IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "C", BANGALORE

Before Shri George George K, JM & Ms.Padmavathy S, AM

ITA No.1954/Bang/2016 : Asst.Year 2008-2009

M/s.I.G.Petrochemicals Limited D-4, Jyothi Complex H.No.1/32/38/103 134/1 Infantry Road Bangalore – 560 001. **PAN : AAACI4115R.**	v.	The Deputy Commissioner of Income-tax, Circle (3)(1)(1) Bengaluru.
(Appellant)		(Respondent)

Appellant by : Smt.Pratibha, Advocate
Respondent by : Smt.Vandana Sagar, CIT-DR

Date of Hearing : 16.02.2022		**Date of Pronouncement : 21.02.2022**

O R D E R

Per George George K, JM :

This appeal at the instance of the assessee is directed against CIT(A)'s order dated 30.09.2019. The relevant assessment year is 2008-2009.

2. The assessee has raised nine grounds, however, the solitary issue argued is regarding allowability of expenditure u/s 43B of the I.T.Act incurred under the head customs duty, excise duty, interest and penalty on payment basis.

3. The brief facts of the case are as follows:

The assessee is a company engaged in the manufacture and sale of chemicals. For the assessment year 2008-2009, the return of income was filed declaring `Nil' income under the normal provisions after setting of brought forward losses. The assessee had declared book profit amounting to

Rs.34,47,91,844 u/s 115JB of the I.T.Act and paid the tax under the MAT. The return was processed u/s 143(1) of the I.T.Act and later selected for scrutiny by issuance of notice u/s 143(2) of the I.T.Act. During the course of assessment, the assessee vide its letter dated 26.10.2010 had claimed a sum of Rs.6,65,34,829 as deduction u/s 43B of the I.T.Act. The said expenditure was paid by the assessee towards customs duty, excise duty, interest and penalty for the import of turbine generator set. The assessee was promoted by Mysore Petro Chemicals Limited (MPCL). The MPCL had imported turbine generator set during the year 1996 and leased the same to the assessee-company. The assessee claimed that it was a 100% EOU and accordingly claimed exemption under Notification No.13/81 and 53/97 of the Customs Department permitting duty free of import of capital goods. The assessee states that subsequently, the Customs and Central Excise Department issued show cause notice on 22.03.2002, whereby the assessee's claim of exemption for duty free import was held to be wrong. It was stated by the Customs and Central Excise Department that the assessee had used imported turbine for producing electricity which were sold to Maharashtra Electricity Board, and therefore, exemption was wrongly claimed by the assessee. Accordingly, the Customs and Central Excise Authorities had levied a sum of Rs.6,65,34,829 comprising of customs duty, excise duty, interest and penalty. The assessee had deposited this amount under protest on 27.11.2007. The assessee vide its letter dated 26.10.2010 before the Assessing Officer, claimed the impugned payment as an allowable deduction. However, the

A.O. did not consider the claim at the time of passing the assessment order.

4. Aggrieved, the assessee preferred an appeal to the first appellate authority. Before the first appellate authority, it was contended that the issue relating to the levy of import duty by the Customs and Central Excise Authorities was pending in appeal and payment of Rs.6,65,34,829 was made under protest. It was submitted that the assessee did not charge this amount as expenditure to the profit and loss account, and accordingly, did not claim this expenditure while filing the return of income for the year under consideration. It was contended that during the course of assessment proceedings the assessee made a claim for deduction of the amount before the A.O. vide letter dated 26.10.2010 and the A.O. has erred in not considering the claim of the assessee while passing the assessment order. The CIT(A) rejected the claim of the assessee. The relevant finding of the CIT(A) reads as follows:-

> *"7.1 The appellant has claimed this amount of deduction u/s 43B of the Act stating that the payment is in the nature of tax, duty, cess or fee which was paid by the appellant during the year under consideration and hence the amount is allowable as deduction u/s 438 of the Act. In this regard it is relevant to note that Sec.43B of the Act refers to allowability of expenses which are `otherwise allowable' under the Act, subject to. other conditions. Therefore it is imperative that for claiming any deduction u/s 438 of the Act, the amount should be 'otherwise allowable' as deduction. In the present case, the Turbine was imported , by M/s Mysore Petro Chemicals Limited and therefore, the liability for payment of the import duty and other ancillary levies should be that of MPCL and not of the appellant. Therefore, the amount paid by the appellant cannot be considered to be an expenditure which is otherwise allowable as deduction in the hands of the appellant. Further as discussed above, the impugned expenditure has been incurred directly in connection with the*

import of the capital asset and therefore, the same cannot be claimed as revenue expenditure. Accordingly, the provisions of section 438 cannot be applied to claim deduction of an amount which is otherwise not allowable as deduction in the hands of the appellant.

7.2 It is also observed that the impugned amount includes a sum of Rs.75, 50,0001 - paid as penalty, for specific infraction of the Customs and Central Excise law. Therefore, this amount being penalty, in any case cannot be allowed as deduction. Further, it is also found that the payment of the impugned amount has been made by the appellant under protest. Therefore, the amount is definitely a disputed liability and hence it cannot be said. that the liability to pay such amount had arisen during the year under consideration. Accordingly the claim of deduction for the same cannot be sustained.

7.3 It is also relevant to note that the appellant has not charged this amount as expenditure to its P & L account and accordingly, the same amount has not been claimed as expenditure in the return of income. The appellant has only made the claim for deduction by filing a letter before the AO during the assessment proceedings. Therefore, following decision of the Hon'ble Supreme Court in the case of Goetze India Limited vs. CIT (2006) 157 Taxman 1 (SC), the disallowance of the claim made by the AO is found to be legally justified.

5. Aggrieved, assessee has filed this appeal before the Tribunal. The learned AR has filed a paper book comprising of 119 pages. Apart from reiterating the submissions made before the Income Tax Authorities, the learned AR relied on the judgment of the Hon'ble jurisdictional High Court in the case of CIT v. M/s.NCR Corporation Pvt. Ltd. reported in (2020) TaxCorp (DT) 83007 (HC-Karnataka). (judgment dated 16th June, 2020)

6. The learned Departmental Representative, on the other hand, strongly supported the findings of the CIT(A).

7. We have heard rival submissions and perused the material on record. Admittedly, the turbine generator set including water cooled condensing unit and accessories were imported on 14.07.1995 by the assessee's promoter MPCL. The turbine generator imported by MPCL was leased to the assessee on 22.03.1996. The lease was extended from time to time by executing supplementary lease agreement. Pursuant to the lease agreement, the assessee was paying lease rentals to MPCL and the same was claimed as deduction in profit and loss account (for which there is no dispute). During the relevant assessment year, the assessee paid under protest on 22.11.2007, customs duty, excise duty, interest and penalty amounting to Rs.6,65,34,829. The details of payments are as follows:-

(i)	Customs duty	Rs.1,93,15,875
(ii)	Excise duty	Rs. 2,82,924
(iii)	Interest	Rs.3,93,86,030
(iv)	Penalty	Rs. 75,50,000

Total		Rs.6,65,34,829
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7.1 As mentioned earlier, the turbine generator set was not imported by the assessee, the customs and other statutory charges are the liability of the importer, which goes to the addition of cost of the asset on which depreciation can be claimed. There is nothing on record nor in the lease agreement entered between the assessee and MPCL which suggest that the assessee shall be liable for the statutory dues of import of turbine generator. The assessee had claimed this amount as deduction u/s 43B of the I.T.Act. Section 43B of

the I.T.Act refers to allowability of expenditure which are otherwise allowable under the Act, subject to other conditions. Therefore, it is imperative for claiming any deduction u/s 43B of the I.T.Act, amounts should be otherwise deductible. In the instant case, it is a case of import of a capital asset and that too not by the assessee, hence, the impugned expenditure cannot be claimed as a revenue expenditure. Therefore, the provisions of section 43B of the I.T.Act cannot be applied to the claim of deduction of an amount which otherwise is not allowable as deduction in the hands of the assessee. Further, the impugned amount includes a sum of Rs.75,50,000 paid as penalty for infraction of customs duty and central excise duty. This amount being penalty, cannot be allowed as a deduction. Moreover, the payment has been made by the assessee under protest. Therefore, the amount is definitely a disputed liability and cannot be said that the liability has crystallized / accrued to the assessee during the relevant assessment year.

7.2 Before concluding, it is to be mentioned that the learned AR has relied on the judgment of the Hon'ble jurisdictional High Court in the case of CIT v. M/s.NCR Corporation Pvt. Ltd. (supra). The judgment of the Hon'ble jurisdictional High Court relied on by the learned AR does not help the case of the assessee. In the case considered by the Hon'ble jurisdictional High Court, the assessee had taken the premises on lease for a period of three years and incurred expenditure on the leasehold premises. The Hon'ble High Court held that the expenses were incurred for conducting the business of the assessee more profitability and more

successfully. It was held by the Hon'ble High Court that it is a revenue expenditure and has confirmed the view taken by the Tribunal. In the instant case, the import is of capital asset and that too not by the assessee, hence, the impugned expenditure cannot be equated with the expenditure incurred for improvement of a leasehold property. Therefore, the claim of the assessee has been rightly rejected by the CIT(A). It is ordered accordingly.

8. In the result, the appeal filed by the assessee is dismissed.

Order pronounced on this 21st day of February, 2022.

Sd/-	**Sd/-**
(Padmavathy S)	**(George George K)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Bangalore; Dated : 21st February, 2022.
Devadas G*

Copy to :
1. The Appellant.
2. The Respondent.
3. The CIT(A)-3, Bangalore.
4. The Pr.CIT-3, Bangalore.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore