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

RESERVED ON: 04.12.2012
PRONOUNCED ON : 14.12.2012

+   **ITA NOS. 903/2011, 993/2011 AND 1029/2011**

COMMISSIONER OF INCOME TAX ……Appellant

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

Vs.

MARUTI SUZUKI INDIA LTD. …..Respondent

Through : Mr. Ajay Vohra with Ms. Kavita Jha, Mr. Somnath Shukla and Mr. Vaibhav Kulkarni, Advocates

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT

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1. The present judgment will dispose of three appeals, concerning AY 1994-95, 1995-96 and 1996-97; the impugned common order of the Income Tax Appellate Tribunal (ITAT) disposed of the revenue's appeals for the said assessment years. The following common questions arise in these appeals:

(a) Did the Tribunal fall into error in holding that the amounts deposited by the assessee/ respondent in the Excise

Personal Ledger Account (PLA) could not be disallowed under Section 43-B of the Income Tax Act;

(b) Did the Tribunal fall into error in not disallowing the provision for warranties made by the assessee, for the assessment year 1996-97; (the question arises only in ITA 993/2011)

2. The assessee is a car manufacturer; it has to comply with the requirements of the Central Excise and Salt Act, 1944 ("Excise Act"), in order to clear the goods, by paying duty. The duties are collected in the form of a regular payment into what is called the "Personal Ledger Account" in terms of Rule 173-G of the Central Excise Rules, which reads as follows:

3. The AO took the position that the amounts paid into, and remaining outstanding, at the end of the financial year, was to be disallowed by reason of Section 43-B. The matter ultimately reached the ITAT, which accepted the assessee's contentions.

4. The revenue is in appeal, contending that since the amount paid into the account was not in respect of manufactured goods, it could not be deducted. Mr. N.P Sahni argued that Section 43B permits deductions only on actual payment of the corresponding amounts. Section 43B contains a non-obstante clause and states that deduction of the prescribed sums is on actual payment only if those sums are "otherwise allowable under this Act". This condition postulates that an assessee cannot claim by way of expenditure, payments of taxes and duties only for the fact that the

assessee has made the payments of those taxes and duties. In addition to the payment of such taxes and duties, it is also necessary that those expenses should be "otherwise allowable" under the provisions of the IT Act, 1961, in computing the business income. Therefore, in the class of cases spelt out in the provision, the deduction of the prescribed sums would be available to an assessee only on the basis of payment, either in the relevant assessment year or in the subsequent assessment year but no deduction would be available on such payments where the corresponding liability was not incurred by the assessee. Adverting to the legal position before introduction of Section 43-B, it was stated that if an assessee maintained the accounts on accrual basis, the deduction of the prescribed sums would be available in computing the business income if those liabilities were accrued during the previous year relevant to the assessment year, without the actual payment thereof. Even now, the rule of accrual of liabilities has not been dispensed with. The accrual of liability remains unchanged. Section 43B imposes a further condition that deductions are permissible additionally to accrual of liability, only on actual payment of the amount.

5. It was next submitted that a deduction "otherwise allowable under this Act", which qualifies to be allowed before considering the question of payment. The item must be permissible as a deduction under any provision; the expenses or liability must be incurred. The restriction brought about by Section 43B that cash

must be actually paid, not mean that other conditions provided in law have been dispensed with. All such conditions are applicable.

6. Emphasizing upon the term *"any sum payable"* it was argued that it is one of the most important limbs of the statute and underlines incurring of a prior liability on the assessee to make such payment. Unless the liability to pay is incurred, it is not possible to say that any sum is payable by the assessee. It was contended that the proviso to Section 43B allows an assessee to claim the deduction even if the designated payment was made after the close of the relevant previous year, but before the due date of filing of the return under s. 139(1). The expression *"...in respect of the previous year in which the liability to pay such sum was incurred as aforesaid.."* is highlighted. The argument is that what is to be paid and for which evidence has to be furnished is in respect of the payment for which the liability was incurred in the previous year. Therefore incurring of prior liability in a previous year is essential in claiming a deduction governed by the provisions of s. 43B. The additional requirement of making actual payment has not obliterated any other remaining requirements embodied in the law relating to deduction of expenses in computing income from business.

7. Learned counsel also relied on the second Explanation to Section 43B. It provides that, for the purposes of cl. (a), as in force at all material time, *"any sum payable means a sum for which the assessee incurred liability in the previous year even though such*

sum might not have been payable within that year under the relevant law." That the actual liability should be incurred during the previous year has been reiterated in the Explanation which rules out any other interpretation. Counsel relied on the rulings of the Andhra Pradesh High Court in *Srikakollu Subba Rao & Co. & Ors. vs. Union of India & Ors.* (1988) 173 ITR 708 (AP) where that High Court held that in order to apply the provisions of Section 43B, not only should the liability to pay tax or duty be incurred in the accounting year but the amount also should be statutorily payable in the accounting year.

8. Counsel for the assessee on the other hand, argued that the amounts paid into the PLA were towards excise liability incurred, as a result of manufacture of goods. It was emphasized that the levy of excise is on goods manufactured and what is mandated by Rule 173G is the precondition for release, or clearance of goods, from the premises. It was submitted that the structure of Rule 173G and the scheme of excise duty collection left the asseesee, or any other manufacturer with no option but to pay amounts into PLA, *as a precondition for their removal and further sale.* Counsel highlighted that the mode chosen by the excise authorities, of requiring the manufacturer to keep certain amounts, was at once a method of collection, as well as a matter of convenience. If the manufacturer were to pay amounts, and then clear the goods, the result would be time consuming; instead, he is obliged to keep, in

the PLA a certain amount to cover the clearances of goods manufactured.

9. It was highlighted that the amounts deposited were towards the obligation to pay excise duty, and nothing else. It was submitted that the assessee could not be denied the deduction, once the basic characteristic of the payment actually made was established. Pointing out that the disallowances were a fraction of the total excise duty, in each of the assessment years, learned counsel submitted that these credits were for finished goods, but which had not been cleared at the time of end of the concerned period.

10. Learned counsel relied on the decision of the Calcutta High Court reported as *Paharpur Cooling Towers Ltd. Vs. Commissioner of Income Tax,* (2011) 244 CRT (Cal) 502. It was submitted that the court, in that case, held that there was no intention of the legislature to deprive an Assessee of the benefit of deduction of tax, duty actually paid by him during the previous year, even though in advance, according to the method of accounting followed by him. It was also argued that if the revenue's contentions were to be accepted, the assessee would not also get the benefit of payment of tax, since it was actually paid in the previous period. In support, counsel relied on the ruling of the Allahabad High Court in *Commissioner of Income Tax and Anr. v C.L. Gupta & Sons* (2003) 259 ITR 513.

11. Section 43-B of the Income Tax Act, reads as follows:

> *"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*
>
> *(b)to (f)...*
>
> *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 :*
>
> *Provided..............*
>
> *Provided further....................*
>
> *Explanation 1..................*
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> *Explanation 2 : For the purposes of Clause (a), as in force at all material times, 'any sum payable means a sum for which the assessee incurred liability in the previous year even though such sum might not have been payable within that year under the relevant law."*

Rule 173G of the Central Excise Rules, states that:

> *"173G. Procedure to be followed by the assessee – (1) Every assessee shall keep an account current with the Collector separately for each excisable goods falling under different Chapters of the Schedule to the Central Excise Tariff Act, 1985, in such forms and manner as the Collector may require, of the duties payable on the excisable goods and in*

particular such account (and also the account in Form R.G. 23, if the asessee is availing of the procedure prescribed in rule 173 K) shall be maintained in triplicate by using indelible pencil and double-sided carbon, and the assessee shall periodically made credit in such account- current, by cash payment into the treasury, so as to keep the balances, in such account-current sufficient to cover the duly due on the goods intended to be removed at any time, and every such assessee shall pay the duty determined by him for consignment by debit to such account-current before removal of the goods".

12. The relevant discussion in *Paharpur* states that:

"8. After hearing the learned Counsel for the parties and after going through the aforesaid provisions including the Explanation 2 added thereto, we find that the requirement of the provision contained in Section 43B(a) of the Act is that the Assessee must have actually paid the amount as well as incurred liability in the previous year for the payment even though such sum might not have been payable within that year under the relevant law. In the case before us, the Assessee has undoubtedly paid the duty in the previous year and such payment was made consequent upon the liability incurred in that very year but in view of the fact that it follows the mercantile system of accounting, the amount is legally payable in the next year. Thus, the case clearly comes under the purview of Section 43B(a) of the Act read with Explanation 2 added thereto.

9. The position would have been different if the amount was not paid in the previous year and in such a case the Appellant would not have been eligible to get the benefit. The object of the legislature is to give the benefit of deduction of tax, duty, etc. only on payment of such amount liability of which the Assessee had incurred and not otherwise. Thus, even if the tax or duty is payable in the next

year in view of the system of accounting followed by the Assessee, if the liability was ascertained in the previous year and the tax was also paid in the said previous year, there is no scope of depriving the Assessee of such benefit.

11. Moreover, in the light of the purposive and objective interpretation of the said provision, and the mischief sought to be remedied through the insertion of the Explanation 2, it becomes abundantly clear that the said claim is allowable only in the year of payment. At this stage, it will be profitable to refer to the following observation of the Supreme Court in the case of K. P. Varghese v. ITO reported in MANU/SC/0300/1981 : AIR 1981 SC 1922 where it has been held:

...where the plain literal interpretation of a statutory provision produces a manifestly absurd and unjust result which could never have been intended by the legislature, the Court may modify the language used by the legislature or even do some violence to it, so as to achieve the obvious intention of the legislature and produce a rational construction.

12. It was never the intention of the legislature to deprive an Assessee of the benefit of deduction of tax, duty etc. actually paid by him during the previous year, although in advance, according to the method of accounting followed by him. If we accept the reasoning given by the Tribunal, an advance payer of tax, duty etc. payable in accordance with the method of accounting followed by him will not be entitled to get the benefit even in the next year when liability to pay would accrue in accordance with the method of accounting followed by him because the benefit of Section 43B is given on the basis of actual payment made in the previous year."

In CIT vs. *Modipon Ltd,* 334 ITR 106 this Court had occasion to deal with the issue, and held as follows:

"In our considered view, the mischief which is sought to be cured by induction of the provisions of sections 43B of the Income Tax Act is sub-served by the payment of the duty to the Department concerned. The procedure envisaged for payment of excise duty envisages such duty to be deposited in advance with the treasury before the goods are removed from the factory premises. The duty, thus, already stands deposited in the accounts of the assessee maintained with the treasury and the amount, thus, stands paid to the State.

We are, thus, not in agreement with the submission of the learned counsel for the Department that it was only on removal of the goods that the amount credited to the personal ledger account could be claimed as deductible under Section 43B of the Income Tax Act. The question is, thus answered in favour of the assessee."

13. The Tribunal had, in a previous year, discussed the issue in detail; its conclusion – in the assessee's case for A.Y.1999-2000 (reported in 92 ITD 119) and A.Y. 2000-01 is as follows:

"28. In view of the above discussion, it is held that advance payment in cash of taxes or duties without incurring liability to pay such taxes or duties without incurring liability to pay such taxes or duties cannot be allowed as deduction under section 43B. Therefore, the lower authorities were justified in disallowing the sum of Rs.3,19,41,468/- representing PLA balance of excise duty on vehicle in as much as there is clear finding of fact in para 9.5 of the Ld. Commissioner of Income Tax (Appeals) that PLA balance are not relatable to any goods manufactured."

"29. However, we find force in the alternate of assessee's counsel that such amount should be allowed in the year in which it is adjusted against liability to pay excise duty on manufactured goods. Accordingly, it is pleaded that deduction should be allowed of the sum of Rs.1,03,79,919/- representing PLA balances on the last day of the preceding

year but adjusted in this year. We have heard both the counsels and perused the records. We are in complete agreement with such contention since such adjustment amounts to actual payment. Even the ld counsel for revenue has no objection to such contention provided such deduction was not allowed in the preceding year since double deduction of the same amount cannot be allowed. Considering the same, the order of ld. CIT(A) is modified and the matter is remitted to the file of Assessing Officer who shall allow the alternate claim of assessee after verification if such deduction was not allowed in the preceding year. Since it has been held that advance payment did not represent the payment of excise duty, the question of including the same in the closing stock does not arise. Therefore, finding of Ld. CIT(A) to that effect is vacated."

14. A plain reading of Section 43-B clarifies that

(a) deduction claimed by the assessee must be "otherwise" allowable under the other provisions of the Act.

(b). The deduction must *relate* to any sum payable by way of tax, duty, cess or fee.

(c) the assessee must have incurred liability in respect of such tax, duty, etc.

On fulfilling these conditions, the assessee's claim can be allowed in the year in which actual payment is made, *notwithstanding the year in which liability is incurred*. The term *"liability to pay such sum was incurred by the assessee"* together with the words *"a sum for which the assessee incurred liability"* in Explanation 2

underline that payment must relate to the incurred liability to be called *'any sum payable'*.

15. In the present case, the assessee had no option, but to keep the account, in respect of each excisable product (evident from the mandate in Rule 173G that it "*shall keep an account current*"). The latter part of the main rule makes it clear beyond any doubt that the assessee has no choice in the obligation, and cannot remove the goods manufactured by it, unless sufficient amounts are kept in credit:

> *"...and the assessee shall periodically made credit in such account- current, by cash payment into the treasury, so as to keep the balances, in such account-current sufficient to cover the duly due on the goods intended to be removed at any time, and every such assessee shall pay the duty determined by him for consignment by debit to such account-current before removal of the goods"*

The revenue's contention that the amounts in credit also relate to goods not manufactured, and therefore not relatable to any "liability incurred" is, in the opinion of this Court, without any basis. The arrangement prescribed by the rule is both a collection mechanism – dictated by convenience, as well as mandatory. It is convenient, for the reason that if the assessee were to be asked to pay the exact amount, through some other method, by deposit, as a precondition for clearance, that would have been cumbersome to it as well as the revenue; it would also have led to problems of storage of goods, and slow down their supply and distribution. The

Rule makers pragmatically directed that "sufficient" amounts ought to be maintained in the account, to cover the removals. Therefore, at any given point of time, there had to be an excess in the account, if the assessee were to remove the goods. Each clearance mentions the quantum of goods, and the duty amount, which is apparently reconciled at the end of the period, and shortfalls if any are appropriated from the account. The excess credit is likewise adjusted for the next day's clearances. The point to be underlined is that there is no choice, and the amounts relate to the assessee's duty liability, falling within the description under Section 43-B. The consequence of not allowing the amounts as deductions, are vividly brought out in the decision of the Allahabad High Court in *C.L.Gupta (supra),* where it was held that:

> *"10. In the case in hand, admittedly, the amount of customs duty of Rs. 3,56,451 was paid by the assessee in March, 1987, and, therefore, in terms of Section 43B it is deductible only in the year in which it is actually paid, i.e., for the assessment year 1987-88, irrespective of the year in which the assessee incurred the liability on the basis of the method of accounting regularly adopted by him and, therefore, in view of the clear provisions of law, the deduction cannot be allowed in the assessment year 1988-89. In our view, both the learned Income Tax Appellate Tribunal as well as the Commissioner of Income Tax (Appeals) fell in error in holding that since the assessee-firm debited the cost of goods imported including the duty paid on delivery of goods in the trading account in April, 1987, and before the actual delivery of the goods, the value of the goods and customs duty paid thereon was shown in the balance-sheet as document in hands, therefore, the deduction should be allowed in the assessment year 1988-89, is contrary to the*

prescription of law. Section 43B in clear terms provides that the deduction claimed by the assessee in respect of any sum paid by way of tax, duty, cess or fee, shall be allowed only in computing the income referred to in Section 28 of that previous year in which it was actually paid, irrespective of the previous year in which the liability was incurred for the payment of such sum as per the method of accounting regularly employed by the assessee. For the purpose of claiming benefit of deduction of the sum paid against the liability of tax, duty, cess, fee, etc., the year of payment is relevant and is only to be taken into account. The year in which the assessee incurred the liability to pay such tax, duty, etc., has no relevance and cannot be linked with the matter of giving benefit of deduction under Section 43B of the Act. In this view of the matter, the appeal deserves to be allowed.

16. This court also notices that the Supreme Court has upheld the view which allows assessee's to claim credits, such as Modvat, etc, falling within the description of liability paid, to escape the mischief of Section 43-B. (CA 6721/2012 : CIT Vs. Shri Ram Honda Power Equipment Corporation, decided on 19.09.2012).

As a result of the above discussion, the first question is answered in favour of the assessee, and against the revenue.

17. As far as the second question is concerned, the Court notices that the issue is covered by the ruling of the Supreme Court in *Rotork Controls India Ltd. Vs. CIT* 314 ITR 62 (SC) where the provisions of warranty were upheld in the following terms:

"A provision is a liability which can be measured only by using a substantial degree of estimation. A provision is

recognized when: (a) an enterprise has a present obligation as a result of a past event; (b) it is probable that an outflow of resources will be required to settle the obligation; and (c) a reliable estimate can be made of the amount of the obligation. If these conditions are not met, no provision can be recognized.

The principle is that if the historical trend indicates that a large number of sophisticated good were being manufactured in the past and the facts show that defects existed in some of the items manufactured and sold, then provision made for warranty in respect of such sophisticated goods would be entitled to deduction from the gross receipts under Section 37."

This question too, is therefore answered in favour of the assessee, and against the revenue.

18. In view of the above discussion, as both questions are answered in favour of the assessee, the appeals fail, and are dismissed. No costs.

S. RAVINDRA BHAT
(JUDGE)

R.V. EASWAR
(JUDGE)

December 14, 2012