

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "B", MUMBAI**

BEFORE SHRI AMIT SHUKLA, HON'BLE JUDICIAL MEMBER

AND

SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER

ITA NO.1918/MUM/2023 (A.Y. 2018-19)

National Securities Depository Limited 4 th Floor, A-Wing Trade World, Kamala Mills Compound Senapati Bapat Marg, Lower Parel Mumbai - 400013 PAN: AADCN9802F	v.	Pr.CIT-8 Room No. 611, 6 th Floor Aayakar Bhavan, M.K. Road Mumbai - 400020
(Appellant)		(Respondent)

Assessee Represented by	:	Shri Percy Pardiwala & Shri Jeet Kamdae
Department Represented by	:	Shri S. Srinivasu
Date of Conclusion of Hearing	:	08.01.2024
Date of Pronouncement	:	07.02.2024

ORDER

PER S. RIFAUR RAHMAN (AM)

1. This appeal is filed by the assessee against order of Learned Principal Commissioner of Income Tax, Mumbai -8 [hereinafter in short "Ld. Pr.CIT"] dated 30.03.2023 for the A.Y.2018-19 passed u/s. 263 of the Income-tax Act, 1961 (in short "Act").

2. Brief facts of the case are, assessee filed its return of income for A.Y. 2018-19 on 31.10.2018 declaring total income of ₹.100,85,31,970/- and the return was selected for scrutiny through CASS and assessment was completed u/s. 143(3) r.w.s 143(3A) & 143(3B) of the Act on 05.03.2021 assessing total income of ₹.105,51,80,570/- making disallowance of ₹.4,66,48,600/- u/s. 14A of the Act.

3. While verifying the assessment records, Ld. Pr.CIT observed that Assessing Officer while passing the order u/s. 143(3) r.w.s 143(3A) & 143(3B) of the Act dated 05.03.2021 has completed the assessment without considering the claim made by the assessee in its profit and loss account for an amount of ₹.436.56 lakhs on account of provision for investor awareness. He observed that as per the Note-33, the SEBI had directed vide Circular No. CIR/MRD/DP/18/2015 dated 09.12.2015 that depositories to set aside 20% of the incremental revenue received from the issuers and accordingly, assessee has set aside ₹.438.56 lakhs. However, the provision set aside to meet the unascertained liability is not an allowable deduction under the provision *ibid*. This led to under assessment of income of ₹.438.56 lakh and consequential short levy of tax of ₹.152 lakhs. With the above observation, Ld. Pr.CIT observed that the assessment order suffers from error and accordingly, in this

case the provisions of section 263 of the Act are attracted to the facts of the case by relying on the decision in the case of Hon'ble Supreme Court *Malabar Industrial Co. Ltd. v. CIT* [2000] 109 Taxman 66 (SC).

4. Accordingly, he issued notice under section 263 of the Act to the assessee and in response assessee has filed detailed submissions along with SEBI circular which is placed on the record and also reproduced by Ld. Pr.CIT in his order at Page No. 3 to 7 of the Ld. Pr.CIT order. By relying on the above submissions, assessee submitted that in view of the SEBI circular, the assessee is supposed to allocate 20% of the incremental revenue received. Accordingly, assessee had made provision to the tune of ₹.438.56 lakhs under the head 'Provision for investment awareness'. In fact, during the course of hearing it was explained that since they are regulatory entity under SEBI and the SEBI vide circular dated 09.12.2015 has directed all depositories to set aside 20% of the incremental revenue received for issuer who are listed with SEBI. Accordingly, assessee has set-aside funds for the above said purpose. It was submitted that Non-compliance of the above circular would have attracted fine/penalty and disciplinary action from SEBI.

5. After considering the above submissions, Ld. Pr.CIT observed that during the course of 263 proceedings, assessee had not submitted any details regarding the amount spent on investment awareness as specified in SEBI circular. Further, he observed that the amount of ₹.438.56 lakhs is only a provision, the expenses made or likely to be made should have been claimed on actual payment basis u/s. 43B of the Act. He rejected the contention of the assessee that provision made by the assessee is not covered within the prescribed list mentioned under section 43B of the Act and it is outside the preview of section 43B of the Act.

6. Ld. Pr.CIT is of the view that the known dictum of law that the Act is always interpreted by inheritance of its ingredients and not by the nomenclature. Not only are the written words essential but the spirit and the time in which the law is promulgated also has to be borne in mind before any application. The heading of Act is itself self-explanatory which reads as "Certain deductions to be only on actual payment. In the present case the assessee has failed to express its say on the relief sought. In fact, it is silent on the expenses part on SEBI's guidelines.

7. In view of the above observations, he held that the assessment order passed by the Assessing Officer is hereby set aside with the

direction to allow an opportunity of being heard to the assessee and thereafter pass the order in accordance with law after due verification.

8. Aggrieved with the above order assessee is in appeal before us and at the time of hearing, Ld.AR of the assessee brought to our notice circular issued by SEBI (Copy is placed on record) and he submitted that the assessee is required to set-aside 20% of the incremental revenue received from the issuers to manage incentivise the depository participants. He also brought to our notice findings of the Ld. Pr.CIT that this transaction is hit by provisions of section 43B of the Act. He also brought to our notice detailed submissions submitted before Ld.Pr.CIT which is reproduced at Para No. 4.3 of the order. He submitted that this transaction is direction of SEBI only to set-aside portion of the incremental revenue before it is utilized subsequently. There is no time limit prescribed in the circular that it should be utilized within the frame of time and this transaction will not come under the provisions of section 43B of the Act. He submitted that provisions of section 43B is very specific on certain deductions to be claimed only on actual payment basis and he submitted that those are clearly specified in the section itself from clause (a) to (g) of the section 43B of the Act. The present transaction under consideration will not fall in any of the

clause mention under section 43B of the Act. In this regard he relied on the following decisions: -

- a. *Somaiya Ogeno-Chemicals Ltd. v. CIT [1995] 216 ITR 291 (Bombay).*
- b. *CIT v. New Horizon Sugar Mills Pvt. Ltd., [2000] 244 ITR 738 (Madras).*
- c. *CIT v. Salem Co-operative Sugar Mills Ltd., [1998] 229 ITR 285 (Madras).*

9. By relying on the above said decisions he submitted that the amount set-aside by the assessee is nothing but diversion of the amount at source. Therefore, the amount claimed by the assessee cannot be brought under section 43B of the Act.

10. On the other hand, Ld. DR submitted that from the record it is fact that Assessing Officer has not verified and the amount set-aside is not predetermined and the amount also not a static amount. It clearly shows that the amount claimed by the assessee is not certain. Therefore, it is a provision only. He submitted that the clause (f) of section 43B is hit by the nature of transactions carried on by the assessee. As per Clause (f) any sum or fees payable by the assessee as an employer will include the above transaction, he submitted that even the Clause (a) can also be considered for the above purpose. He

wondered it is only a provision created by the assessee, according to him it can also be below the line adjustment. It is not necessary that is an expenditure of the assessee and it is only an amount created as per the direction of the SEBI and unless it is utilized for the above purpose it cannot be claimed as an expenditure.

11. In the rejoinder Ld. AR submitted that it is not a provision but an allowable expenditure. In this regard he relied on the case of Metal Box Company of India Ltd. *v.* Their Workmen [73 ITR 53] and Bharat Earth Movers *v.* CIT [245 ITR 425]. He submitted that based on the above decisions, it is settled issue as far as provisions are concerned. He submitted that the assessee has created 20% of the liability which is mandatory and also ascertained liability. Further, he submitted that the views of the Ld. DR are not the case of the Ld. Pr.CIT. The definition of the fee is different from the analogy drawn by the Ld. DR.

12. Considered the rival submissions and material placed on record, we observe from the record that the Assessing Officer has passed the assessment order without discussing anything on the issue of incentive to depository participants based on the SEBI Circular. However, the Assessing Officer has considered the issue of section 14A of the Act.

Even though the assessment was selected to verify the issues relating to (i) Claim of any other amount allowable as deduction in schedule BP, (ii) ICDS Compliance and Adjustment and (iii) Expenses incurred for Earning exempt income, while verifying the assessment order passed under section 143(3) r.w.s. 143(3A) and 143(3B) of the Act dated 05.03.2021, Ld. Pr.CIT observed that the Assessing Officer has not dealt with the issue of claim of provision for investor awareness in his assessment order this lead to under assessment of income to the extent of provisions created by the assessee. Since there was no discussion or any paper found by the Ld. Pr.CIT the assessment order passed by the Assessing Officer may be treated as erroneous. However, as per provisions of section 263 twin conditions has to be satisfied i.e., erroneous as well as whether the order passed by the Assessing Officer is "prejudicial to the interest of the revenue". On careful consideration of the facts on record we observe that the assessee being regulatory agency is bound by the directions of the SEBI, since it is regulatory entity registered with SEBI. As per the Circular dated 09.12.2015 the assessee was directed to set-aside 20% of the incremental revenue received from issuer who are listed with SEBI. Respectfully following the above direction, the assessee has set-aside a sum of ₹.438.56 lakhs under the head provision of investor awareness.

13. At the time of hearing, it was brought to our notice that the above sums set-aside for the purpose of investor awareness was utilized by the assessee in the subsequent assessment years. In fact, it is brought to our notice that assessee has utilized the above said funds for the purpose for which it was set-aside. The year wise provision of utilization is submitted before us, for the sake of clarity it is reproduced below: -

Financial Year	Provision Amount	Utilization (Paid during the year)	Net Balance
2015-16	3,84,00,049.00	-	3,84,00,049.00
2016-17	4,06,29,833.00	1,01,11,623.00	6,89,18,259.00
2017-18	4,38,55,588.69	97,06,706.35	10,30,67,141.34
2018-19	4,09,84,195.20	-	14,40,51,336.54
2019-20	4,52,99,466.51	-	18,93,50,803.05
2020-21	5,14,96,515.12	5,78,06,654.31	18,30,40,663.86
2021-22	5,60,43,135.98	7,22,51,414.00	16,68,32,385.84
2022-23	6,40,26,081.82	7,65,43,418.93	15,43,15,048.73
2023-24 (upto Nov-2	4,33,64,745.88	4,49,03,261.38	15,27,76,533.23
TOTAL	42,40,99,611.20	27,13,23,077.97	

14. From the above it is clear that as per the direction of SEBI assessee has to set-aside 20% of the incremental revenue for the purpose investor awareness, accordingly, assessee has created the provision from Financial Year 2015-16 till date. The assessee has utilized for the purpose for which it was set-aside from the financial year

2016-17 onwards. It clearly shows that as per the direction of SEBI assessee has to set-aside 20% of the incremental revenue and there is no specific mention in the Circular dated 09.12.2015 that it should be utilized within a specified time or period. Specific direction is only to set-aside 20% of the incremental revenue. Since there is no specific direction to be utilized within a period of time it is only an obligation on the part of the assessee to set-aside the above said sum from its revenue for the purpose investor awareness. Therefore, it is an ascertained liability as far as assessee is concerned and assessee has set-aside the above said ascertained liability from its direct source of income. Therefore, as far as obligation on the part of the assessee is nothing but diversion of the income at source. Therefore, it is a direct liability and allowable expenditure as far as assessee is concerned.

15. To the extent of provision created for the purpose of investor awareness are set-aside in a running account for the purpose utilization, as noticed in the circular issued by the SEBI that this provision of expenditure is under review and it was stated under clause (g) of the circular that the incentives scheme may be reviewed after the period of two years. It clearly indicates that the incentive set-aside by the assessee are for a special purpose will be kept in a separate account will

be utilized only for the above said purpose and it will be reviewed by the SEBI on periodical basis. Accordingly, as per the utilization chart submitted by the assessee which is reproduced above clearly show that assessee has created the provision for investor awareness and the same were under supervision of the SEBI and the same were utilized by the assessee over a period of time. Therefore, this transaction certainly will not fall under any provisions of section 43B of the Act and the set-aside incentives were under the constant monitoring of the SEBI will be utilized or as per the directions of the SEBI. In case the same is discontinued or the amount is left with the assessee the same may be treated as income under section 41(1) of the Act in the year of such direction by the SEBI. As far as current assessment year is concerned provision for inventor awareness created by the assessee is nothing but diversion of the income at source which has to be allowed as allowable expenditure as and when assessee set-asides the above funds from the income earned by the assessee during the year. Accordingly, we hold that even though assessment order passed by the Assessing Officer is erroneous but not "prejudicial to the interest of the revenue", since Ld.Pr.CIT has invoked provisions of section 263 of the Act without satisfying the twin conditions mentioned under the act, therefore, we are inclined to allow the ground raised by the assessee.

16. With regard to Ground No. 2 which is on merits of the case, since we have allowed Ground No. 1 therefore, Ground No. 2 becomes infructuous. Accordingly, we dismiss the same as such.

17. In the result, appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 07th February, 2024.

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Mumbai / Dated 07.02.2024
Giridhar, Sr.PS

Sd/-
(S. RIFAUH RAHMAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum