005-06. There is no other discussion and elucidation in the order passed by the Assessing Officer.

4. In the first appeal, the Commissioner of Income Tax (Appeals) deleted the said addition relying upon the order passed by the Tribunal in respect of the Assessment Year 2005-06 in favour of the respondent-assessee. On further appeal by the Revenue, this issue was decided in favour of the respondent-assessee and against the Revenue by again relying upon order passed by the Tribunal for the Assessment Year 2005-06.

5. Learned counsel for the Revenue has drawn our attention to the order dated 03.12.2012 passed in ***ITA No. 1288/2011, Commissioner of Income Tax Vs. Lakshmi Sugar Mills Co. Ltd.*** relating to the Assessment Year 2005-06 and it is submitted that the decision of the Tribunal has been reversed. This is correct; the decision of the Tribunal for the Assessment

Year 2005-06 has been reversed by the High Court and the issue decided against the respondent-assessee. The reasoning given by the High Court in ***ITA No. 1288/2011, CIT Vs. Lakshmi Sugar Mills Co. Ltd.*** decided on 03.12.2012 reads as under:

> *"13. Section 145-A reads as follows:*
>
> *145A. Notwithstanding anything to the contrary contained in section 145,—*
> *(a) the valuation of purchase and sale of goods and inventory for the purposes of determining the income chargeable under the head "Profits and gains of business or profession" shall be—*
> *(i) in accordance with the method of accounting regularly employed by the assessee; and*
> *(ii) further adjusted to include the amount of any tax, duty, cess or fee (by whatever name called) actually paid or incurred by the assessee to bring the goods to the place of its location and condition as on the date of valuation.*
>
> *Explanation.—For the purposes of this section, any tax, duty, cess or fee (by whatever name called) under any law for the time being in force, shall include all such payment notwithstanding any right arising as a consequence to such payment.*
>
> *(b) interest received by an assessee on compensation or on enhanced compensation, as the case may be, shall be deemed to be the income of the year in which it is received."*
>
> *Section 145 of the Act obliges every assessee to maintain, subject to accounting standards which may be notified by the Central Government, books of accounts on cash or mercantile basis. Section 145-A begins with a non-obstante clause, and prescribes that the value of goods shall be "further adjusted to include the*

amount of any tax, duty, cess or fee (by whatever name called) actually paid". This provision was introduced in 1999, and overrides other provisions. Its object is to include, for the purpose of valuation of goods, the actual amount of tax, duty, cess or fee, paid by the assessee. Unlike in the case of Section 43-B, which mandates the inclusion, in the computation of income, amounts paid, towards certain liabilities, including tax, but not actually arising or accruing at the time of payment, this provision (Section 145-A) directs inclusion of the amounts of tax, duty etc, actually paid for the purpose of valuation alone.

14. The decision of the Supreme Court in Orient Paper Mills Ltd. Vs. Union of India AIR 1967 SC 1564 is now an authority on the issue that removal of goods from the factory premises, or other specified place implies that it is leviable, and not postponed. The observation of the Supreme Court in that regard are as follows: "Thus, though Section 3 of the Excise Act talks of levy and collection, the actual collection is only at the time of removed [sic, removal] of excisable goods from the factory premises or any other specified place of removal. The duty is leviable and is premises or any other specified place of removal. The duty is leviable and is actually imposed on the transaction value defined in subsection (3) (d) of section 4 of the Excise Act. these circumstances, it is not possible to state that under the Excise Act, the duty has become due and payable only by operation of section 3 simplicter. If Section 3 of the Excise Act is considered to be the only charging section and section 4 of the Excise Act is considered as only a provision for assessment, the charge levied by section 3 of the Excise Act cannot be brought home. Section 3 and 4 have to be read together to bring the charge home. The charge is partially embedded in both the provisions".

15. In the present case, the sum of Rs. 69,91,983/- no doubt was unpaid; however, the assessee's contention is not merited, because the goods were admittedly removed, and therefore the duty was payable. The assessee cannot profit or take advantage from that default or omission. Having regard to the object and

the wording of Section 145-A, it is held that the AO's opinion could not have been faulted in the facts of the case".

6. The aforesaid paragraphs state that as per Section 145A, which is a non-obstante provision and prescribes manner of valuation of goods, any tax, duty, cess or fee actually paid or incurred has to be added to the value of the stock. Thus, Section 145A of the Act directs inclusion of tax, duty etc., actually paid or incurred for the purpose of valuation. Reference was thereafter made to ***Orient Paper Mills Ltd. Vs. Union of India, AIR 1967 SC 1564*** and it was observed that levy of duty arises only at the time when the excisable goods are removed from the factory premises or any other specified place of removal. The duty is leviable and is actually imposed on the transaction value defined in the Excise Act as per Sections 3 and 4, which have to be read together harmoniously. Paragraph 15 of the said judgment specifically records that the goods in the said case were admittedly removed, and therefore, the duty was payable but had not been paid. Thus, the question was decided against the respondent-assessee.

7. Learned counsel for the respondent-assessee, on this aspect, has drawn our attention to the decision of the Bombay High Court in ***Commissioner of Income Tax-III, Pune Vs. Loknete Balasaheb Desai S.S.K. Ltd., [2011] 339 ITR 288 (Bom.)*** wherein, it has been observed as

under:

> *"8. Section 145A inserted by the Finance (No. 2) Act, 1998 w.e.f. 1/4/1999 reads thus:*
>
> *145A. Method of accounting in certain cases-Notwithstanding anything to the contrary contained in Section 145, the valuation of purchase and sale of goods and inventory for the purposes of determining the income chargeable under the head "Profits and gains of business or profession" shall be--*
>
> *(a) in accordance with the method of accounting regularly employed by the Assessee, and*
>
> *(b) further adjusted to include the amount of tax, duty, cess or fee (by whatever name called) actually paid or incurred by the Assessee to bring the goods to the place of its location and condition as on the date of valuation.*
>
> *Explanation -For the purposes of this section, any tax, duty, cess or fee (by whatever name called) under any law for the time being in force, shall include all such payments notwithstanding any right arising as a consequence to such payment.*
>
> *9. The expression 'incurred by the Assessee' in Section 145A(b) is followed by the words 'to bring the goods to the place of its location and condition as on the date of valuation'. Thus, the expression 'incurred by the Assessee' relates to the liability determined as tax, duty, cess or fee payable in bringing the goods to the place of its location and condition of the goods. Explanation to Section 145A(b) makes it further clear that the income chargeable under the head profits and gains of business shall be adjusted by the amount paid as tax, duty, cess or fee. Therefore, the expression 'incurred' in Section 145A(b) must be construed to mean the liability actually incurred by the Assessee.*

10. Where the excisable goods are manufactured and are lying in stock on the last day of the accounting year, whether the manufacturer has incurred liability to pay excise duty on the manufactured goods is the question.

11. The Apex Court in the case of Commissioner of Central Excise v. Polyset Corporation and Anr. reported in 115 ELT 41 (S.C.) has held that the dutiability of excisable goods is determined with reference to the date of manufacture and the rate of excise duty payable has to be determined with reference to the date of clearance of the goods. Therefore, though the date of manufacture is the relevant date for dutiability, the relevant date for the duty liability is the date on which the goods are cleared. In other words, in respect of excisable goods manufactured and lying in stock, the excise duty liability would get crystallised on the date of clearance of goods and not on the date of manufacture. Therefore, till the date of clearance of the excisable goods the excise duty payable on the said goods does not get crystalised and consequently the Assessee cannot be said to have incurred the excise duty liability. In respect of the excisable goods lying in stock, no liability is determined as payable and consequently, there would be no question of incurring excise duty liability.

12. In the present case, it is not in dispute that the manufactured sugar was lying in stock and the same were not cleared from the factory. Therefore, in the facts of the present case, the ITAT was justified in holding that in respect of unsold sugar lying in stock, central excise liability was not incurred and consequently the addition of excise duty made by the assessing officer to the value of the excisable goods was liable to be deleted."

8. This Court, on 21.10.2013 had passed a detailed order, noticing the fact that the closing stock can consist of opening stock, purchases and manufactured stock. Reference was then made to the statutory mandate of

Section 145A of the Act, that the valuation of the closing stock must include any tax, duty, cess or fee actually paid or incurred by the assessee to bring the goods to the place of its location and condition on the date of valuation. The issue in the present case relates to valuation of the manufactured goods. The contention of the respondent-assessee was that on manufactured goods, excise duty is payable after adjustment of CENVAT or MODVAT credit on the date of removal and not on the date of manufacture. Thereafter, reference was made to Central Board of Direct Taxes (CBDT) circular No. 772 dated 23.12.1998, which was quoted in paragraph 11 of the decision dated 03.12.2012 in ***CIT Vs. Lakshmi Sugar Mills Co. Ltd. (supra),*** clearly observing that MODVAT credit cannot be reduced from the value of opening or closing stock. Directions were given to the parties to verify and ascertain facts. However, we do not think, the aforesaid exercise can be safely and under the Statute undertaken by this Court in an appeal under Section 260A of the Act, which relates to substantial questions of law. We have already noticed the facts in the present case that the appellate authorities had simply relied on the order passed by the Tribunal in the Assessment Year 2005-06, which as noticed above, stands reversed by the High Court. Facts are also not clearly brought out in the assessment order.

In these circumstances, we deem it appropriate to answer the aforesaid question of law in favour of the Revenue but, with an order of remand, and direct the Tribunal to decide the issue afresh in the light of the aforesaid observations and the position of law. The Tribunal, before deciding the issue, will first ascertain and determine the actual and true factual position.

9. The appeal stands disposed of. No costs.

SANJIV KHANNA, J

V. KAMESWAR RAO, J

SEPTEMBER 01, 2014/akb