

IN THE INCOME TAX APPELLATE TRIBUNAL,
NAGPUR BENCH, NAGPUR

BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER.

(S.M.C.)

I.T.A. No. 222/Nag/2012.
Assessment Year : 2007-08.

M/s Oswal Industries,
Khamgaon.
PAN AAAFO1933E.
Appellant.

Vs. The Income-tax Officer,
Khamgaon.

Respondent.

Appellant by : S/Shri C.J. Thakar &
Sanjay Thakar.

Respondent by : Shri A.R. Ninawe.

Date of Hearing : 06-12-2016
Date of Pronouncement : 11th January, 2017.

ORDER.

This appeal by the assessee is directed against order of learned CIT(Appeals)-I, Nagpur dated 22/3/2012 and pertains to assessment year 2007 – 08. The revised grounds of appeal read as under :

1. Learned CIT(A) failed to see that the liability of VAT for F.Y. 2005-06 having been crystallized only in F.Y. 2006-07 i.e. during the assessment year 2007-08 in question at Rs.11,69,773.73 the same was rightly allowable in A.Y. 2007-08.
2. Learned CIT(A) in the facts and circumstances of the case erred in restricting the allowance of AT liability at Rs.83,232/- and erred in disallowing balance of Rs.10,86,542/-.
3. Learned CIT(A) unnecessarily erred in bringing into picture the provisions of section 145-A of I.T. Act, 1961 which had no relevance to the issue concerned. Even otherwise if the value of unexplained credit is added to the value of closing stock correspondingly purchase cost will have to be increased and it will have neutral effect on profit or

loss.

4. Learned CIT(A) for similar reasons, erred in sustaining the addition of Rs.1,97,657/- pertaining to A.Y. 2007-08.
5. Under the facts and circumstances of the case the learned CIT(A) erred in partly confirming the disallowance of interest as claimed was fully allowable.

2. Apropos the issue relating to VAT liability.

On this issue the Assessing Officer noted as under along with assessee's response to :

“ During the assessment proceedings, it is seen that the assessee has debited Rs. 24,41,816/- on account of VAT in the return of income filed on 23.11.2007 as follows :

i)	A.Y. 2006-07	Rs.11,69,773/-.
ii)	A.Y. 2007-08	<u>Rs.12,72,083/-</u>
		Rs. 24,41,816/-

On perusal of the P&L account enclosed alongwith the Audit report, the assessee has credited VAT refund amounting to Rs.1774545/-. However, during the filing of return, the assessee has debited the amount of Rs.24,41,816/- on account of VAT. It is seen that the amount of mRs.11,69,773/- was pertaining to A.Y. 2006-07. Thus it did not pertain to the year under consideration. Further the assessee claimed the amount at Rs.12,72,043/- on account of VAT for the AY 2007-08. It is further seen that the assessee has not made any provision for the same during the respective years. In view of this the assessee was requested how the amount of VAT as mentioned above have been debited to the P&L account and to explain how same are allowable. In reply, the assessee submitted as under :

“Deduction of VAT Rs. 24,41,816/- :- The assessee has claimed deduction of VAT paid for A.Y. 2006-07 and 2007-08 as under :

MVAT came into force for A.Y. 2006-07 under which assessee was entitled for set off of VAT paid on purchase from its own liability

collected from the sale price separately. So the assessee was declaring the VAT paid on the purchase as VAT set off receivable in the balance sheet. The assessee was required to audit its books of account under the MVAT Act and determine its VAT liability from the auditors. The last date for submitting the audit report to the sales tax department was extended upto 31/01/2007. In the course of audit the auditor disallowed the VAT paid on purchase of cotton seed for setting off against VAT liability arising out of sale of cotton seed oil and cake outside Maharashtra as prescribed under the rules of MVAT Act. Thus the auditor determine the VAT liability for AY 2006-07 at Rs.11,69,773/- and allowing VAT paid Rs.1086541/- asked to make a provision of (1169773 - 1086541) Rs.83232/- towards VAT liability of AY 06-07. The assessee paid the said provision on 24/04/2007. The relevant VAT audit report is enclosed herewith. The checking of the books of accounts and relevant bills in the audit was completed by 15th March, 2007 and the auditor informed the VAT Tax liability and its provision. Thus the assessee has claimed deduction of Rs.11,69,773/- on account of VAT paid for AY 2006-07. The VAT audit of AY 2007-08 was also completed simultaneously and in the said audit the auditor determined the VAT liability of March, 2007 at Rs.1,97,657/- and asked the assessee to make provision of Rs.197657/- towards VAT its liability. The assessee has paid the said liability alongwith interest of Rs.21104/- totalling Rs.2,18,741/- on 19/01/2008. The assessee has not claimed the deduction of VAT liability u/s 43B but the said deduction is claimed as rejection of VAT set off by the auditor in the form of business loss suffered by the assessee on account of payment of VAT on the purchases of raw material. The assessee has paid total VAT of Rs.23,50,490/- as mentioned on page No. 24 of the paper book. It is therefore submitted that deduction on account of VAT set off is on account of payment of VAT on purchases and so should be allowed as a deduction as part of of the purchase price of raw material. The copy of VAT audit report is enclosed herewith for your ready reference.”

3. The Assessing Officer was not convinced with the assessee's submissions. He made following observations as under :

“5.2 The assessee's submission has been carefully perused. It has been submitted that the liability for the for VAT was ascertained by the Auditor for the AY 2006-07 was determined on 20.04.2007 & paid on

24.04.2007. It is seen that the liability of VAT for the AY 2007-08 was simultaneously determined & the assessee has paid the liability on 19-01-2008.

5.3 payment of sales tax at Rs.11,69,773/- pertaining to the A.Y. 2006-07.

The assessee has debited the amount of VAT in the return of income for the financial year 2006-07 i.e. A.Y. 2007-08 the year under consideration. The assessee's argument is not acceptable. First of all the assessee failed to determine the liability under the tax Audit. It also failed to determine & pay the liability before the due date of filing of return of income. The assessee failed to carry out the VAT Audit within time. Further, the assessee has not made any provision for the liability of the VAT in its books of accounts for the financial year 2005-06. It is assessee's fault that the liability has not been determined and no provision has been made. The assessee was not prevented from any reasonable cause to determine the liability. Even as per the provisions of section 43B of the Income Tax Act, the liability on this account was to be determined & paid before the due date specified under section 139(1) of the I.T. Act for filing of the return i.e. 31.10.2006. Thus, it is clear that the assessee has not actually paid the liability before the due date for the filing of return.

The assessee has submitted that the liability VAT arose due to non getting of set off for the sales made out of the Maharashtra. The provisions for the MVAT are very clear the set off is available to the assessee if the sale is made on consignment to the branch office only. Therefore, the assessee's argument is lame that he was not knowing the provisions of MVAT for non determining the liability.

So in view of above discussion, the assessee is not entitled to debit the expenses of Rs.11,69,773/- which is not pertaining to the year under consideration. Therefore, the expenses of Rs.11,69,773/- on account of VAT payment are disallowed.

5.4 Payment of VAT at Rs.12,72,043/- pertaining to the A.Y. 2007-08.

The assessee has debited the amount in the return of income in the year under consideration. The assessee's argument is not acceptable. First

of all, the assessee failed to determine the liability under the Tax Audit itself. It also failed to determine & pay the liability before the due date of filing of return of income. The assessee failed to carry out the VAT Audit within time. Further, the assessee has not made any provision for the liability of the VAT in its books of accounts for the financial year 2006-07. It is the assessee's fault that the liability has not been determined and no provision has been made. The assessee was not prevented from any reasonable cause to determine the liability. Even as per the provisions of section 43B of the Income Tax Act, the liability on this account was to be paid before the due date specified under section 139(1) of the I.T. Act for filing of the return i.e. 31.10.2007. The assessee paid the liability on 19.01.2008. Thus, it is clear that the assessee has not actually paid the liability before the due date for filing of return.

The assessee has submitted that the liability VAT arose due to non getting of set off for the sales made out of the Maharashtra. The provisions for the MVAT are very clear the set off is available to the assessee if the sale is made on consignment to the branch office only. Therefore, the assessee's argument is lame that h was not knowing the provisions of MVAT for non-determining the liability.

So in view of above discussion, the assessee is not entitled to debit the expenses of Rs. 12,72,043/- on account of VAT. Therefore, the expenses of Rs.12,72,043/- on account of VAT payment are disallowed.”

4. Against above order assessee appealed before the Learned CIT(Appeals). Learned CIT(Appeals) considered the issue. He granted some relief as under :

“6. I have carefully considered the issue before me. As pointed out by the appellant the complexity in the enactment has resulted in certain difficulties in ascertaining the AT liability for AY 2006-07. Unexpired VAT credit available to the appellant for adjustment towards the liability in F.Y. 2005-06 was Rs.10,86,542/-. Appellant has said that this was subsequently diluted, meaning presumably that this was not available for adjustment in F.Y. 2006-07 and therefore this would go to increase the cost of input. However, it is evident from the records that the amount of unexpired VAT credit has not been included for valuing the inventory of

stock as on 31-03-06 for A.Y. 2006-07. Therefore, it is clear that the appellant is attempting to write off a notional loss relating to A.Y. 2006-07 as the availability of unexpired VAT credit has lapsed during A.Y. 2007-08. I am also of the view that this cannot be taken to increase the cost of input as the amount of unexpired VAT available for A.Y. 2006-07 has not been considered in valuation of closing stock of inventory as required by provisions of S. 145A. The addition to the extent of Rs.10,86,542 is therefore sustained. As regards the balance amount of that has crystallized during the course of year, pertaining to AY 2006-07 appellant has stated to have paid an additional sum of Rs.83,232/- on 24.04.2007 before the due date of filing of return. This amount is admissible even as per the provisions of S 43B.

6.1 Similarly for A.Y. 2007-08 appellant has stated the liability to VAT for A.Y. 2007-08 had crystallized during the year. Annexure 8 enclosed along with submissions in appellate proceedings before me clearly reveals that an amount of Rs.12,72,043/- was available out of VAT paid on inputs out of which an amount of Rs.10,78,448/- has been set off. Therefore only an amount of Rs.1,97,657/- is outstanding and the amount of disallowance u/s 43B is to be restricted to an amount of Rs.1,97,657/-. The disallowance made by the A.O. is therefore to be restricted to the following amounts :-

Out of amounts pertaining to A.Y. 2006-07 - Rs.10,86,542/-

Out of amounts pertaining to A.Y. 2007-08- Rs. 1,97,657/-

6. A.O. is directed to allow the balance amount of Rs.11,57,617/-. This ground is therefore partly allowed. ”

5. Against above order assessee is in appeal before the ITAT.

6. I have heard both the counsel and perused the records. Learned counsel of the assessee has summarised his submission on this issue as under :

“CIT(Appeals) was wrong in disallowing Rs.10,86,542/- VAT liability for A.Y. 2006-07 on altogether different and curious ground. She having allowed part of the liability amounting to Rs.83,232/- relating to A.Y.

2006-07 paid on 20-04-2007 before due date of filing of return for A.Y. 2007-08 on the basis and on accepting that the liability for VAT for A.Y. 2006-07 crystalized only in A.Y. 2007-08 she could not have disallowed other portion of the same liability for same year on the alleged ground of invoking section 145-A and saying that unexpired VAT available for A.Y. 2006-07 has not been considered in valuing the closing stock of inventory as required under the provisions of sec. 145-A. She also appears to assume that availability unexpired VAT credit for A.Y. 2006-07 has lapsed in A.Y. 2007-08 and assessee is trying to claim some notional loss.

Re: 1,97,657/- CIT(A) says that the same is paid after due date of filing of return for A.Y. 2007-08.

Paid on 19-01-2008.

Above reasoning of learned C.I.T.(A) are fallacious.

(i) **One and only question was as to when the liability of AT for A.Y. 2006-07 crystalized.**

(a) Vat tax became enforceable for the first time in A.Y. 2005-06 and there was lot of confusion and ambiguity due to various trade circulars issued by State Govt. as already discussed in detail in W.S. before C.I.T.(A) which was finally settled in A.Y. 2007-08. Learned C.I.T.(A) has herself accepted the said position.

Total liability of VAT for A.Y. 2006-07 was crystalized in A.Y. 2007-08 a Rs.11,69,773/-/-. Out of this Rs.10,86,542/- was paid/stood paid by adjustment of VAT receivable on input and balance Rs.83,232/- was paid in cash on 20-04-2007 before due date of filing of return for A.Y. 2007-08 C.I.T.(A) hasm allowed this portion of liability of Rs.83,232/- on the ground that the liability for A.Y. 2006-07 was crystalized in A.Y. 2007-08 and the amount of Rs.83,232/- was paid before due date of filing of return for A.Y. 2007-08. Learned C.I.T.(A) having allowed the portion of

liability for A.Y. 2006-07 in A.Y. 2007-08 as the VAT liability was crystallized in A.Y. 2007-08, she could not disallow other portion (s.10,86,542/-) of the same liability on some untenable ground r assumption.

(b) Learned C.I.T.(A) is unnecessarily bringing in the provision of section 145-A which is neither relevant nor germane to the issue n question. Secondly, if the VAT credit of Rs.10,86,542/- available on purchase/input is taken or added to the value of closing stock, correspondingly the purchase cost will have to be increased by Rs.10,86,542/- and it has no impact in computation of income under the Income-tax Act, 1961 nor it has any impact under the sales-tax act or VAT claim.

(c) Learned C.I.T.(A) appears to have assumed that availability of VAT credit of Rs.10,86,542/- for A.Y. 2006-07 has lapsed in A.Y. 2007-08 and the assessee is trying to claim some notional loss. C.I.T.(A) has no basis either in fact or in law for assuming that VAT credit of Rs.10,86,542/- for A.Y. 2006-07 has lapsed in A.Y. 2007-08. The Sales Tax Department having actually given credit for Rs.10,86,542/- in computing VAT liability for F.Y. 2005-06 i.e. A.Y. 2006-07, how the learned C.I.T.(A) can assume that the said liability has lapsed. It is just her own pure surmise without any foundation of fact or law.

(i) In view of the above, the disallowance of Rs.10,86,542/- for A.Y. 2006-07 crystallized and adjusted in A.Y. 2007-08 is wholly unjustified.

(ii) Disallowance of Rs.1,97,657/- for A.Y. 2007-08 being paid after due date of filing is not disputed in this appeal.

(d) Case Laws relied.

(1997) 225 ITR P,970 (Mad.)

Liability to pay excise duty arose when the doubts in the mind of Dept. and assessee were got cleared. Liability crystallized then.”

7. Per Contra learned Departmental Representative relied upon the order of Learned CIT(Appeals).

8. I have carefully considered the submissions. I find that the AO has made the impugned disallowance by holding that the amounts were not allowable under the provisions of section 43B as well as the amounts do not relate to the year under consideration. Learned CIT(Appeals), on the other hand, has granted part relief by considering different factual aspects. Now the learned counsel of the assessee in his submissions has brought forward several other factual aspects. In my considered opinion these submissions need verification on the part of the AO. Hence I remit this issue to the file of the AO. The AO is directed to consider the issue afresh by taking into account the submissions of the learned counsel of the assessee and after giving proper opportunity of being heard.

9. Apropos the issue relating to disallowance of interest:

On this issue the Assessing Officer noted that assessee has granted loans in advance which family members and concerns in charge interest running from 3 – 6%. On the other hand the Assessing Officer noted that assessee has paid interest to banks at the rate of 12 – 15%.

10. Assessee responded as under.

“ Charging of interest on debit of sister concern :-

The assessee has charged interest of Rs.432186/- to the sister concerns of the assessee as per page 7 of the paper book at the rate

varying between 3 to 6%. The copies of accounts of those parties with the assessee are operated just like current account and so the assessee has charged lesser interest to those parties. The assessee has paid interest of Rs.1100965/- out of which 601975/- is paid to the relatives of partners of the assessee at the rate of 9% only. The interest paid to outside partners is paid at the rate of 12 to 15% as mentioned on page 9,10,11 of the paper book. It is therefore submitted that interest paid to the relatives of the partners is very reasonable.”

11. However the Assessing officer was not convinced. He held as under :

“ The submission is perused carefully and same is not acceptable as the assessee has utilized the interest bearing capital which is bearing interest 9% to 15% The assessee, partnership firm, is not having any capital which is interest free. The assessee should have charged interest from these advances on prevailing market rate. The assessee has given the advances out of the interest bearing capital and debited the interest as expenses on the corresponding amounts in the P&L. Therefore, the assessee should have charged the interest at the prevailing market rate. Further the assessee could not establish the nexus of the advances so given with the business of the assessee. Considering all facts, it is held that the interest @ 9% as reasonable (which is charged to the partners) should be disallowed as the assessee utilized the fund for non business activity.

12. Upon assessee's appeal Learned CIT(Appeals) granted some relief as under :

“ I have carefully considered the issue before me. As pointed out by the AO during the year assessee has utilized interest bearing funds for loan and advances made to sister concerns and related parties. According to appellant interest free funds of Rs.51,97,938/- were available taking into account the amount reserve and surplus of Rs.41,99,693/-. Appellant has explained in detailed that certain parties namely Jai Refinery Pvt. Ltd. was a trade debtor from whom there is no practice to charge interest. Similarly transactions with Oswal Oil products are also in the nature of business transaction. Therefore these two parties cannot be considered to be non business purposes. As regards Nareshkumar Pankaj Chopda it is claimed that there were only an amount of Rs.28,129/- was advanced to

him and A.O. has adopted a wrong figure in this regard. Considering the facts and entirety I am of the view that this issue has not been appreciated in proper perspective by the AO. The addition on account of advances made to M/s Oswal Oil and M/s Jai Refinery Pvt. Ltd. and Pankaj Chopda are therefore deleted. A.O. is directed to rework the disallowance accordingly. This ground is therefore partly allowed.”

13. Against above order assessee is in appeal before the ITAT

14. I have heard both the counsel and perused the records. The Learned counsel of the assessee has summarised his submissions as under :

“ A.O. disallowed Rs.5,56,369/- out of total interest payment on the ground that the interest charged from sister concern, relatives etc. is at lesser percentage. Funds are on average borrowed at 9% while interest charged is between 3% to 6%. C.I.T.(A) deleted the addition in respect of three parties viz. Jai Refineries (P) Ltd. (Rs.3,17,269/-), Oswal Oil Production, Khamgaon (Rs.65,596/- as relating to trade transaction and Nareshkumar Chopda (Rs.78,287/-) i.e. total Rs.4,61,152/- and retained addition of Rs.95,188/- in respect of following three relatives etc. :

	Intt. Charged	Should have charged at	Disallowance
1. Manoj Pukjhraj Chopda	at 4%	9%	53,651/-
2. Surekha Sanjay Chopda	at 4%	9%	35,568/-
3. Vinodkumar Ratanchand	at 6%	9%	2,969/-
			----- 95,188/- -----

(i) C.I.T.(A) in para 11 has not disputed the fact that the assessee had interest free fund of Rs.51,97,938/-.

(ii) Advance to above parties are from interest free fund.

- (iii) C.I.T.(A) has not given any reason why in respect of above three parties any disallowance is called for. Hence the same needs to be deleted.
- (iv) There is no dispute that the money borrowed is for business purpose only.”

15. Per Contra learned Departmental Representative relied upon order of the Learned CIT(Appeals).

16. I have carefully considered the submissions. I find that it is the plea of the learned counsel of the assessee that the assessee has sufficient interest free funds of Rs.51,97,938/- which have been utilised for granting the impugned advances. Learned counsel of the assessee has submitted that it has not been disputed by the learned CIT(Appeals). I find that this aspect also needs factual verification on the part of the AO. Accordingly I remit this issue to the file of the AO. The AO is directed to examine this issue as to whether the assessee has adequate interest free funds for granting advances and decide as per law. Needless to add the assessee should be granted adequate opportunity of being heard.

17. In the result this appeal by the assessee stand allowed for statistical purposes.

Order pronounced in the Open Court on this 11th day of January., 2017.

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER.

Nagpur,
Dated: 11th January, 2017.

Copy forwarded to :
1. M/s Oswal Industries, Chikhali Road, Sarki Lines, Khamgaon-444303. Dist. Buldhana.
2. I.T.O., Khamgaon.
3. C.I.T.-I, Nagpur.
4. CIT(Appeals), -I, Nagpur.
5. D.R., ITAT, Nagpur.
6. Guard File

True Copy

By Order

Assistant Registrar,
Income Tax Appellate Tribunal,
Nagpur Bench, Nagpur.

Wakode.