आयकर अपीलीय अधिकरण, हैदराबाद पीठ

IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad ' B ' Bench, Hyderabad

Before Shri R.K. Panda, Vice-President
AND
Shri K. Narasimha Chary, Judicial Member

आ.अपी.सं /**ITA No.48/Hyd/2024**
(निर्धारण वर्ष/Assessment Year: 2017-18)

Pennar Industries Ltd Hyderabad PAN:AABCP3074H	Vs.	Dy. C. I. T. Circle 5(1) Hyderabad
(Appellant)		(Respondent)

आ.अपी.सं /**ITA No.78/Hyd/2024**
(निर्धारण वर्ष/Assessment Year: 2017-18)

Asstt. CIT Circle 5(1) Hyderabad	Vs.	Pennar Industries Ltd Hyderabad PAN:AABCP3074H
(Appellant)		(Respondent)

निर्धारिती द्वारा/Assessee by:	Advocate Mohd. Afzal
राजस्व द्वारा/Revenue by::	Shri Waseem Ur Rehman, DR
सुनवाई की तारीख/Date of hearing:	26/02/2024
घोषणा की तारीख/Pronouncement:	28/02/2024

ORDER

Per Bench:

These are cross appeals. The first one is filed by the assessee and the second one filed by the Revenue and are directed against the order dated 23.11.2023 of the learned CIT (A)-NFAC, Delhi, relating to A.Y. 2017-18.

2. Facts of the case, in brief, are that the assessee is engaged in the manufacturing of steel and filed its return of income on 25.10.2017 declaring total income of Rs.45,63,06,740/-. Subsequently, the assessee filed a revised return of income u/s 139(5) of the Act on 11.06.2018 admitting the same income. The return was selected for scrutiny under CASS and statutory notices u/s 143(2) and 142(1) of the Act were issued and served on the assessee to which the AR of the assessee appeared before the Assessing Officer and furnished the requisite details as called for. The Assessing Officer completed the assessment u/s 143(3) on 15.12.2019 determining the total income of the assessee at Rs.48,38,41,030/- wherein he made the following additions:

A)	Disallowance u/s 40(a)(ia)	- Rs. 2,01,240
B)	Disallowance of personal expenses	– Rs. 14,63,993
C)	Interest paid on customs duty	- Rs.1,83,00,000
D)	Delayed payment of employees' Contribution to PF	- Rs. 72,94,624
E)	Duty drawback on export	- Rs. 2,74,437

3. In appeal, the learned CIT (A) NFAC granted part relief to the assessee.

4. Aggrieved with such order of the learned CIT (A) NFAC giving part relief, the assessee as well as the Revenue are in appeal before the Tribunal by raising the following grounds:

A) Grounds raised by the assessee:

"1) The order of the learned CIT (A) is against the law, weight of evidence and probabilities of case.

2) The learned CIT erred in confirming the addition of Rs.14,63,993/- which was incurred towards the medical expenditure of one of the Director inspite of submission that the same is approved by the Board resolution of the company.

3) The learned CIT (A) erred in confirming the addition of Rs.14,63,993/- incurred by the company towards medical expenditure of the Director.

4) The learned CIT (A) erred in disallowing an amount of Rs.72,94,624/- which was paid during the financial year relevant to the subject A.Y towards employees contribution to PF.

5) The appellant craves leave to add to, amend or modify the above grounds of appeal either before or at the time of hearing of the appeal, if it is considered necessary".

B) Grounds raised by the Revenue

"1. The order of the learned CIT (A) NFAC Delhi dtd. 23.11.2023 in Appeal No. CIT (A) Hyderabad-4/10666/2019-20 is against the facts of the case.

2. Whether on the facts and circumstance of law, the CIT (A) is correct in holding that the interest on custom duty paid is allowable as revenue expenditure which is in contravention to Explanation 1 of Section 37(1) of the I.T. Act, 1961.

3. Any other ground that may be urged at the time of hearing".

5) So far as the first issue raised by the assessee is concerned, the same relates to the order of the learned CIT (A) NFAC in confirming the addition of Rs. 14,63,993/- made by the Assessing Officer on account of disallowance of personal expenses.

6) Facts of the case, in brief, are that the Assessing Officer during the course of assessement proceedings noted that the assessee has made payment/remittance of Rs. 14,63,993/- to USA towards medical treatment of one of its Directors. Since the expenditure incurred is personal in nature, the Assessing Officer asked the assessee to explain as to why the same should not be disallowed u/s 37(1) of the I.T. Act. The assessee stated before the Assessing Officer that the Directors are eligible for reimbursement of medical expenditure and in the process, the company has incurred medical expenses for the Chairman of the company which is allowable as staff welfare expenses. However, in absence of production of any Board Resolution approving the said treatment, he disallowed the same and added back to the income of the assessee.

7. In appeal, the learned CIT (A) NFAC upheld the action of the Assessing Officer.

8. Aggrieved with such order of the learned CIT (A) NFAC, the assessee is in appeal before the Tribunal.

9. We have heard the rival arguments made by both sides and perused the record. We find due to non-submission of the Board Resolution approving the treatment of the Chairman of the company in USA and in absence of production of any evidence that the Chairman has admitted such expenditure as perquisites in his hands to tax, the Assessing Officer disallowed the expenditure incurred by the assessee towards the treatment

of the Chairman of the company in USA for an amount of Rs.14,63,990/-. We find in absence of any further details filed before the learned CIT (A) NFAC, the learned CIT (A) NFAC upheld the action of the Assessing Officer. The learned Counsel for the assessee referred to the certified copy of the Bozard Resolution and copy of Form 16 filed in the paper book and requested for admission of the same as additional evidence. He submitted that given an opportunity, the assessee is in a position to produce the copy of the resolution of the Board of Directors approving the treatment of the Chairman of the company in USA and also file the copy of the ITR of the Chairman wherein such amount has been admitted to tax as perquisites. Considering the totality of the facts of the case and in the interest of justice, we deem it proper to restore the issue to the file of the Assessing Officer with a direction to grant more opportunity to the assessee to file the requisite details to his satisfaction and decide the issue as per fact and law. Needless to say, the Assessing Officer shall give due opportunity of being heard to the assessee. We hold and direct accordingly. The first issue raised in Grounds No.1 to 3 raised by the assessee are accordingly allowed for statistical purposes.

10. The second issue raised by the assessee in the grounds of appeal is against the order of the learned CIT (A) NFAC in confirming the disallowance of belated deposit of employee's contribution to PF amounting to Rs.72,94,624/-.

11. After hearing both sides, we find the Assessing Officer made addition of Rs.72,94,624/- to the total income of the assessee on account of belated payment of employee's contribution to PF by treating the same as income u/s 2(24)(x) of the Act r.w.s. 36(1)(va) of the Act. We find the learned CIT (A) NFAC upheld the action of the Assessing Officer by relying on various decisions. We do not find any infirmity in the order of the learned CIT (A) NFAC on this issue which has now been settled by the decision of the Hon'ble Supreme Court in the case of Checkmate Services (P) Ltd vs. CIT (2022) 143 taxmann.com 178 (S.C)/448 ITR 518 dated 12.10.2022 wherein it has been held that the employee's contribution to PF & ESI, if not remitted before the due dates mentioned in the respective Act, cannot be allowed as a deduction. The learned Counsel for the assessee also fairly conceded that the above issue stands decided against the assessee by the decision of the Hon'ble Supreme Court in the case of Checkmate Services (P) Ltd vs. CIT (Supra). Accordingly, this ground raised by the assessee is dismissed.

12. So far as the appeal filed by the revenue is concerned, the only issue that has been challenged in the grounds of appeal relates to the order of the learned CIT (A) NFAC in upholding the addition of Rs.1,83,00,000/- made by the Assessing Officer towards interest paid on customs duty.

13. Facts of the case, in brief, are that the Assessing Officer observed from the note No.24.2 of the financial

statement that as per the direction of the Hon'ble Supreme Court order dated 31.07.2015, the assessee has paid interest on customs duty of Rs.1,83,00,000/- which is debited under the head “Miscellaneous Manufacturing Expenses”. Since according to the Assessing Officer, the expenditure so incurred is penal in nature and not related to business, therefore, he asked the assessee to explain as to why the same should not be disallowed u/s 37(1) of the Act and added back to the total income of the assessee. The assessee in response to the same submitted that the amount of Rs.1,83,00,000/- paid is on account of customs duty along with interest and is in the nature of business expenditure and not penalty. Accordingly, it was claimed that the assessee is eligible to claim the same as business expenditure u/s 37(1) or 43B of the I.T. Act.

14. However, the Assessing Officer was not satisfied with the arguments advanced by the assessee. According to him, the assessee had defaulted in payment of customs duty which is an offence and only on the direction of the Hon'ble Supreme Court, the assessee has paid customs duty along with interest of Rs.1,83,00,000/- . Had the assessee paid the customs duty in time, the interest expenditure would not have arrived. Since the interest expenditure of Rs.1,83,00,000/- is not at all relate to the business, the Assessing Officer disallowed the same and added back to the total income of the assessee.

15. In appeal, the learned CIT (A) NFAC following the decision of the Hon'ble Supreme Court in the case of

Mahalakshmi Sugar Mills Co. vs. CIT (123 ITR 0429) deleted the addition by observing as under:

> *"Ground No.3 is directed against disallowance of interest paid or custom duty amounting to Rs.1,83,00,000/- debited under the head "miscellaneous manufacturing expenses".*
>
> *The said interest on custom duty was disputed by the appellant and has been paid by the order of the Hon'ble Supreme Court. The same cannot be termed as punitive in nature as no law has been contravened by the appellant. The interest on custom duty paid of Rs.1,83,00,000/- is allowable as revenue expenditure laid out wholly and exclusively for purpose of business. Reliance is placed on the decision of Hon'ble Supreme Court in the case of Mahalakshmi Sugar Mills Co. vs. CIT (123 ITR 0429).*
>
> *In the above terms the ground of appeal No.3 is allowed".*

16. Aggrieved with such order of the learned CIT (A) NFAC, the Revenue is in appeal before the Tribunal.

17. The learned DR strongly supported the order of the Assessing Officer.

18. The learned Counsel for the assessee, on the other hand, apart from relying on the decision of the order of the learned CIT (A) NFAC, also relied on the decision of the Pune Bench of the Tribunal in the case of Enkei Wheels India Ltd vs. Dy.CIT vide ITA No.831/PUN/2019 order dated 11.01.2023 for A.Y 2013-14 and the decision of the Mumbai Bench of the Tribunal in the case of M/s. M.J. Exports Pvt Ltd vs. DCIT vide ITA No.4874 & 4937/Mum/2012 order dated 17.05.2016 for A.Ys 2007-08 & 2008-09.

19. We have heard the rival arguments made by both sides and perused the record. We have also considered the various decisions cited by both the sides. We find the Assessing Officer disallowed an amount of Rs.1,83,00,000/- being interest on customs duty paid by the assessee as per the direction of the Hon'ble Supreme Court vide order dated 31.07.2015 on the ground that the assessee had defaulted in payment of customs duty which is an offence and therefore, the provisions of Explanation 1 to section 37(1) is applicable. Further such interest has been paid as per the direction of the Hon'ble Supreme Court and had the assessee paid the customs duty in time, such interest expenditure would not have arisen. We find the learned CIT (A) NFAC, following the decision of the Hon'ble Supreme Court in the case of Mahalakshmi Sugar Mills Co. vs. CIT (Supra) has deleted the addition, the reasons of which have already been reproduced in the preceding paragraph. We do not find any infirmity in the order of the learned CIT (A) NFAC on this issue. We find the Hon'ble Supreme Court in the case of the assessee vide Civil Appeal No.4444-4445 of 2005 dated 31.07.2015 has observed as under:

> *"14) In the present case, advance licence was issued to the assessee in terms of para 7.4 of the EXIM Policy 1997-2000. It was in terms of this licence that the import of the specified material was permitted on the condition that the assessee is obligated to meet the export obligation as contained in the licence issued by the DGFT. No doubt, this obligation in the export licence, read with conditions contained in Notification No. 30/1997, puts the onus upon the assessee to make the exports of the products produced from the material so imported. However, it is the case of the assessee that for certain bona fide reasons (as the bona fides of the assessee have been accepted by the DGFT), as the assessee was not able to export same very goods produced by it from the material imported on which he was given exemption from payment*

of the import duty, the DGFT allowed the assessee to meet the export obligation through third party.

15) It is also correct that insofar as DGFT is concerned, it has passed Order-in-Original dated 03.08.2011 holding that the export through third party would tantamount to fulfilling the export obligation contained in the licence. However, since the total import entitlement of the firm, as per the amended licences, worked to 2123.1538 MTs and the assessee had imported 2712.41 MTs, it resulted in excess import of 589.26 MTs. Therefore, only on this excess import, customs duty was payable, which was directed to be paid along with interest calculated @ 15% from the date of first import to the date on which last consignment of exports were effected by the assessee through third party. The DGFT, in its order, also mentioned that there was no misutilization of the raw material imported by the assessee and there was no violation of any other conditions of the licence causing Revenue loss at the cost of exchequer.

16) The aforesaid Order-in-Original of DGFT was under the provisions of EXIM Policy. It is held by this Court in Sheshank Sea Foods Pvt. Ltd. (supra) that the same would not be binding on the customs authorities and as far as action taken under the Customs Act is concerned, the same is to be covered by the provisions of the Customs Act. The relevant discussion thereupon which takes note of the concerned provisions of the Act as well is reproduced below:

"6. Learned counsel placed reliance upon a communication to all Collectors of Central Excise issued by the Central Board of Excise and Customs on 13-5-1969, on the subject of whether, in the event of the contravention of a post-importation condition of an import licence, it was open to the Customs authorities to confiscate imported goods under Section 111(o) of the Customs Act. The said communication stated that before Section 111(o)……..xxxx…

17) The decision in the aforesaid case, which is of the Coordinate Bench, binds us.

18) Judgment in the case of Titan Medical Systems (P) Ltd. (supra), which was referred to by Mr. Banerji , has no relevance at all. In that case, one of the conditions of duty exemption scheme contained in Notification No. 116/88-CUS was for conversion of raw material into the resultant product involving substantial manufacturing activity. The Court considered the scope of 'substantial manufacture' and held that assembly of various components into finished machines (ultrasound scanners in that case) amounted to substantial manufacture and it was not necessary that manufacturing of substantial amount of component

is required. Obviously, the issue was altogether different which has no bearing on the controversy involved in the present case.

19) Since the conditions of the exemption notification are not fulfilled and the law requires strict compliance of the exemption notification, the assessee becomes liable to pay the import duty which was payable, but for the benefit of exemption Notification No 30/1997, which was obtained by the assessee.

20) Though we have rendered this decision keeping in view the legal position discussed above, at the same time, we deem it necessary to observe that the Government should bestow its consideration and make appropriate provision dealing with such situations. After all, the Exemption Notification No. 30/1997 has been issued to implement and effect the EXIM Policy provisions. Therefore, the purport of the exemption notification is to advance the objectives of the EXIM Policy. When the DGFT has itself accepted the benefits of the assessee and carried out the amendment in the import licence and further that the assessee could make the exports on the basis of the amendment; albeit through third party, such person should not be left high and dry. Therefore, necessary amendments are needed in such notifications making appropriate provisions to meet these types of eventualities. We are hopeful that the competent authority shall look into these aspects and cater for such situations as well so that unnecessary hardship is not caused to the bona fide assessees as well.

21) Insofar as charge of interest is concerned, we are conscious of the fact that as per the bond the assessee had agreed to pay interest @ 24% per annum. However, that would not take away our right to reduce the rate of interest if the ends of justice so warrant. In the peculiar facts of this case, more so when there was an amendment in the licence by the DGFT and DGFT has taken the view that export obligation is fulfilled, we deem it proper to reduce the rate of interest from 24% per annum to 9% per annum. Further, there shall not be any penalty.

22) Setting aside the order of the Tribunal, the appeals are allowed in the aforesaid terms with no order as to costs."

20. We find the Hon'ble Supreme Court in the case of Mahalakshmi Sugar Mills Co. vs. CIT (Supra) has held that the interest paid u/s 3(3) of the U.P Sugarcane Cess Act, 1965 cannot be described as a penalty paid for an infringement of the law. The Coordinate Bench of the Tribunal following the decision of the Hon'ble Supreme Court in the case of

Mahalakshmi Sugar Mills Co. vs. CIT (Supra) has held that the interest paid for delayed payment of such taxes is a deductible item of expenditure. In view of the above discussion, we do not find in any infirmity in the order of the learned CIT (A) NFAC holding that the interest paid on customs duty is allowable as revenue expenditure and is not in contravention to Explanation (1) of section 37(1) of the I.T. Act. Accordingly, the ground raised by the Revenue is dismissed.

21. In the result, appeal filed by the assessee is partly allowed for statistical purposes and the appeal filed by the Revenue is dismissed.

Order pronounced in the Open Court on 28th February, 2024.

Sd/-	**Sd/-**
(K. NARASIMHA CHARY) **JUDICIAL MEMBER**	**(R.K. PANDA)** **VICE-PRESIDENT**

Hyderabad, dated 28th February, 2024

Vinodan/sps

Copy to:

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3	Pr. CIT-, Hyderabad
4	DR, ITAT Hyderabad Benches
5	Guard File

By Order