आयकर अपीलीय अधिकरण, 'बी' न्यायपीठ,चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH, CHENNAI

श्री महावीर सिंह, उपाध्यक्ष एवं श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष

BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENTAND
SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA No.: 968/CHNY/2023**
निर्धारण वर्ष/Assessment Year: 2015-16

The Deputy Commissioner of Income Tax, Corporate Circle – 3(1), Chennai – 600 034.	Vs.	**Tamil Nadu State Marketing Corporation Limited,** CMDA Tower II, IV Floor, Gandhi Irwin Bridge Road, Egmore, Chennai – 600 008. **PAN: AAACT 2964P**
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by : Shri S. Senthil Kumaran, CIT
प्रत्यर्थी की ओर से/Respondent by : Shri R. Vijayaraghavan, Advocate

सुनवाई की तारीख/Date of Hearing : 30.01.2024
घोषणा की तारीख/Date of Pronouncement : 30.01.2024

आदेश /O R D E R

PER MAHAVIR SINGH, VICE PRESIDENT:

This appeal by the assessee is arising out of the order of the Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi in order No.ITBA/NFAC/S/250/2023-24/1054468852(1) dated 20.07.2023. The assessment was framed by the Assessing Officer, National Faceless Assessment Centre, Delhi

for the assessment year 2015-16 u/s.147 r.w.s. 144B of the Income Tax Act, 1961 (hereinafter 'the Act'), vide order dated 28.09.2021.

2. The only issue in this appeal of Revenue is against the order of CIT(A) deleting the disallowance made by the AO by invoking the provisions of section 40(a)(iib) of the Act being VAT in the nature of "any other fee or charge". For this, Revenue has raised the following three grounds:-

"1. The order of the learned ld.CIT(A) is contrary to law and facts and circumstances of the case.

2. The ld.CIT(A) has erred in following the decision of the Hon'ble ITAT in the assessee's own case for the A.Y. 2014-15, without appreciating the fact that the said order was not accepted by the Revenue & further appeal against the said order was filed by the Revenue.

3. For these and other grounds that may be adduced at the time of hearing, it is prayed that the order of the Ld.CIT(A) be set aside and that of the Assessing Officer be restored.

3. Brief facts are that the assessee is a government of Tamil Nadu undertaking engaged in the business of wholesale / retail vending in liquor. The assessee filed its return of income for the assessment year 2015-16 declaring income at Rs.Nil. The assessee's case was reopened u/s.147 of the Act after taking prior approval from the Additional Commissioner of Income Tax, Corporate Range-3, Chennai. The assessee, in its books has debited a sum of Rs.12906

crores as VAT expenses in the profit & loss account. During the assessment proceedings, the AO has considered the amount debited of Rs.12,906 crores in the profit and loss account as the indirect appropriation of the surplus of the state government undertaking viz the assessee by the state government itself. The AO held that the VAT expenses levied under the head VAT expenses fits perfectly into the clause "any other fee or charge" by whatever name called as per section 40(a)(iib) of the Act. Accordingly, the AO has disallowed VAT expenses claimed at Rs.12,906 crores u/s.40(a)(iib) of the Act. Aggrieved, assessee preferred appeal before CIT(A).

4. The CIT(A) following the Tribunal's decision in assessee's own case for the assessment year 2014-15 deleted the disallowance by holding in para 5.5 as under:-

> *"5.5 It is evident from the above judgment that, the VAT payment made by the appellant would not attract the provisions of section 40(a)(iib) of the Act. Hence, I am of the view that VAT expenses claimed by the appellant are allowable as deduction u/s.37 r.w.s. 43B of the Act. So respectfully following the decision of the Hon'ble ITAT in the appellant's own case for the A.Y. 2014-15, the disallowance made by the AO of Rs.12,906 Cr (VAT expenses is hereby deleted. Accordingly Grounds 1 to 7 are allowed."*

5. At the outset, the ld.counsel for the assessee filed copy of Hon'ble Supreme Court judgment in the case of Kerala State

Beverages Manufacturing & Marketing Corporation Ltd., vs. ACIT in Civil Appeal No.11 of 2022 and pointed out that the Hon'ble Supreme Court has considered this issue in great detail and finally held that the VAT is entirely distinct as that of ''any other fee or charge''. The Hon'ble Supreme Court held as under:-

> *14. In the instant case the gallonage fee, licence fee, shop rental (kist), surcharge and turnover tax are the amounts of which assessee claims that they are not attracted by Section 40(a)(iib) of the Act. On the other hand it is the case of the respondent/revenue that all the said components attract the ingredients of Section 40(a)(iib)(A) or Section 40(a)(iib)(B), as such they are not deductible. Broadly these levies can be divided into three categories. Gallonage fee, licence fee and shoprental (kist) are in the nature of fee imposed under the Abkari Act of 1902. These are the fees payable for the licences issued under FL-9 and FL-1. In the impugned order, the High Court has held that the gallonage fee, licence fee and shop rental (kist) with respect to FL-9 licence are not deductible, as it is an exclusive levy on the Corporation. Further a distinction is drawn from FL-1 licence from FL-9 licence, to apply Section 40(a)(iib), only on the ground that, FL-1 licences are issued not only to the appellant/KSBC but also issued to one other Government Undertaking, i.e., Kerala State Co-operatives Consumers Federation Ltd. High Court has held that as there is no other player holding licences under FL-9 like KSBC as such the word 'exclusivity' used in Section 40(a)(iib) attract such amounts. At the same time only on the ground that FL-1 licences are issued not only to the KSBC but also to Kerala State Co-operatives Consumers' Federation Ltd., High Court has held that exclusivity is lost so as to apply the provision under Section 40(a)(iib). If the amended provision under Section 40(a)(iib) is to be read in the manner, as interpreted by the High Court, it will literally defeat the very purpose and intention behind the amendment. The aspect of exclusivity under Section 40(a)(iib) is not to be considered with a narrow interpretation, which will defeat the very intention of Legislature, only on the ground that there is yet another player, viz., Kerala State Co-operatives Consumers' Federation Ltd. which is also granted licence under FL-1. The aspect of 'exclusivity' under Section 40(a)(iib) has to be viewed from the nature of undertaking on which levy is imposed and not on the number*

of undertakings on which the levy is imposed. If this aspect of exclusivity is viewed from the nature of undertaking, in this particular case, both KSBC and Kerala State Co-operatives Consumers' Federation Ltd. are undertakings of the State of Kerala, therefore, levy is an exclusive levy on the State Government Undertakings. Therefore, we are of the considered view that any other interpretation would defeat the very object behind the amendment to Income-tax Act, 1961.

14.1. It is fairly well settled that the interpretation is to be in the manner which will subserve and promote the object and intention behind the legislation. If it is not interpreted in the manner as aforesaid it would defeat the very intention of the legislation. To defeat the said provision, the State Governments may issue licences to more than one State owned undertakings and may ultimately say it is not an exclusive undertaking and therefore Section 40(a)(iib) is not attracted. The submission of Sri Ganesh, learned senior counsel for the appellant is that the gallonage fee, licence fee and the shop rental (kist) are the levies under the Abkari Act on all the licence holders, as such it cannot be said that same is an exclusive levy on the appellant/KSBC. It is submitted that because of the Abkari Policy in particular year, licences are issued in favour of the appellant – State owned Undertaking, as such it cannot be said that the statutory levies under the Abkari Act are on the State Government Undertaking and such levies are only on the licensees but not on the State-owned Undertakings like KSBC. The said submission cannot be accepted for the reason that by virtue of licence which is granted in favour of State-owned Undertaking, the statutory fees etc., viz., gallonage fees, licence fee and shop rental (kist) are payable by the appellant-Undertaking, i.e., KSBC.Once the State Government Undertaking takes licence, the statutory levies referred above are on the Government Undertaking because it is granted licences. Therefore, we are of the view that the finding of the High Court that gallonage fee, licence fee and shop rental (kist) so far as FL-1licences are concerned, is not attracted by Section 40(a)(iib), cannot be accepted and such finding of the High Court runs contrary to object and intention behind the legislation.

14.2. Further, because another State Government Undertaking, i.e., Kerala State Co-operatives Consumers' Federation Ltd. was also granted licences during the relevant years, as such exclusivity mentioned in Section 40(a)(iib) is lost, also cannot be accepted, for the reason that exclusivity is to be considered with reference to nature of licence and not

on number of State owned Undertakings. If the interpretation, as held by the High Court, is accepted, the legislative intent can be defeated by issuing licences in FL-1 to several State Government Undertakings and then make a contention that exclusivity is lost. Said interpretation runs contrary to the intent of the amendment.

14.3. So far as surcharge on sales tax is concerned, the High Court has held in favour of KSBC and against the revenue. The reasoning of the High Court is that surcharge on sales tax is a tax and Section 40(a)(iib) does not contemplate 'tax' and surcharge on sales tax is not a 'fee' or a 'charge'. Therefore, High Court was of the view that surcharge levied on KSBC does not attract Section 40(a)(iib) of the Act. The submission of Sri Venkataraman, learned ASG with regard to surcharge on sales tax is two-fold. One is that the levy of surcharge on sales tax is also an exclusive levy on KSBC, therefore, attracts Section 40(a)(iib) (A) itself. Secondly, it is submitted, as an alternative submission that if the same is not covered by Section 40(a)(iib)(A) it would fall under Section 40(a)(iib)(B) of the Act, for the reason that the surcharge on sales tax is a tax and tax is a form of appropriation by the State from KSBC. The learned counsel placed reliance on a recent judgment of this Court in the case of Jalkal Vibhag Nagar Nigam and Others. On the other hand it is the case of the appellant/assessee that the sales tax is outside the scope of Section 40(a)(iib) and the surcharge is nothing but is an enhancement of the tax. By referring to words used in Section 40(a)(iib), learned counsel Sri Ganesh has submitted that the said provision is to be interpreted by applying the doctrine of ejusdem generis. It is submitted that the words 'any other fee or charge' immediately following the words 'royalty, licence fee, service fee, privilege fee, service charge' relate to such similar charges and none of the terms can possibly cover a tax, like sales tax or surcharge on sales tax. With regard to surcharge on sales tax, we are in agreement with the submission of Sri Ganesh, learned senior counsel appearing for appellant. The 'fee' or 'charge' as mentioned in Section 40(a)(iib) is clear in terms and that will take in only 'fee' or 'charge' as mentioned therein or any fee or charge by whatever name called, but cannot cover tax or surcharge on tax and such taxes are outside the scope and ambit of Section 40(a)(iib)(A) and Section 40(a)(iib)(B) of the Act. The surcharge which is imposed on KSBC is under Section 3(1) of the KST Act which reads as under :

"3. Levy of surcharge on sales and purchase taxes. –

(1) The tax payable under sub¬section (1) of section 5 of the Kerala General Sales Tax Act, 1963, by a dealer in foreign liquor shall be increased by a surcharge at the rate of ten per cent, and the provisions of the Kerala General Sales Tax Act 1963 shall apply in relation to the said surcharge as they apply in relation to the tax payable under the said Act. Provided that where in respect of declared goods as defined in clause (c) of section 2 of the Central Sales Tax Act, 1956 the tax payable by such dealer under the Kerala General Sales Tax Act, 1963 together with the surcharge payable under this sub¬section, exceeds four per centum of the sale or purchase price, the rate of surcharge in respect of such goods shall be reduced to such an extent that the tax and the surcharge together shall not exceed four per centum of the sale or purchase price."

Section 5(1)(b) of the Kerala General Sales Tax Act, 1963 reads as under :

5. Levy of tax on sale or purchase of goods: - (1) Every dealer (other than a casual trader or agent of a nonresident dealer or the Central Government, or Government of Kerala or the Government of any other state or of any Union Territory, or any local authority) whose total turnover for a year is not less than two lakhs rupees and every casual trader or agent of a non-resident dealer, the Central Government, Government of Kerala, the Government of any other state or of any Union Territory, or any local authority whatever be its total turnover for the year in respect of goods included in the Schedule at the rate mentioned against such goods,-

(a) … … … …

(b) in respect of Foreign liquor, at the point of sale by the Kerala State Beverages (Manufacturing and Marketing) Corporation Limited and at the point of first sale in the State by a dealer liable to tax under this section except where the sale is to the Kerala State Beverages (Manufacturing and Marketing) Corporation Limited.

(c) … … … …"

14.4. A reading of preamble and Section 3(1) of the KST Act, make it abundantly clear that the surcharge on sales tax levied by the said Act is nothing but an increase of the basic sales tax levied under Section5(1) of the KGST Act, as such the surcharge is nothing but a sales tax. It is also settled legal position that a surcharge on a tax is nothing but the enhancement of the tax. In this regard, in support the said view, ready reference can be made to the judgments of this Court in the case of K. Srinivasan and Sarojini Tea Co. Ltd. Para 7 of the judgment in the case of K. Srinivasan reads as under :

> "7. The above legislative history of the Finance Acts, as also the practice, would appear to indicate that the term "Income tax" as employed in Section 2 includes surcharge as also the special and the additional surcharge whenever provided which are also surcharges within the meaning of Article 271 of the Constitution. The phraseology employed in the Finance Acts of 1940 and 1941 showed that only the rates of income tax and supertax were to be increased by a surcharge for the purpose of the Central Government. In the Finance Act of 1958 the language used showed that income tax which was to be charged was to be increased by a surcharge for the purpose of the Union. The word "surcharge" has thus been used to either increase the rates of income tax and super tax or to increase these taxes. The scheme of the Finance Act of 1971 appears to leave no room for doubt that the term "Income tax" as used in Section 2 includes surcharge."

Para 20 of the judgment in the case of Sarojini Tea Co. Ltd. reads as under:

> "20. For the reasons aforesaid, we are unable to endorse the view of the High Court that surcharge on land revenue payable under the Surcharge Act is not land revenue but a levy which is distinct from land revenue. In consonance with the law laid down by this Court in Vishwesha Thirtha Swamiar case [(1972) 3 SCC 246 : (1972) 1 SCR 137 : AIR 1971 SC 2377] it must be held that the surcharge on land revenue levied under the Surcharge Act, being an enhancement of the land revenue, is part of the land revenue and has to be treated as such for the purpose of assessing compensation under Section 12 of the Ceiling Act."

14.5. Further, CBDT itself has issued circular in Circular No.3/2018 which is issued, as a measure for reducing litigation, by revision of monetary limits for filing appeals by the Department before the Incometax Appellate Tribunal, High Courts and SLP/appeals before this Court. In the said circular it is clearly mentioned that for considering tax effect it includes applicable surcharge and cess. Same will also strengthen the stand of the assessee. Thus it is clear that the surcharge which is sought to be levied is nothing but the enhancement of sales tax, which is levied under Section 5(1) of the KGST Act. When the basic sales tax paid by KSBC under Section 5(1)(b) of the KGST Act, deduction was allowed, there is no reason not to allow deduction of surcharge on sales tax. If the revenue does not consider Section 40(a)(iib) is applicable to the basic sales tax paid by KSBC under Section 5(1)(b) of the KGST Act, it is not known how the surcharge on sales tax, which is nothing but the sales tax, can be brought in the net of Section 40(a)(iib)(A) or 40(a) (iib)(B) of the Act. Further a clear distinction between 'fee' and 'tax' is carefully maintained throughout the scheme under Section 40(a) of the Act itself. Wherever the Parliament intended to cover the tax it specifically mentioned as a tax. Section 40(a)(i) and 40(a)(ia) specifically relate to tax related items. Section 40(a)(ic) refers to a sum paid on account of fringe benefit tax. At the same time, Section 40(a)(iib) refers to royalty, licence fee, service fee, privilege fee or any other fee or charge. If these words are considered to include a tax or surcharge like sales tax, the distinction so carefully spelt out in Section 40 between a tax and a fee will be obliterated and rendered meaningless. It is settled principle of interpretation that where the same Statute, uses different terms and expressions, then it is clear that Legislature is referring to distinct and different things. To support the said view ready reference can be made to judgments of this Court in the case of DLF Qutab Enclave Complex Educational Charitable Trust v. State of Haryana & Ors. ; Kailash Nath Agarwal & Ors. v. Pradeshiya Industrial & Investment Corporation of U.P. Ltd. & Anr. ; and Shri Ishar Alloy Steels Ltd. v. Jayaswals Neco Ltd.. The judgment relied on by the learned ASG in the case of Jalkal Vibhag Nagar Nigam and Others3 would not render any assistance to support the case of the revenue. The said judgment only considers whether the levy of water tax under Section 52A of the U.P. Water Supply and Sewerage Act is a fee or whether it is a tax covered by Entry 49 of List II of the seventh schedule to the Constitution. The said judgment in fact maintains and does not take away the basic constitutional distinction between 'fee' and 'tax'. Having regard to language used in Section 40(a)(iib), we are of the view that the aforesaid judgment does not support the case of the revenue. Even the other alternative submission of the learned counsel that it may attract Section 40(a)(iib)(B) also cannot be accepted for the reason that wherever the Parliament intended to include tax, referred clearly to taxes clearly in the very Section 40. That itself indicates that the surcharge or tax were never intended to be included in

the net of amended Section 40(a)(iib)(A) or 40(a)(iib)(B) of the Income-tax Act, 1961.

15. So far as turnover tax is concerned it is submitted by the learned ASG appearing for the revenue that such tax was imposed not only on KSBC in terms of Section 5(1)(b) of KGST Act, but it is imposed on various other retail dealers specified under Section 5(2) of the said Act. Further turnover tax is also a tax. The very same reason which we have assigned above for surcharge, equally apply to the turnover tax also. As such turnover tax is also outside the purview of Section 40(a) (iib)(A) and 40(a)(iib)(B).

16. For the aforesaid reasons, we hold that the gallonage fee, licence fee and shop rental (kist) with respect to FL¬9 and FL¬1 licences granted to the appellant will, squarely fall within the purview of Section 40(a)(iib) of the Income-tax Act, 1961. The surcharge on sales tax and turnover tax, is not a fee or charge coming within the scope of Section 40(a)(iib)(A) or 40(a)(iib)(B), as such same is not an amount which can be disallowed under the said provision and disallowance made in this regard is rightly set aside by the High Court.

17. Accordingly, the civil appeal filed by the assessee is dismissed and the civil appeals filed by the revenue are partly allowed to the extent indicated above. In result, the assessments completed against the assessee with respect to assessment years 2014-2015 and 2015-2016 stand set aside. The assessing officer to pass revised orders after computing the liability in accordance with the directions as indicated above. As the dispute relates to assessment years 2014¬2015 and 2015-2016, the assessing officer shall pass appropriate orders, within a period of two months from the date of receipt of this judgment.

5. The ld.CIT-DR also could not controvert or brought to our notice any contrary decision of Hon'ble Apex Court.

6. As the issue is squarely covered by the decision of Hon'ble Supreme Court in the case of Kerala State Beverages Manufacturing & Marketing Corporation Ltd., *supra,* we confirm the action of the

CIT(A) deleting the disallowance and accordingly, dismiss the appeal filed by the Revenue.

7. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the open court at the time of hearing on 30th January, 2024 at Chennai.

Sd/-	Sd/-
(मनोज कुमार अग्रवाल)	(महावीर सिंह)
(MANOJ KUMAR AGGARWAL)	**(MAHAVIR SINGH)**
लेखा सदस्य/ACCOUNTANT MEMBER	उपाध्यक्ष /VICE PRESIDENT

चेन्नई/Chennai,
दिनांक/Dated, the 30th January, 2024

RSR

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त /CIT
4. विभागीय प्रतिनिधि/DR
5. गार्ड फाईल/GF.