

**IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR**

**Before Sh. N. S. Saini, Accountant Member
And**

Sh. N. K. Choudhry, Judicial Member

ITA No. 38/Asr./2017 : Asstt. Year : 2013-14

ITA No. 77/Asr./2017 : Asstt. Year : 2012-13

ITA No. 119/Asr./2018 : Asstt. Year : 2014-15

Sh. Vijay Kumar Aggarwal, C/o S.K. Gupta & Co., Chartered Accountant, EG, 934, 2 nd Floor, N.G. Road, Jalandhar-144001	Vs	Income Tax Officer, Ward-II(2), Jalandhar
(APPELLANT)		(RESPONDENT)
PAN No. ADHPA5106D		

Assessee by : Sh. J. S. Bhasin, Adv.

Revenue by : Ms. Shivani Bansal, DR

Date of Hearing : 21.02.2019

Date of Pronouncement : 19.03.2019

ORDER

Per N. S. Saini, Accountant Member:

These are the appeals filed by the assessee against the order of CIT(A)-1, Jalandhar dated 28.10.2016 for the assessment year 2013-14, dated 29.11.2016 for the assessment year 2012-13 and dated 14.12.2017 for the assessment year 2014-15.

2. At the time of hearing, the Id. AR of the assessee submitted that the facts and issue involved in all these appeal is common and therefore, he will be arguing for appeal for assessment year 2013-14 and the same arguments should be

taken for the other two assessment years, namely, the assessment years 2012-13 and 2014-15.

3. The sole issue involved in all these three appeals is that the CIT(A) erred in confirming the addition of Rs.32,40,830/- in assessment year 2013-14, Rs.24,95,755/- in assessment years 2012-13 and Rs.36,62,148/- in assessment years 2014-15.

4. The brief facts are that in the assessment year 2013-14, the Assessing Officer observed that the assessee has debited interest of Rs.32,47,463/- paid to State Bank of Patiala. Since, the assessee had not paid the interest during the financial year, therefore, he disallowed the deduction for the same by invoking the provisions of Section 43B(e) of the Income Tax Act, 1961. Similarly, the claim for interest paid to State Bank of Patiala of Rs.24,95,755/- in assessment year 2012-13 and Rs.36,99,103/- in assessment year 2014-15 was disallowed by the AO.

5. The assessee carried the matter is in appeal before the CIT(A) who confirmed the action of the AO and observed as under:

"7. Assessee has filed return claiming a loss of Rs. 12,47,782/- after debiting interest of Rs. 32,47,463/- as his business expenditure. Assessing Officer allowed interest expenditure of Rs. 6,333/- paid to Axis Bank. But Assessing Officer disallowed an amount of Rs. 32,40,830/- u/s 43B since it was not paid by the assessee during the previous year.

8. *Aggrieved over this disallowance assessee is in appeal. The main contention is that the bank has written to the assessee stating that the liability is accrued, but not payable in the current A.Y. and therefore it should be allowed as business expenditure.*

9. *A perusal of RBI guidelines (RBI/2012-13/39DBOD.No.BP.BC.9/21.04.048/2012-13) indicate that RBI has instructed banks not to take any interest on NPA accounts to the income account. Infact if any interest has accrued in past periods and not actually been realized; and has been booked as income by Banks, the same also has be reversed. It is clear therefore that RBI has clearly advised PSU Banks not to take interest on NPA assets into their books of accounts under the head income.*

10. *RBI has also advised banks to keep a record of accrued interest in a Memorandum account. Even for the purpose of accounting gross advances, such interest recorded m the memorandum account is not to be taken into account. Thus for the Bank, interest on NPA assets is nothing but notional interest, neither charged to income account, nor even shown as part of gross advances.*

11. *In consonance with RBI guidelines on NPA assets, various courts have a ready held that .merest income on NPA assets will be part of a Bank's taxable income only when is received. Accrued interest or recorded interest, not applied on NPA accounts will not be part of a Bank's income. Thus as far as the Bank is concerned, interest income from NPA accounts is only to be kept record of. It is not to be included in the income of the Bank.*

12 *On the other hand the intent of sec 43B is quite clear. Provisions of sec 43B apply on expenses which are otherwise allowable under the Act. It mandates disallowance of specific expenses otherwise allowable if they are not paid. These are to be allowed only on payment, irrespective of whether expenses accrued or*

arose during the assessment year. Thus sec 43B clearly provides for allowing such expenses only as and when they are paid.

13. Irrespective of the method of accounting following by the assessee, interest expenses of the nature referred to section 43B(d) of the Act can be allowed as a deduction only in the year in which such interest are actually paid.

14. The assessee has cited various judgments particularly related to accrual of liability of expenditure, judgments cited by the assessee do not apply to the instant case. In case of Telelink Neco Ltd., (2001) 73 TTJ 28, adjustment had been made u/s/143(1)(a). ICICI bank had entered into an agreement with the assessee and had deferred interest on loans given to assessee. No such agreement or deferment of interest has been brought on record or pleaded by the assessee. Similarly in case of Neo Pipes and Tubes Co Ltd, the adjustment was u/s 143(1)(a), which is not the case in the instant appeal. In other cases cited by assessee, provisions of sec 43B of the IT Act are not the subject matter, and therefore are of no help to the assessee.

15. Allowability of expenditure under the IT Act, is distinct from the provisions of sec 43B. Certain deductions which are expressly allowable under other provisions of the Act will be allowed u/s 43B only on payment. This is irrespective of whether liability to pay these sums was accrued during the previous year.

16. There is no question over the fact that interest has not been paid by the assessee to State Bank of Patiala. All accounts including car loan, two term loans, cash credit, and medium term loans have been treated as NPA by the bank. In fact, letter of manager of State Bank of Patiala indicates that it has not even applied interest on any of assessee's loans. Under explanation 3(d) to sec 43B, assessee has the window within the IT Act to claim this expense as and when interest is paid to the Bank.

17. I therefore have no hesitation in holding that the Assessing Officer has correctly disallowed interest debited as expenditure by the assessee when it is not even applied by the Bank."

6. Before us, the AR of the assessee filed written submissions which are as under:

"The assessee is a manufacturer of Rubber Transmission and Conveyor Belts. Income Tax Return for this year was filed on 25.09.2013 declaring net loss of Rs: 12,47,782. However, after the case was taken in scrutiny, it was assessed at Rs.20,99,900/- by making addition of Rs.32,40,830/- disallowing accrued interest due to bank under section 43B besides some other disallowances.

Before the AO as also before the CIT(A), it was explained that the assessee had availed credit facilities from State Bank of Patiala, Jalandhar of Rs: 270.75 lakhs. During the FY 2011-12, all the accounts were declared NPA by the bank. That being so, as per the RBI guidelines, the bank did calculate interest as 'accrued interest' on the entire amount of loan, but did not debit it to the loan account of assessee. The assessee however, working under the mercantile system of accounting, debited Rs.32,40,830.00 as interest accrued, due to the bank, in P & L Account for the year under appeal, and credited to the State Bank of Patiala interest account. The said claim was justified before the authorities below, by laying stress on the word "payable" used in Section 43B clause (e) which reads as follow:-

"(e) any sum payable by the Assessee as interest on any loan or advances from a scheduled bank in accordance with the terms and conditions of the agreement governing such loan or advances".

It was argued that only when the amount becomes payable, that it has to be actually paid in terms of section 43B before the filing of return. However, in

this case, when the accounts of the assessee were declared NPA, and no interest was debited to its loan account by the Bank, the amount had not become payable, though it had accrued as an expense under the mercantile system of accounting. Therefore, the term 'any sum payable' used in section 43B(e), was emphasized to be understood for the purpose of said clause (e) in pure commercial and accounting sense. Payability implies a right on the part of the condition of enforcing the payment and also of recourse to legal action as considered necessary. Even under banking norms, whenever the amount of interest is debited to the account of the loanee party, the interest is treated as payable by the loanee party. Therefore, when the bank had not debited the interest to assessee's account, but kept in a suspense account on accrued basis, the same had not become payable. A bank certificate to this effect was also placed before the AO/CIT(A) (page No.26 of paper book). The assessee placed wholesome reliance on the decision of ITAT E-Bench, Kolkatta in the case of Deputy CIT Vs. Tele link Nieco Ltd. (2001) 73 TTJ 28 (Cal). Though it dealt with clause (d) of sec 43B, being akin to clause(e), it was directly relevant to this case. In para 9.01, the Bench held as under:-

"Accrual of Liability and payability of such Liability are two different events. The accrual of liability normally precedes in point of time the discharge of such liability. The crux of Sec 43B is that deduction is to be allowed on the basis of discharge of liability by way of payment and not the basis of accrual. The Explanation "2" to Sec 43B which has the effect of synchronizing the accrual of liability with payability of such liability is confined to only clause (a) of section 43B which deals with payment of tax, duty, cess or fees, and not to clause (d) which deals with payability of interest on loans from any public financial institutions. Keeping in view the distinction between the "sum payable" and accrual of liability it would be easy to conclude that because the

liability had accrued, the Assessee was correct in debiting the interest accrued in Profit and loss account. Close reading to clause (d) makes it dear that any sum payable as interest on loan has been linked with the terms and conditions of the agreement governing such loan. Unless there is information about the agreement governing such loan and further information to the effect that the interest has become payable during the year under consideration provision of sec 43B (d) cannot be invoked" (Copy of decision enclosed at Page 32-33 of Paper book).

Reliance was also placed on another decision of ITAT Kolkotta "A" Bench in the case of Neo Pipes of tubes Co. Ltd., Vs Deputy CIT (2004) 086 T.T.J. 0609 (Cal), wherein the above decision was also followed. (Copy of decision enclosed at Page 34 of paper book).

In addition to above, to buttress its point, the assessee also placed heavy reliance on following judicial authorities:

- i) Bharat Earth Movers Vs CIT (2000) 245 ITR 428(SC)*
- ii) Metal Box Company Ltd., Vs Their Workmen (1969) 73 ITR 53(SC)*
- iii) Taparia Tools Ltd. Vs Joint CIT (2015) 372 ITR 605(SC)*
- iv) CIT Vs Modern Spinners Ltd., (2016) 382 ITR 472 (Del)*
- v) Taparia Toos Ltd., Vs Joint CIT (2015) 372 ITR 605 (SC).*

But the Id.CIT(A), without addressing the real issue that the interest had not become payable even in terms of section 43B(e), in para 9 of her order took note of the RBI guidelines instructing the banks not to apply interest on NPA accounts, and not to book the same as the income of the bank. Against this, she held in para 12 that section 43B mandates disallowance of specific expenses

otherwise allowable if they are not paid, which were to be allowed only on actual payment whether expenses accrued or arose during the year. She distinguished the judicial authorities with comfortable ease on one or the other pretext. Finally, in para 16, she held that since no interest had been paid to the bank, it was disallowable, with a window given to assessee under explanation 3(d) to sec 43B to claim it when actually paid.

SUBMISSIONS BEFORE THE BENCH

i) It is undisputed that no interest had been charged by the Bank in the loan account of assessee but kept in a suspense account. Obviously therefore, it had accrued but not become payable. Unless it becomes payable, it cannot be paid, and for that matter, it cannot be disallowed u/s.43B(e), and its claim as an expense on accrued basis, following mercantile system of accounting, cannot be disallowed.

ii) As held by the ITAT Bench of Calcutta in the case of Telelink (supra), "Accrual of Liability and payability of such Liability are two different events. The accrual of liability normally precedes in point of time the discharge of such liability. The crux of Sec 43B is that deduction is to be allowed on the basis of discharge of liability by way of payment and not the basis of accrual. The Explanation "2" to Sec 43B. which has the effect of synchronizing the accrual of liability with playability of such liability is confined to only clause (a) of section 43B which deals with payment of tax, duty, cess or fees, and not to clause (d) which deals with payability of interest on loans from any public financial institutions. Keeping in view the distinction between the "sum payable" and accrual of liability it would be easy to conclude that because the liability had accrued, the Assessee was correct in debiting the interest accrued in Profit and loss account. Close reading to clause (d) makes it dear that any sum payable as interest on loan has been linked with the terms and conditions of the

agreement governing such loan. Unless there is information about the agreement governing such loan and further information to the effect that the interest has become payable during the year under consideration provision of sec 43B (d) cannot be invoked".

iii) Taking a consistent view, the Calcutta Bench, in yet another decision, in the case of Neo Pipes of Tubes Co Ltd. vs Dy. CIT (2004) 86 TTJ (Cal) 609, again held that unless the interest becomes payable, it could not be disallowed u/s.43B(d), more so u/s.143(1)(a).

iv) The emphasis of the Hon'ble Calcuatta Bench in the above two cases has been on the point that provisions of clause (d) of sec 43B, unlike the provisions of clause (a) of section 43B, are not absolute but qualify 'any sum payable' as interest on any loan or borrowing from any public financial institution or State Financial Corpn. or State Industrial Investment Corpn., in accordance with the terms and conditions of the agreement governing such loan or borrowing. The Bench therefore, held that only the interest payable during the year in accordance with the terms and conditions of the agreement could be disallowed under s. 43B if the same was not paid during the year. Unless there was information in the return of income or the documents accompanying with it about the agreement governing such loan and further information to the effect that interest had become payable during the year under consideration, the provisions of s. 43B(d) could not be invoked.

v) In the case of Neo Pipes (supra), it was clear that the amount was debited to P&L a/c and not paid during the year, but it was not clear as to whether the said amount had become payable during the year itself in accordance with the terms and conditions of the agreement. Therefore, the disallowance made u/s. 143(1) was held to be not sustainable.

vi) However, in the case of Telelink (supra), out of the interest payable for the period 1st Nov., 1987, to 30th April, 1988, the assessee could not pay Rs. 62,63,542 due to financial stringency. Out of the total interest payable of Rs. 1,61,67,796 for the period 1st May, 1988, to 31st March, 1989, the assessee-company capitalized Rs. 34,88,666 and debited Rs 1,26,79,130 in the P&L a/c. This amount was also not paid due to shortage of funds. The assessee-company however, preferred the request before 31st March, 1989, to the financial institutions to defer the payment of the concerned interest. The ICICI Ltd. agreed to defer the collection of interest and other charges falling due upto 20th June, 1989, subject to the consideration that the deferred interest will be repayable in equal quarterly installments commencing from 15th May, 1990. The said order deferring the payment of interest was issued on 12th July, 1989, i.e., after the completion of the accounting period. The assessee contended that the as per the cl. (d) of s. 43B whether any sum was payable as interest on any loan or borrowing from any public financial institution should be determined in accordance with the terms and conditions of the agreement governing such loans or borrowing. In view of the order dt. 12th July, 1989, of ICICI Ltd. no interest was payable by the assessee. Hence, the returned loss was sought not be reduced by Rs. 1,26,79,130/- for non-payment of interest. It was in the backdrop of these facts that the Bench held that the interest had not become payment in terms of clause (d) of sec 43B of the Act.

vii) It is contextually important to examine Explanation 2 of sec. 43B, which defines "any sum payable" for the purpose of clause (a) of sec. 43B to mean "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". There is no such Explanation for clause (d) or (e) in the Act. Sans any such explanation, "any sum payable" has to be understood for the purpose of clause (d) & (e), in a

pure commercial and accountancy sense. Payability implies a right on the part of the condition of enforcing the payment and also of recourse to legal action as considered necessary. Neither the bank had thus created a right to recover nor the assessee had incurred a responsibility to pay the said amount in this year.

viii) In the case of this assessee, as already stated in facts narrated earlier, the loan accounts were declared NPA by the Bank and as per the guidelines of RBI, governing such loans, no interest was charged to the loan account, but kept separately in suspense account. The assessee is covered by clause (e) of sec 43B inasmuch as he had raised loans from a scheduled bank. The RBI guidelines operate as binding conditions on such loans and the parties involved thereto. Therefore, the provisions of clause (e) being akin to clause (d) of sec 43B, the RBI guidelines, governing such loans, have to be taken due cognizance of in determining whether or not the interest had become payable during the year. Needless to reiterate, when no interest had been charged to the assessee's loan account, it had not become payable. Contrary to this, since the assessee had been consistently following mercantile system of accountancy, it had to debit the interest on accrual basis to his P&.L account. Under such circumstances and the language of clause (d) of sec 43B, no disallowance was called for.

*ix) What emerges clear from the above findings of Calcutta Bench is that in any case, unless the interest becomes payable in accordance with the agreement governing such loan, it would not invite disallowance u/s.43B(d) of the Act *ibid*.*

x) Before the authorities below, the assessee also drew support from the decision of Hon'ble Supreme Court in the case of "M/S Bharat Earth Movers Vs Commissioner of Income Tax (2000) 245 ITR 428 ISCL In para 4 of this order, their Lordships held that:-

"The law is settled that if a business liability has definitely arisen in the accounting year, the deduction should be allowed, although the liability may have to be quantified and discharged at a future date. What should be certain is the incurring of the liability. It should also be capable of being estimated with reasonable certainty though the actual quantification may not be possible. If these requirements are satisfied the liability is not a contingent one. The liability is in praesenti though it will be discharged at a future date. It does not make any difference if the future date on which the liability shall have to be discharged is not certain."

Further, in para 5 of the said order, the Hon'ble Apex Court also reiterated the following principles as were laid down in the case of M/S Metal Box Company Ltd., Vs Their Workmen (1969) 73 ITR 53(SC) the relevant of which for our purpose are extracted and reproduced as under:-

i) For an Assessee maintaining his accounts on mercantile system, a liability already accrued, though to be discharged at a future date, would be a proper deduction while working out the profits and gains of his business, regard being had to the accepted principles of commercial practice and accountancy. It is not as if such deduction is permissible only in case of amounts actually expended or paid.

ii) Just as receipts, though not actual receipts but accrued due are brought in for Income Tax Assessment, so also liabilities accrued due would be taken into account while working out the profits and gains of the business.

iii) A condition subsequent, the fulfillment of which may result in the reduction or even extinction of the liability, would not have the effect of converting that liability into a contingent liability.

iv) A trader computing his taxable profits for a particular year may properly deduct not only the payments actually made to his employees but also the present value of any payments in respect of their services in that year to be made in a subsequent year if it can be satisfactory estimated.

(Copy of decision is enclosed at page 35-36 of paper book).

Hon'ble Supreme Court in the case of Taparia Tools Ltd. Vs Joint CIT (2015) 372 ITR 605 has held that:-

"Normally, the ordinary rule namely, that revenue expenditure incurred in a particular year is to be allowed in that year, the department cannot deny it. However, in a case where the Assessee himself wants to spread the expenditure over a period of ensuing years, it can be allowed only if the principle of matching concept" is satisfied, which upto now has been restricted to cases of debenture."

The Hon'ble court further held that:-

"According to the definition of paid in section 43(2) of the Act even if the amount is not actually paid but is "incurred" according to the method of accounting, the sum would be treated as "paid".

(Copy of Judgment is enclosed at page 37-44 of paper book).

xii) Also, in the case of CIT Vs Modern Spinners Ltd., (2016) 382 ITR 472(SC), the Hon'ble Supreme Court, dismissing the revenue's appeal, affirmed the following decision of Hon'ble Delhi High Court:

"Even if the amount of loan was not paid by the Assessee as per the agreement, the liability could not cease to exist that the bilateral consented action on behalf of the pa/ties was binding in

terms of the agreement, and that therefore, the interest liability was not a contingent liability but an ascertained liability".

(Copy of Judgment is enclosed at page 37-44 of paper book).

xiii) In the case of CIT vs. Hindustan Construction Co. Ltd (2015) 374 ITR 101(Bom), the assessee had availed loan on December 26, 2002 for one year and it was payable with interest. However, on accrued basis, the interest upto 31.3.2001, had been charged to P&L but not paid. On disallowance made u/s.43B, the Tribunal found that there was no question of sec 43B being invoked and at the stage when the interest not payable. The loan itself was availed of on 26.12.2002 for one year and it was payable with interest. Hence, the question of relying on sec 43B to disallow the claim did not arise. On appeal, the Hon'ble High Court held that "(ii) That by plain language of the provisions of section 43B and given the factual and admitted position, the Tribunal had not erred in the view that that it had taken. The view taken was neither perverse nor vitiated by any error of law apparent on the face of the record."

xiv) Hon'ble Rajasthan High Court in CIT vs OM Metals and Minerals P Ltd (2015) 373 ITR 406 (Raj), taking note of the effect of Supreme Court decision in Bharat Earth Movers vs CIT (2000) 245 ITR 428 and Rotork Controls India P Ltd vs. CIT (2009) 314 ITR 62, held that Liability accrued but to be discharged at future date, was deductible expenditure.

xv) Of late, Hon'ble P&H High Court in its recent decision in the case of CIT vs. Haryana Warehousing Corporation (2016) 97 CCH 0090 PHHC, was seized of a matter with regard to allow ability of an adhoc provision of Rs. 12.88 crores, made by assessee for discharge of arrears of pay. Haryana State notified revision of pay scales of its employee in view of 6th pay commission. In the light of a letter issued by the

concerned authority, the assessee made provision of the entire arrear in current Financial Year i.e. 2008-09 relevant to AY 2009-10, though as per the Govt Policy, 40% of arrears were to be paid in current year and balance in future. Though the claim was allowed by AO, the CIT(A) set aside the assessment u/s.263 with direction to allow only 40% of the arrears in current year. The matter travelled before the High Court. The Hon'ble High Court after taking detailed note of all the facts and legal position, inter alia held (in para 16) that "concluding part of the Minutes adopted the letter dated 07.01.2009. The Minutes also referred to the arrears. As the word "arrears" absent anything else, indicates that the liability had been incurred and had also been agreed to be discharged. The liability, thus, arose in praesenti and not in futuro. A part of the liability was to be discharged in future. The accrual of a liability and the time for the discharge thereof are different matters. In the mercantile system, the mere postponement of the date of payment of a liability already incurred, acknowledged and agreed to be met arises in the year it is stated to be so incurred and met." To arrive at this conclusion, the Hon'ble Court relied on the Apex Court decisions in Bharat Earth Movers vs CIT, Metal Box Co of India Ltd vs Workmen and Calcutta Co Ltd vs. CIT (1959) 37 ITR 1.

CONTENTIONS OF LD.SR.DR AND DECISIONS RELIED UPON BEFORE THE HON'BLE BENCH whether relevant ?

Section 43D of the Income Tax Act, is again a special provision, which provides that in the case of a Public Financial Institution or a Scheduled Bank, the income by way of interest in relation to prescribed categories of bad or doubtful debts, having regard to the guidelines issued by the RBI in relation to such debts, shall be chargeable to tax in the previous year in which it is credited by the Public Financial Institution or the scheduled bank, to its profit & loss account for that year, or as the case

may be in which it is actually received, whichever is earlier. This provision, if seen in close focus, rather lends supports to assessee's stand point that when the Bank itself is not to charge the interest to its P&L account in view of RBI guidelines in respect of such bad/doubtful debts, how it would become payable for assessee to pay the same in the said year. It would become payable only in the year, when it is either credited to P&L a/c or received by the bank, whichever is earlier. Hence, when the interest had not become payable, its claim on accrued basis could not be disallowed u/s.43B(e) of the Act ibid merely because it was unpaid.

1. Dy.CIT 4(1) Chandigarh vs. M/s Glaxo Smithkline Concumser Healthcare Ltd, Nabha (Spl Bench, ITAT Chandigarh) in ITA No.343/Chd/05 for AY 2001-02.

The controversy involved in this case was with regard to allowability of assessee's claim of payment of excise duty, when it was sought by way of adjustment of Modvet Credit available to the assessee as on the last day of the previous year. It was finally held that credit balance as such does not amount to payment of excise duty per se, but it was in fact a payment made towards the purchase cost.

Importantly, this decision of the Hon'ble Bench was primarily addressing the issue of excise duty payable in terms of clause (a) of sec 43B, which was held to have not been paid, when the assessee sought its adjustment against Modvet credit available to assessee at the last day of the previous year. In this decision before the Bench, neither clause (d) nor clause (e) of sec 43B was brought in close focus, so as to define the terms 'any sum payable' as used in these two clauses. The language of clause (a) is different from the language of clause (d) & (e) read with Explanation 2 thereof.

Therefore, this decision as such, would not apply to facts of this case being on a different point of contention.

2. Triveni Engineering & Industries Ltd vs. CIT New Delhi in ITA No.410/2004 dated 11.9.2009 of Delhi High Court.

This case pertains to AY 1991-92. As per facts, the assessee had raised loans from Industrial Finance Corporation of India (IFCI) and its repayment with interest was to be made in five yearly installments payable on 18.11.1996, 18.11.1997, 18.11.1998, 18.11.1999 & 18.11.2000. The assessee claimed interest on accrued basis. However, AO made disallowance of Rs.21,15,615/- being aggregate amount of interest accrued but not due upto 31.3.1991, holding that it was payable only on 18.11.1996. CIT(A) upheld the disallowance u/s.43B(d). The Hon'ble High Court held that merely because the interest was debited in the books of accounts maintained on mercantile basis would not mean that the interest had become due and accrued because admittedly the interest liability would become due not during the relevant previous year but only for the first time on 18th Nov., 1996. Thus, interest cannot be said to have accrued to become due and payable in the relevant previous year. The concept of debiting the books maintained on mercantile basis is on the principle that the payment has become due and payable and since it has become payable it is therefore debited in the books of accounts. Admittedly, in the present case the interest was not due and payable from the relevant previous year. It is in the backdrop of this find that the Hon'ble Court further held that the provision of sec. 43B(d) directly and categorically disentitles the assessee company to claim benefit of interest deduction because with respect to interest due and payable to a financial institution such as the IFCI till the interest is actually paid, the same cannot be allowed as a deduction.

With due respect, the initial findings of the Hon'ble Court to the effect that interest cannot be said to have accrued to become due and payable in the relevant previous year even when the accounts are

maintained on mercantile basis, is not consistent with the law laid down by Hon'ble Supreme Court in series of cases cited above i.e. Bharat Earth Movers vs CIT, Metal Box Co of India Ltd vs Workmen, Calcutta Co Ltd vs. CIT (1959) 37 ITR 1 and Taparia Tools Ltd. Vs Joint CIT. Therefore, this decision of Hon'ble Delhi High Court, even while holding that the deduction was not allowable u/s.43B(d), being per incuriam, when it did not consider the law laid down by Hon'ble Apex Court supra, cannot be relied upon, for its initial view that the interest had not accrued in this year even under mercantile basis of accounting.

Furthermore, the finding of the Hon'ble Court that interest had not become due and payable in the relevant previous year is also not consistent with the settled law, as reiterated by the Hon'ble P&H High Court in CIT vs. Haryana Warehousing Corporation (2016) 97 CCH 0090 PHHC, in the light of various Supreme Court decisions, when it categorically held that " The accrual of a liability and the time for the discharge thereof are different matters. In the mercantile system, the mere postponement of the date of payment of a liability already incurred, acknowledged and agreed to be met arises in the year it is stated to be so incurred and met."

Also, in this decision, the term 'any sum payable' as used in clause (d) of sec 43B has not been thrashed vis a vis Explanation 2 thereof. Therefore, this decision also cannot be relied upon to negate the assessee's claim when it does not address the real issue in correct perspective.

3. BOARD CIRCULAR NO.07/2006 DATED 17.07.2006

This board circular clarifies that any unpaid interest on any loan or borrowing or advance, if converted into a loan or advance or a borrowing, shall not be allowed as 'actually paid' in terms of u/s.43B(d). Different instances with examples have been cited

therein to clarify this standpoint of the Board. To say the least, even this circular, does not address the issue that has been brought for adjudication in this case before the Hon'ble Bench. Even otherwise, it is settled law that the Board circulars are not binding on Appellate authorities. It is worth mentioning that Hon'ble Karnataka High Court in the case of Vinir Engineering P Ltd vs. DCIT (2009) 313 ITR 154 (Kar) had held that 'conversion of outstanding interest into a fresh loan during the relevant assessment year must be treated as deemed payment of interest, allowable u/s.43B. This decision, thus dilutes the effect of the Board Circular.

The Hon'ble Kolkata High Court in the case of CIT Vs. National Standard Duncan Ltd (2003) 260 ITR 97(Mad) held that where the Bombay Sales Tax Act 1959 and the rules thereunder allows the assessee to set-off sales tax paid on the purchase of raw material used for the finished products, then such assessee would be entitled to set off or adjustment of its liability to pay sales tax payable on the sale of such finished products, availing such set off by the assessee should be treated as actual payment of sales tax liability for Section 43B purposes.

Hon'ble P&H High Court, in the case of CIT vs. Maha Luxmi Bricks Mfg. Moulding & Fabricating Inds (P) Ltd (2005) 273 ITR 190(P&H), following the decision of Gujrat High Court in CIT vs Bhagwati Autocast Ltd (2002) 261 ITR 481(Guj), also held that where under the 'deferred payment scheme' formulated by the State Government, assessee was allowed to retain the amount of sales tax collected by it and the payment was to be made after certain number of years and the assessee was not required to make payment under the relevant sales tax law, the department shall treat the sales tax as actually paid for all purposes and benefit given u/s.43B can be claimed by assessee.

The Hon'ble Jharkhand High Court in CIT Vs. Shakti Spring Industries (P) Ltd. (2013) 84 CCH 0293, in

the context of interest payment u/s 43B(d), held that even book adjustments constitute "actual payment" for Section 43B.

It is noteworthy that in view of the above decisions of various High Courts, it cannot be held that 'actual payment' of any sum payable u/s.43B is essential in all situations and the Board itself has allowed relaxation in certain cases, which paves way for the assessee to claim that the interest it charged to P&L account, even if not paid because of the RBI norms, cannot be disallowed u/s.43B.

In the light of above detailed discussion, it cannot be held that the issue raised by assessee has been conclusively decided against the assessee by any binding judicial authority. Moreover, it is also settled legal position, as laid down by Hon'ble Apex Court in under noted cases, that an interpretation in favour of the assessee has to be taken when there are two possible interpretations to a Section.

- (a) Vegetable Products Ltd., 88 ITR 192 (S.C.)*
- (b) Bajaj Tempo Ltd. vs. CIT(1992) 196 ITR 188 (S.C.)*
- (c) CIT vs. Gwalior Rayon Silk Mfg. Co. Ltd. (1992) 196 ITR 149, 153 (SC)*
- (d) CIT 1/5. K.E.Sundara Mudaiiar (1950) 18 ITR 259 (Mad.) 18 ITR 259.*

Therefore, the appeal of the assessee, in the light of facts and the judicial authorities relied upon supra, deserves to be allowed in full."

7. On the other hand, the departmental representative relied on the orders of the lower authorities.

8. We have heard the rival submissions and perused the orders of the lower authorities and materials available on record. The undisputed facts of the case are that the assessee has debited Rs.32,47,463/- in assessment year 2013-14,

Rs.24,95,755/- in assessment year 2012-13 and Rs.36,62,148/- in assessment year 2014-15 under the head bank interest and claiming the same as business deduction. Further, it is also not in dispute that the said interest was not paid by the assessee till the date of furnishing of return u/s 139(1) of the Act.

9. On the above undisputed fact, the Assessing Officer has added back Rs.32,47,463/- in assessment year 2013-14, Rs.24,95,755/- for the assessment 2012-13 and Rs.36,62,148/- in assessment year 2014-15 to the income of the assessee while computing its business income by invoking provisions of Section 43B(e) of the Act.

10. On appeal, the CIT(A) confirmed the action of the AO.

11. The AR of the assessee submitted that all its loans with State Bank of Patiala were classified as NPA by the bank. Interest of Rs.32,47,463/- in assessment year 2013-14, Rs. 24,95,755/- in assessment year 2012-13 and Rs.36,62,148/- in assessment year 2014-15 relates to these NPA accounts. The bank has not accounted for these interests as its income and has not applied these interests in the accounts of the assessee maintained by the bank in its books of account. As the bank has not applied these interests in their books and has not shown the said amount as receivable from the assessee, the contention of the assessee is that therefore, the amounts were not due or payable by the assessee and accordingly provisions of Section 43B(e) of the Act is not applicable in its case.

12. On the other hand, the Id. DR supported the orders of the lower authorities.

13. We find that in spite of the fact that the Bank has not shown amount of interest in question as receivable from the assessee, the assessee claimed the said amount as its business income of the period under consideration. The assessee has claimed because as per the terms of loan agreement, the said interest accrued. As per the very same loan agreement with the Bank, the amount also become due or payable by the assessee. The payability or amount becoming due does not depend on the accounting entries passed by the bank or the creditor in its books of account but the same depends upon the terms of agreement. We, therefore, do not find force in the above contention of the assessee. The assessee has brought no material either before the lower authorities or before us to show that as per any agreement entered into by the assessee with the bank though the interest in question accrued during the year under consideration but its payability was deferred to any point of time in future. In absence of such an evidence, submission of the assessee cannot be agreed to.

14. The assessee placed reliance on the decision in the case of DCIT Vs Tele Link Nieco Ltd. (2001) 73 TTJ 28 (Cal.). However, we find that the facts of that case are distinguishable from the facts of the instant case as in that case the assessee furnished an agreement dated 12.07.1989 entered into with ICICI Bank whereby the payability of interest was deferred by the bank. No such agreement could be produced by the assessee in the instant case.

15. The assessee also placed reliance on the decision in the case of Neo Pipes and Tubes Co. Ltd. Vs DCIT (2004) 86 TTJ 609

(Cal.) wherein also there was an agreement with the bank and the assessee for deferment of payability of interest.

16. The assessee also relied upon the decision of Hon'ble Supreme Court in the case of M/s Bharat Earth Movers Vs CIT (2000) 245 ITR 428 (SC) where the issue was not of Section 43B but was in relation to accrual of liability even when the actual quantification of liability could not be made. The above decision does not help the case of the assessee as in the instant case, the issue is not of accrual of liability but the issue relates to adding back of unpaid liability u/s 43B(e) of the Act.

17. Similarly, the other decision relied upon by the assessee also does not touch upon the issue under consideration which is of Section 43B(e) of the Act. We thus, confirm the orders of the lower authorities and dismiss the grounds of appeal of the assessee.

18. In the result, the appeals of the assessee are dismissed.
(Order Pronounced in the Open Court on 19/03/2019)

Sd/-
(N. K. Choudhry)
Judicial Member

Sd/-
(N. S. Saini)
Accountant Member

Dated: 19/03/2019

Subodh

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR