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

Date of Decision: September 03, 2014

+ **ITA 495/2013**

COMMISSIONER OF INCOME TAX(C)-III

..... Appellant
Through: Mr.N.P.Sahni, Sr.Standing Counsel

Versus

SVP INDUSTRIES LTD

..... Respondent
Through: Mr.M.P.Rastogi, Mr.K.N.Ahuja,
Advocates

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE V. KAMESWAR RAO

SANJIV KHANNA, J. (ORAL)

1. By order dated 28.04.2014, the following substantial question of law was framed in this appeal, which pertains to the Assessment Year 2004-05:

“Did the Tribunal fall into error in holding that no addition could be made in excess in the value of closing stock of finished goods to the tune of Rs. 3,04,39,626/-, made originally by the AO?”

2. The respondent-Assessee during the relevant period was engaged in the business of manufacture and sale of alcohol and vanaspati. In



addition, the assessee was having rental and interest income.

3. As is apparent from the substantial question of law which has been admitted for hearing, the issue raised is limited and a narrow one. The Assessing Officer, in the assessment order dated 26.12.2006 made addition of Rs. 3,04,39,626/- for the following reasons:

*“6. **Excise duty in closing stock** It is noticed that excise duty has not been included in the value of closing stock in compliance to the verdict of the Hon'ble SC in the case of CIT Vs British Paints Ltd. (188 ITR 44SC) holding that valuation of stock only at the actual cost of raw material/ finished goods and not taking into account the overhead charges is not a correct mode of valuation. Excise and custom duties' payable by the manufacture are manufacturing expenses and should go into calculation of production cost and closing inventory should include on element of such duties. In this regard the auditor has made article in his report which is reproduced below:*

"The company has been liability for excise duty on finished goods as and when these are, cleared as per consistent practice as also considered the accepted practice of the Excise Authority. The liability in respect of finished products lying in factory at close of the year has not been provided for in the accounts and hence not included in the valuation of inventory in the valuation of inventory of such products."

When assessee company was asked it has been stated that as per circular of the Excise department, the excise duty is not includible but no copy of such circular or notification has been furnished. Excise duty payable by the manufacturer are manufacturing expenses and should go into calculation of production cost. and the closing stock should include an element of such duties as held by the Apex Court, the assessee's contention is not acceptable. Accordingly an addition of Rs.3,04,39,626/-is made to the income of the assessee



company on account of non inclusion of excise duty in the closing stock of finished products shown at 434851,80.

(Addition of Rs. 3, 04,39,626/-)

This is the only discussion in the assessment order and no other aspect or facts were examined.

4. The aforesaid reasoning records the stand of the respondent-Assessee that the excise duty had not been claimed as an expenditure in the profit and loss account and had not been included in the valuation of stock. This, the Assessing Officer held was contrary to the ratio of the Supreme Court in ***CIT Vs. British Paints Ltd. [1991] 188 ITR 44 (SC)***. The said reasoning is wrong and legally untenable, unless the respondent-assessee had included and treated the excise duty as an expenditure in the profit and loss account. In such cases, the entry in the profit and loss account is required to be matched or balanced with the corresponding increase in the valuation of the closing stock. In ***Commissioner of Income Tax, Tamil Nadu Vs. Dynavision Ltd. [2012] 210 Taxman 239 (SC)***, the Assessing Officer had made addition of Rs. 16,39,000/- to the valuation of the closing stock on the ground that excise duty was payable but the plea of the Revenue was rejected observing as under:

"2. At the outset, it may be stated, that, it is not in dispute that the assessee has been following consistently the method of valuation of closing stock which is "cost or market price whichever is lower." Moreover, the AO conceded before the CIT(A) that he revalued the closing



stock without making any adjustment to the opening stock (see: page 50 of the Paper Book). Lastly, though under section 3 of the Central Excise Act, 1944, the levy of excise duty is on the manufacture of the finished product the same is quantified and collected on the value (i.e. selling price). Before concluding, we may rely on judgment of this Court in the case of *Chainrup Sampatram V. CIT* [1953] 24 ITR 481 in which it has been held that "valuation of unsold stock at the close of the accounting period was a necessary part of the process of determining the trading results of that period. It cannot be regarded as source of profits. That, the true purpose of crediting the value of unsold stock is to balance the cost of the goods entered on the other side of the account at the time of the purchase, so that on cancelling out of the entries relating to the same stock from both sides of the account would leave only the transaction in which actual sales in the course of the year has taken place and thereby showing the profit or loss actually realized on the year's trading. The entry for stock which appears in the trading account is intended to cancel the charge for the goods bought which have remained unsold which should represent the cost of the goods". (see also: para 8 of the judgment of this Court in the case of *Commissioner of Income Tax v. Hindustan Zinc. Ltd.* [2007] 291 ITR 391/161 Taxman 162".

(emphasis supplied)

5. We note that the legislature, by Finance (No.2) Act, 1998, has enacted Section 145A of the Income Tax Act, 1961 (Act, in short), with effect from April 01, 1999, which reads as under:

"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”.

The effect of the aforesaid Section is that ‘notwithstanding anything to the contrary in Section 145’, valuation of purchase and sale of goods and inventory for the purposes of determining income chargeable under the head ‘Profits and gains of profession’ if required and necessary, has to be adjusted to include amount of tax, duty, cess or fee 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. In case of actual payment there would be no difficulty, but when actual payment is not made it has to be ascertained with reference to the applicable statute or the rule, whether tax, duty, cess, fee has been incurred by the Assessee to bring the goods to the place of its location and condition as on the date of valuation. In ***Commissioner of Income Tax Vs. Lakshmi Sugar Mills Co. Ltd., [2013] 215 Taxman 126 (Del.)***, appeal filed by the Revenue was allowed after recording that the excise duty, no doubt was unpaid, but the goods had been removed and therefore, the duty was payable. Thus, the taxable



event had occurred, liability incurred and Section 145A of the Act w applicable. Reference was made to the decision of the Supreme Court in ***Orient Paper Mills Ltd. Vs. Union of India, AIR 1967 SC 1564***. It was observed that removal of goods from the factory premises, or any other specified place, implied that the excise duty was leviable and the liability was not postponed. The following observations of the Supreme Court in ***Orient Paper Mills Ltd. (supra)*** were quoted:

"Thus, though Section 3 of the Excise Act talks of levy and collection, the actual collection is only at the time of removed 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. In 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 simplicitor. 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".

6. The Bombay High Court in ***Commissioner of Income Tax Vs. Loknete Balasaheb Desai S.S.K. Ltd. [2011] 339 ITR 288 (Bom)*** had an occasion to examine Section 145A of the Act, and has pertinently elucidated:-

"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”.

7. In the aforesaid judgment, decision of the Supreme Court in ***Collector of Central Excise Vs. Polyset Corporation, [2000] 10 SCC 241*** was quoted and it has been observed that dutiability on excisable goods is determined with reference to the date of manufacture and the rate of excise duty payable is determined with reference to the date of clearance of the goods. In other words, in respect of the excisable goods manufactured and lying in stock, excise duty liability would crystallize on the date of clearance of goods and not on the date of manufacture. This would be the date on which goods are “removed” as per the mandate of Excise Act and the applicable Rules. This aspect has been highlighted as noticed in the decision of the Delhi High Court in ***Lakshmi Sugar Mills Co. Ltd. (supra)***.



8. With regard to the MODVAT credit etc., we may notice that Central Board of Direct Taxes (CBDT) has issued circular No. 772 dated 23.12.1998, the relevant portion of which reads as under:

"52. Method of accounting in certain cases.

52.1. The issue relating to whether the value of the closing stock of the inputs work-in-progress and finished goods must necessarily include the element for which MODVAT credit is available, has been a matter of considerable litigation over the years. 52.2 Consequent with the other provisions of the Act, with a view to put an end to this point litigation and in order to ensure that the value of opening and closing stock reflect the correct value, a new section 145A is inserted. This section provides that the valuation of purchase, sale and inventory shall be made in accordance with the method of accounting regularly employed by the assessee and such valuation shall be 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 to goods to the place of its location and condition as on the date of valuation."

9. We may note that in the present case, it is not contention of the Revenue that MODVAT credit or duty in respect of the inputs has not been included in the value of the closing stock. This is not what is averred and asserted in the assessment order or an argument, which was raised before the Tribunal or even before us. When we turn to the factual matrix of the present case, it is noticeable that the Assessing Officer, while making the addition, did not go into these factors and issues. He proceeded on a wrong assumption that as per the decision of the Supreme Court in ***British Paints Ltd. (supra)***, excise duty, even if not paid or



leviable or incurred, must be added to value the closing stock. This is r
the correct position in law and the mandate of Section 145A of the Act.

10. Commissioner of Income Tax (Appeals), on examination of the issue, had rightly held that as per the respondent-Assessee, the excise duty was payable at the time of removal of goods and not at the time of manufacture and the on the last date of the accounting year, the goods were lying in the bonded warehouse and the duty would be payable only at the time of unbonding. Thus, the contention of the respondent-Assessee was that neither excise duty was paid nor the duty was incurred. Further, the duty had not been included and did not form part of the cost as it was not claimed in the profit and loss account. The Commissioner of Income Tax (Appeals) therefore deleted the addition.

11. The Tribunal has affirmed the aforesaid finding and dismissed the appeal of the Revenue. There is nothing on record to show that the Revenue in the appeal preferred before the Tribunal had raised the contention that the excise duty had, in fact, become payable and had been incurred in terms of the Excise Act or the applicable rules.

12. In these circumstances, we have to hold that the decision of the Tribunal is correct and accordingly, substantial question of law mentioned above, is answered in favour of the respondent-Assessee and against the appellant-Revenue.



The appeal is accordingly disposed of. There will be no order as to costs.

SANJIV KHANNA, J

V. KAMESWAR RAO, J

SEPTEMBER 03, 2014/_{akb}