

5J-5h

IN THE INCOME TAX APPELLATE TRIBUNAL
SURAT BENCH, SURAT

Before Shri C.M.GARG, Judicial Member, and
Shri O.P. MEENA, Accountant Member

ITA 746/AHD/2012
&
ITA No.2617/AHD/2014

Assessment Year: 2008-09

Devanshi Devangkumar Gandhi, 6/2507, Limbu Sheri, Mahidharpura, Surat - 395001.	बनाम/ Vs.	ITO, Ward -2(2)(5), Surat
(Appellant)		(Respondent)
P.A. No. ABGPG4734Q		



Assessee by	Shri P. M. Jagaseth – CA
Revenue by	Shri Dilip Kumar – Sr. DR
Final Date of Hearing:	18/12/2017
Date of Order:	10/01/2018

आदेश / ORDER

Per Shri C.M. Garg, J.M:

These appeals has been filed by the assessee against the order of the learned CIT (Appeals) – IV, Surat, dated 24/01/2012 for A.Y. 2008-09 in the quantum appeal and CIT (Appeals) – I, Surat, dated 28.07.2014 passed under section 271(1)(c) of the Income Tax Act, 1961(for short the Act) for the assessment year 2008-09 in the penalty appeal.

2. In the beginning of the hearing the Ld. Counsel submitted that in quantum appeal ITA No 746/AHD/2012/SRT the assessee does not want to press ground no. 2 & 3 hence the same are dismissed as not pressed. Ground No. 4 & 5 are of general in nature which requires no adjudication and remaining sole effective ground no. 1 reads as follows: -

a) On the facts and in the circumstances of the case as well as law on the subject, the learned commissioner of the Income Tax (Appeals) has erred in confirming the action of the assessing officer in making addition of Rs. 20,12,220/- on account of difference of interest expenditure u/s 36 (i)(iii) of the I.T. Act 1961.

3. We have heard the arguments from both the sides and carefully perused the relevant material placed on the record of the Tribunal. The Ld. Counsel of the assessee submitted that the Assessing Officer made disallowance by observing that no active business has been carried out and there is no evidence that the borrowed funds have been utilized for the purpose of business. The Ld. Counsel further submitted that the Ld. CIT (A) wrongly held that interest was not incurred for the purpose of business and the same was inadmissible u/s 43B of the Act. The Ld. Counsel submitted that the Assessing Officer has made addition on GP rate of Rs. 4,21,831/- after rejection of books of accounts which establish that there was business activity by the assessee and observations of the Assessing



Officer that there was no business activity becomes perverse and incorrect in the light of said facts.

4. The Ld. Counsel also submitted that the assessee has paid interest to the Gujarat Industrial Co-operative Bank Ltd which is not a Scheduled Bank therefore, provisions of section 43B(a) of the Act does not apply to the present case. The Ld. Counsel further submitted that as per decision of ITAT, Ahmadabad 'A' Bench provision of section 43B(a) of the Act interest paid on the loans availed by the assessee from Co-operative Bank cannot be disallowed as Co-operative Banks cannot be equated with the Scheduled Banks. The Ld. Counsel also submitted that in the case of sister concern of assessee i.e. M/s Hari Om Silk Mills, ITAT, Ahmadabad in the ITA No 1076/AHD/2012 for preceding A.Y. 2007-08 has restored the issue to the file of Assessing Officer, thus, present case may also be restored to the file of Assessing Officer on the same line.



5. Replying to the above, the Ld. Departmental Representative (DR) strongly supported the orders of the authorities below. However, he could not controvert the fact that the Tribunal, in the case of sister concern of the assessee by order dated 26/04/2016 (Supra), has restored the issue to the file of the Assessing Officer and assessee has paid impugned interest to the Gujarat Industrial Co-operative Bank Ltd, Surat.

6. Placing rejoinder to the above, the Ld. Counsel of the assessee submitted that as per order of the ITAT, Ahmadabad dated 26/04/2016 (Supra) the provision of section 43B(a) of the Act are not applicable to the present case and thus, the case may be restored to the file of Assessing Officer for fresh adjudication after allowing opportunity of being heard to the assessee.

7. First of all, we may point out that the parties to these appeals have agreed to the facts that the quantum appeal may be restored to the file of Assessing Officer for a fresh adjudication in the light of earlier Tribunal order in the case of sister concern dated 26/04/2016 (Supra) but since from the record we find that every fact and circumstances required for adjudication of the issue are there on the record of the Tribunal therefore we decline to accept said request of the parties and proceed to decide the quantum appeal on merits.

8. On careful consideration of above rival submissions we are of the view that as per provisions of section 43B(a) of the Act 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, the deduction is to be allowed only on actual payment. As per section 43B(e) of the Act any sum payable by the assessee as interest on any loan from a Scheduled Bank is to be allowed on actual payment. As per explanation 4(aa) to



section 43B of the Act Scheduled Bank shall have the meaning assigned to it in the explanation to clause (iii) of subsection (5) of section 11 of the Act, which provides that the Scheduled Bank means State Bank of India & other Banks created under various laws but it does not state that Co-operative Banks are Scheduled Banks. We may also point out that in clause (iii) of subsection (5) of section 11 of the Act, Scheduled Bank or a Co-operative Society engage in carrying on the business in banking has been mentioned but in the definition of Scheduled Bank there is no mentioning of letter kind of banks i.e. Co-operative Banks which means that the legislation has not included Co-operative Banks within the ambit of provision of Section 43B of the Act.



9. In this situation and in the backdrop of above facts, we are inclined to hold that the assessee was conducting business activities during the financial year under consideration as the Assessing Officer has made GP rate addition to the income of the assessee on estimate basis based on turnover. It is not a case of the Assessing Officer that the assessee either diverted or misused the borrowed funds out of business, thus, it is has to presume that the assessee used borrowed funds for her business. So far as factum of non-payment of alleged interest during the financial period is concern, as we have noted above that the provision of section 43B of the Act does not apply to the interest due to the Co-operative Bank therefore, no disallowance can be made by taking aid of said provision.

Finally we are inclined to hold that the outstanding amount of interest as on 31/03/2008 i.e. 20,12, 220/- is allowable u/s 36(1)(iii) of the Act as when out of entire interest due to the assessee i.e. Rs. 1, 26,83,389.70 the major part of the same has been allowed then the outstanding amount on the last day of year i.e. difference between the due and paid interest cannot be disallowed by taking aid of section 43B of the Act as undisputedly interest has been paid to a Co-operative Bank. Accordingly ground no. 1 of the assessee is allowed and Assessing Officer is directed to allow the outstanding interest as on last day of the financial year to the Co-operative Bank.

10. The assessee has raised following grounds of appeal in ITA No. 2617/AHD/2014/SRT for A.Y 2008-09: -



- a) *On the facts and in the circumstances of the case as well as law on the subject, the learned commissioner of the Income Tax (Appeal) has erred confirming the action of the assessing officer in levying penalty of Rs. 6,48,260/- u/s 271(1)(c) of the Income Tax Act, 1961.*
- b) *It is therefore prayed that the above addition may please be deleted as learned members of the tribunal may deem it proper.*

11. The Ld. Counsel also placed reliance on the decision of Hon'ble Madras High Court in the case of CIT Vs MSK Construction Pvt. Ltd dated 05/03/2007 in TC(A) No 196 & 197 of 2007 and submitted that the disallowance of interest u/s 43B of the Act does not amount to concealment of interest

and when there is no tax payable then penalty could not be levied. The Ld. Counsel has also placed reliance on the order of ITAT, Ahmadabad 'C' Bench in the case of Evergreen Synthetics Pvt. Ltd dated 01/04/2016 in ITA No. 1151/AHD/2012 for A.Y. 2005-06, wherein considering the ratio of the decision of Hon'ble Madras High Court in the case of MSK (Supra) it has been held that on mere disallowance of interest expenses u/s 43B of the Act penalty would not be leviable.

12. On the other hand, the Ld. DR supported the penalty order and submitted that the assessee did not appear before the Ld. CIT(A) and after considering the record and facts of the case the first appellate authority rightly confirm the penalty.

13. On careful consideration of above rival submission we are of the view that since by the earlier part of this order we have allowed appeal of the assessee challenging the addition made u/s 43B of the Act therefore, the penalty based on such addition, which was not in existence being found non sustainable, cannot be held as valid and sustainable thus, we direct the Assessing Officer to delete the penalty. Accordingly, grounds of assessee in penalty appeal are allowed.



14. In the result both the appeals are allowed.

Order pronounced in the open court on 10/01/2018

Sd/-

(O.P. Meena)
ACCOUNTANT MEMBER

Sd/-

(C.M. Garg)
JUDICIAL MEMBER



दिनांक /Dated : 10th January, 2018

Nhanu/LDC

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard file. ✓

By order

J. Carve
25/1/18
Sr. Private Secretary, Surat
For सहायक पंजीकार
आयकर अपीलपीठ, सुरत.
सुरत न्यायपीठ, सुरत.