

**THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "H" MUMBAI**

**BEFORE SHRI PRAMOD KUMAR (VICE PRESIDENT) AND  
SHRI RAVISH SOOD (JUDICIAL MEMBER)**

**ITA No.599/MUM/2019  
(Assessment Year: 2010-11)**

DCIT -2(2)(1)  
Room No.545, 5<sup>th</sup> Floor,  
Aayakar Bhavan,  
Mumbai – 400 020

M/s K.S. Diesels Ltd.  
Vs. 4<sup>th</sup> Floor, Bombay Mutual  
Chambers, 19-21,  
Ambalal Doshi Marg, Fort,  
Mumbai – 400 001

**PAN No. AAACK3253C**

**(Revenue)**

**(Assessee)**

Assessee by  
Revenue by

: Shri Dhruv Kapadia, A.R  
: Shri Gurubinder Singh, D.R

Date of Hearing : 21/09/2021  
Date of pronouncement : 29/09/2021

**ORDER**

**PER RAVISH SOOD, J.M:**

The present appeal filed by the revenue is directed against the order passed by the CIT(A)-5, Mumbai, dated 20.11.2018, which in turn arises from the order passed by the A.O u/s 143(3) r.w.s 147 of the Income Tax Act, 1961 (for short 'Act'), dated 26.02.2016 for A.Y 2010-11. The revenue has assailed the impugned order on the following solitary ground before us:

"Whether on the fact and circumstance of the case law, Ld. CIT(A) is justified in allowing partly the assessee claim of Rs.3,23,84,509/- u/s 43B of the I.T. Act and given direction A.O for further verification without appreciating the fact that said disallowance was made by the A.O rightly and per law during the assessment proceedings."

2. Briefly stated, the assessee company which is engaged in the business of manufacturing of fuel injection equipments and pump sets had filed its return of income for A.Y 2010-11 on 29.09.2010, declaring a loss of (-) Rs.1,46,11,516/- (including unabsorbed depreciation of Rs.7,29,864/-). The return of income filed by the assessee company was initially processed as such u/s 143(1) of the Act. Original assessment was framed by the A.O vide his order passed u/s 143(3), dated 08.02.2013 determining the total income of the assessee company at (-) Rs.1,44,83,023/-. Subsequently, the A.O holding a belief that the assessee's claim for deduction u/s 43B of interest payable to Gujarat Industrial Investment Corporation Ltd.(GIIC) of Rs.3,23,84,509/- was wrongly allowed while framing the assessment u/s 143(3), dated 08.02.2013, reopened the case of the assessee u/s 147 of the Act.

3. During the course of the reassessment proceedings, it was observed by the A.O that the assessee company had obtained a "term loan" from Gujarat Industrial Investment Corporation Ltd. (GIIC) way back in the year 1973 for acquisition of new plant and machinery. Thereafter, as the assessee company in succeeding years had suffered losses and had become a sick company, it thus failed to repay the aforesaid loan. Interest charged by GIIC on the aforesaid loan over the years was provided for by the assessee company as per the mercantile system of accounting in its 'books of accounts'. However, as the aforesaid amount of interest was not actually paid by the assessee, therefore, it is stated to have while computing its income for the said respective years disallowed the same as per the mandate of Sec. 43B of the Act, as under :

Sr. No.	Assessment Year	Amount (in Rs.)
1.	2002-03	26,83,113/-
2.	2003-04	31,72,781/-
3.	2004-05	33,06,524/-
4.	2005-06	44,36,520/-
5.	2006-07	52,46,185/-
6.	2007-08	62,03,613/-

7.	2008-09	73,35,773/-
	Total	3,23,84,509/-

As per the records, the amount outstanding by the assessee company towards GIIC on the first day of the accounting year under consideration i.e on 01.04.2009 amounted to Rs.4,75,31,789/- (including interest).The assessee company moved a request for “One Time Settlement” (OTS) qua its aforesaid outstanding dues before GIIC. GIIC accepted the request of the assessee company and vide its letter dated 10.07.2009 sanctioned OTS during the year under consideration. As per the terms and conditions of OTS the assessee company was required to make a payment of Rs. 2,35,00,000/- as full and final settlement of its outstanding dues to GIIC. OTS amount to be paid by the assessee comprised of viz. (i). Principal: Rs. 43,80,917/-; and (ii). Interest : Rs. 1,91,19,083/-. As per the aforesaid settlement the assessee company made a payment of Rs. 2,35,00,000/- during the year under consideration. In pursuance of the terms of the OTS the following position emerged as per the books of accounts of the assessee company:

Sr. No.	Particulars	Amount (in Rs.)		
		Principal	Interest	Total
1.	Total amount outstanding to GIIC as on 01.04.2009	79,92,000	3,95,39,789	4,75,31,789
2.	Waiver received by the appellant under OTS, (distributed between interest and principal on the basis of net outstanding after reducing an amount of Rs.10,00,000/- form principal as reversal of old provision)	36,11,083	2,04,20,706	2,40,31,789
3.	Payment made by the appellant to GIIC under OTS	43,80,917	1,91,19,083	2,35,00,000

The Principal of Rs.36,11,083/- AND Interest of Rs.2,04,20,706/- waived under OTS were credited by the assessee in its Profit and loss account under the head ‘Extraordinary Items’. In its return of income for the year under consideration the Principal of Rs.36,11,083/- waived under OTS was reduced by the assessee by claiming the same as a ‘Capital receipt’. Also, the assessee in its computation of income had reduced from its income the amount of Interest of Rs.3,23,84,509/-

that was stated to have been suo motto disallowed u/s 43B over the years i.e A.Y 2002-03 to A.Y 2008-09. Rationale for reducing the aforesaid amount of interest of Rs. 3,23,84,509/-(supra) from its total income was explained by the assessee as under:

- i. Out of the amount of Rs.3,23,84,509/- disallowed u/s 43B in earlier years, an amount of Rs.1,91,19,083/- was paid by the appellant to GIIC as a part of full and final payment of Rs.2,35,00,000/- in OTS. The amount so paid was expressly deductible u/s 43B in the year of payment.
- ii. The appellant credited the full amount of interest waived as per books of accounts of Rs.2,04,20,706/- in the P & L Account. Out of this the amount of Rs.1,32,65,426/- [Rs.3,23,84,509 (-) Rs. 1,91,19,083/-] was already disallowed u/s 43B in earlier years. It is settled principle under taxation that the credit back an expense not allowed in earlier is not taxable. This avoids double taxation of same amount.”

However, the A.O while framing the assessment rejected the assessee’s claim for deduction of interest of Rs.3,23,84,509/- (supra) while computing its income, for the following reasons:

- i. The appellant failed to reconcile the amount of Rs.3,23,84,509/- claimed u/s 43B of the Act.
- ii. Under Sec. 43B read with Explanation 3C & 3D thereof, the amount of interest actually paid is only allowable and waiver of interest does not amount to actual payment.
- iii. The waiver of principal amount of loan was also taxable as the loan was for fixed asset and the same was depreciated over a period of time.”

Accordingly, the A.O vide his order passed u/s 143(3) r.w.s 147, dated 26.02.2016 had after disallowing the assessee’s claim for deduction u/s 43B of interest payable to GIIC of Rs.3,23,84,509/- assessed its total income at Rs.1,79,01,490/-.

4. Aggrieved, the assessee carried the matter in appeal before the CIT(A). After deliberating at length on the issue in hand it was observed by the CIT(A) that as the interest of Rs.3,23,84,509/- (supra) had never been claimed/allowed as an expense to the assessee and was in fact disallowed in the earlier years u/s

43B of the Act, therefore, the remission of the said amount, either in full or in part could not be brought to tax u/s 41(1) of the Act. It was however noticed by the CIT(A) that the A.O had not made any addition towards remission /cessation of interest liability u/s 41(1) of the Act, but had declined the assessee's claim for deduction of the aforesaid interest of Rs.3,23,84,509/-(supra), for the reason, that the waiver of interest cannot be held to be 'actually paid' within the meaning of Sec. 43B of the Act. It was further observed by the CIT(A) that the assessee had in its Profit and loss account for the year under consideration credited waiver of interest of Rs.2,04,20,706/- and not the entire amount of interest of Rs.3,23,84,509/-(supra). Backed by the aforesaid facts, it was observed by the CIT(A) that the claim of the assessee that it had credited the entire sum of Rs.3,23,84,509/-(supra) in its Profit and loss account was not correct and required to be verified. In the backdrop of the aforesaid facts, the A.O was directed by the CIT(A) to verify the records and ascertain the correct amount of waiver of interest income payable to GIIC that was credited by the assessee in its profit and loss account for the year under consideration. Also, the A.O was directed to verify as to whether or not the interest waived under OTS was included in the figure of 'Profit' as per Profit & loss account taken to the computation of income a/w the fact that as to whether or not the aforesaid interest payable to GIIC of Rs.3,23,84,509/- (supra) was disallowed by the assessee in the earlier years u/s 43B of the Act. The A.O was directed by the CIT(A) that the assessee's claim for deduction of interest payable to GIIC that was waived under OTS was to be allowed to the extent the same cumulatively satisfied a set of two fold conditions, viz. (i). that the interest waived was credited in the profit & loss a/c of the assessee company for the year under consideration; and (ii). that such interest was disallowed by the assessee u/s 43B in the earlier years. Accordingly, the CIT(A) in terms of his aforesaid observations partly allowed the appeal of the assessee company.

5. The revenue being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The Id. Authorized Representative (for short 'A.R') for the assessee relied on the orders of the CIT(A).

6. Per contra, the Id. Departmental Representative (for short 'D.R') though did not seriously objected to the observations of the CIT(A), but at the same time relied on the assessment order.

7. We have heard the Id. Authorized Representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as considered the judicial pronouncements that have been pressed into service by the Id. A.R to drive home his claim. As observed by us hereinabove, the assessee company had raised a "term loan" from Gujarat Industrial Investment Corporation Ltd. (GIIC) way back in the year 1973 for acquisition of new plant and machinery. Thereafter, as the assessee company in succeeding years had suffered losses and was declared a sick company, it had thus failed to repay the aforesaid loan. It is the claim of the assessee that interest aggregating to Rs.3,23,84,509/- (supra) charged over the years by GIIC on the "term loan" was though provided for in its 'books of accounts' as per the mercantile system of accounting, but the same not having been paid during the said respective years was consistently disallowed u/s 43B of the Act. On 01.04.2009 the outstanding dues of the assessee company towards GIIC was Rs.4,75,31,789/- (including interest). OTS was sanctioned by GIIC vide its letter dated 10.07.2009. As per terms and conditions of OTS the assessee company had to make a payment of Rs. 2,35,00,000/- towards full and final settlement of its outstanding dues towards GIIC. Complying with the terms and conditions of OTS the assessee company had paid an amount of Rs. 2,35,00,000/- to GIIC, viz. (i). Principal: Rs. 43,80,917/-; and (ii). Interest: Rs.1,91,19,083/-. As a result of the aforesaid settlement the assessee company had inter alia received a waiver of interest of Rs.2,04,20,706/-. In its Profit & loss a/c the assessee company had credited the

amount of interest waived of Rs. 2,04,20,706/- under the head 'Extraordinary Item'. Thereafter, the assessee had in its computation of income separately claimed deduction of interest of Rs.3,23,84,509/- (supra) i.e pertaining to the preceding years i.e A.Y.2002-03 to AY 2008-09 that is stated to have been disallowed u/s 43B while computing the income of the said respective years.

8. Before us the controversy involved lies in a narrow compass i.e the entitlement of the assessee for claim of deduction of interest of Rs. 3,23,84,509/- (supra). On the one hand the assessee had claimed deduction of the entire amount of interest of Rs.3,23,84,509/- (supra) that is stated to have been disallowed u/s 43B while computing the income of the respective preceding years; while for on the other hand the A.O being of the view that the aforesaid interest that was disallowed in the preceding years u/s 43B was not actually paid by the assessee during the year under consideration, thus, was not entitled for deduction as claimed by the assessee. On appeal, it was observed by the CIT(A), that to the extent the part of interest of Rs.3,23,84,509/-(supra) that was disallowed u/s 43B in the earlier years had been credited by the assessee in its profit and loss account for the year under consideration, its claim for deduction of the same in its computation of income was in order. However, in all fairness the CIT(A) had directed the A.O to verify from the records and ascertain the correct amount that was credited on account of waiver of interest payable to GIIC in the Profit and loss account of the assessee for the year under consideration; and also, whether the same had been included in the figure of 'Profit' as per Profit and loss account taken to the computation of income a/w the fact as to whether the said amount of Rs.3,23,84,509/- being interest payable to GIIC had been disallowed u/s 43B in the earlier years, as claimed by the assessee company. Backed by his aforesaid observations, the CIT(A) had directed the A.O to delete the disallowance to the extent waiver of interest payable to GIIC was credited by

the assessee in its Profit and loss account of the current year, provided the same had also been disallowed u/s 43B of the Act in the earlier years.

9. We have deliberated at length on the issue in hand and find that the controversy involved in the present case hinges around the maintainability of the assessee's claim for deduction of interest of Rs. 3,23,84,509/- (supra). It is the claim of the assessee that as the aforesaid interest aggregating to Rs. 3,23,84,509/- was not actually paid by it in the years to which they pertained i.e A.Y 2002-03 to A.Y 2008-09, therefore, while computing its income for the said respective years it had suo motto disallowed the same as per the mandate of Sec. 43B of the Act. We may herein observe, that as held by the CIT(A), and rightly so, as the assessee had after OTS paid interest of Rs. 1,91,19,083/- during the year under consideration and not the entire amount of Rs. 3,23,84,509/-, therefore, the narration in its computation of income i.e "*Amount disallowed u/s 43B pd. during the year*" is not only incorrect but also confusing. Be that as it may, it is a matter of fact borne from the record that the assessee company during the year under consideration had under OTS paid an amount of Rs.1,91,19,083/- towards interest to GIIC. If the claim of the assessee that interest payable to GIIC of Rs. 3,23,84,509/- (supra) in the preceding years i.e A.Y 2002-03 to A.Y 2008-09 had been disallowed u/s 43B in the said respective years is found to be in order, then, we find no justification that as to why its claim for deduction of interest of Rs. 1,91,19,083/- i.e having actually been paid during the year under consideration is not to be allowed u/s 43B of the Act. Insofar the assessee's claim for deduction of the balance interest of Rs. 1,32,65,426 [Rs. 3,23,84,509/- (-) Rs. 1,91,19,083/-] is concerned, we concur with the view taken by the CIT(A) that if the said amount was already disallowed by the assessee u/s 43B in the earlier years and formed part of the amount of interest of Rs. 2,04,20,706/- that was waived under OTS and credited in its Profit & loss a/c for the year under consideration, then, the declining of the assessee's claim for

deduction of the said amount in the computation of income would result to double taxation. In our considered view, once the aforesaid interest/any part of the same had been disallowed u/s 43B in the aforementioned preceding years, then, crediting of such interest/part thereof in a subsequent year in which the same had been waived under OTS would result to a double taxation of the said amount. Our aforesaid view is fortified by the judgment of the Hon'ble High Court of Madras in the case of CIT VS. M/s Samudra Shoe Overseas Ltd, TCA No. 349 of 2016, dated 06.06.2016. It was observed by the Hon'ble High Court that the interest payable by the assessee to the financial institution which was earlier disallowed u/s 43B of the Act was eligible as a deduction on the waiver of such interest by the bank in One Time Settlement (OTS).

10. Backed by the facts involved in the case before us, we are of the considered view that as the assessee as per the terms and conditions of the OTS had during the year under consideration made a payment of interest of Rs.1,91,19,083/- to GIIC out of the interest of Rs.3,23,84,509/- (supra) that was disallowed u/s 43B in the said earlier years, therefore, such sum so actually paid would be eligible as a deduction during the year under consideration u/s 43B of the Act. As regards the balance amount of interest of Rs.1,32,65,426/- [Rs.3,23,84,509/- (-) Rs.1,91,19,083/-], we concur with the view taken by the CIT(A) that if the said amount was disallowed u/s 43B in the earlier years and had been credited by the assessee company in its Profit and loss account for the year under consideration on account of waiver of interest income payable to GIIC, then, the claim of the assessee for deduction of such amount in its computation of income is in order. We, thus, in terms of our aforesaid observations find no infirmity in the view taken by the CIT(A) who had directed the A.O to carry out certain verifications, viz. (i). that the interest waived was credited in the profit & loss a/c of the assessee company for the year under consideration; and (ii). that the interest waived had been included in the figure of

'Profit' as per the profit & loss a/c taken to the computation of income; and (iii). that such interest payable to GIIC was disallowed u/s 43B in the earlier years. Accordingly, in terms of our aforesaid observations finding no infirmity in the view taken by the CIT(A) we uphold his order in terms of our aforesaid observations.

11. The appeal filed by the revenue being devoid and bereft of any merit is dismissed in terms of our aforesaid observations.

Order pronounced in the open court on 29.09.2021

Sd/-  
(Pramod Kumar)  
VICE PRESIDENT

Sd/-  
(Ravish Sood)  
JUDICIAL MEMBER

Mumbai;  
Dated: 29.09.2021  
PS: Rohit

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,  
//True Copy//

(Sr. Private Secretary)  
**ITAT, Mumbai**