

आयकर अपीलिय अधिकरण "जी" न्यायपीठ मुंबई में।

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

श्री डि. करुनाकर राव, लेखा सदस्य एवं

श्री अमित शुक्ला, न्यायिक सदस्य के समक्ष ।

**BEFORE SHRI D. KARUNAKARA RAO, ACCOUNTANT MEMBER
AND SHRI AMIT SHUKLA, JUDICIAL MEMBER**

ITA No. : 4985/Mum/2011

(Assessment year :2007-08)

Asst. Addl Commissioner of Income Tax -5(1), Aayakar Bhavan, M K Road, Mumbai -400 020	Vs	Gabriel India Ltd, Room No. 568, 5 th Floor, Aayakar Bhavan, M K Road, Mumbai -400 020
अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)
Appellant by	:	Shri Neil Philip
Respondent by	:	Shri Rajesh S Athavale

ITA No. : 7560/Mum/2011

(Assessment year :2008-09)

Gabriel India Ltd, 10, Prasad Chambers, Opera House, Mumbai -400 020 स्थयी लेखा सं.: PAN: AAACG 1994 N	Vs	Addl. Commissioner of Income Tax -5(1), Aayakar Bhavan, M K Road, Mumbai -400 020
अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)
Appellant by	:	Shri Rajesh S Athavale
Respondent by	:	Shri Neil Philip

CO No. 237/ Mum/2012

Arising out of ITA No. :7560/Mum/2011, AY :2008-09)

Dy. Commissioner of Income Tax -5(1), Aayakar Bhavan, M K Road, Mumbai -400 020	Vs	Gabriel India Ltd, Room No. 568, 5 th Floor, Aayakar Bhavan, M K Road, Mumbai -400 020 स्थयी लेखा सं.: PAN: AAACG 1994 N
अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)
Appellant Cross Objector by	:	Shri Neil Philip
Respondent by	:	Shri Rajesh S Athavale

सुनवाई की तारीख /Date of Hearing : 06-08-2015

घोषणा की तारीख /Date of Pronouncement : 30-10-2015

**आदेश
ORDER**

अमित शुक्ला, न्या. स.:

PER AMIT SHUKLA, JM:

The aforesaid appeal and cross objection have been filed by the revenue and cross appeal by the assessee against impugned order dated 23.03.2010, passed by CIT(A)-9, Mumbai for the quantum of assessment passed u/s 143(3) for the assessment year 2007-08. We will first take-up revenue's appeal in 4985/Mum/2011 vide which following ground has been raised:-

“Whether on the facts, in the circumstances and in law, the Ld. CIT(A) erred in directing to delete the addition of Rs. 5.29 Crores made by the AO on account of gain on settlement of Sales Tax Deferral Loan ignoring that the Assessee availed benefit u/s 43B of the IT Act in earlier years and the receipt on account of settlement of Sales Tax Deferral Loan is Revenue in nature and not Capital Receipt”.

2. At the outset, both the parties agreed that this issue is covered in favour of the assessee by the order of the Tribunal in assessee's own case for the assessment year 2006-07, wherein the Tribunal following the decision of ITAT Special Bench in the case of Suzler India Ltd, reported in 42 SOT 457 allowed this issue. Further, this decision of the Special Bench has now been approved by the Hon'ble High Court in a very detailed judgment vide order dated 5th December, 2014.

3. Before us, the Ld DR, though admitted that this issue is covered by the decision of the Hon'ble High Court, however the revenue wish to raise revised / additional grounds dated 14.08.2012 which was similar to the ground raised in the appeal of M/s Gujarat Consumer Products in ITA No. 4103/Mum/2010 and Cos 112 & 113/Mum/2011 and other appeals wherein the similar ground were admitted by the Tribunal but the issue was decided against the Department following the decision of the Spl. Bench. In this case also, he requested that the said grounds raised in the revised memo on appeal should be admitted.

4. After considering the revised memo of appeal, we find that the Department has raised as many as 8 grounds on the issue of remission of sales-tax liability u/s 41(1) which are by and large argumentative in nature, the said grounds however for sake of ready reference are reproduced hereunder :-

- (1) *"On the facts and in the circumstances of the case and in law, the remission of sales tax liability, though confirmed u/s.41(1) of the I. T. Act is alternatively liable to be taxed under other provisions of the I. T. Act."*
- (2) *"On the facts and in the circumstances of the case and in law, the remission of sales tax liability which was worked out at a particular rate of interest for the period for which there was prepayment of liability, each liable to be taxed as interest u/s.2(28A) of the LT. Act, as this section clearly provides that interest includes any amount in respect of any credit facility which was not utilized."*
- (3) *"Originally the liability of the assessee is for outstanding sales tax payable to the state government which was deferred later on under the incentive scheme of state government and converted into sales tax loan thus trying to make it as the loan liability rather than the trading liability, which itself raises the following two questions:

 - (a) *whether this issue means that trading liability of assessee ceases to exist?*
 - (b) *In case of some remission, whether amount remitted is taxable u/s.41(1) or u/s.28(iv) or under any other provisions of the I. T. Act?"*
 - (c)*
- (4) *"Whether the ITAT was correct in deciding the issue in favour of the assessee based on decision of Suzler Ltd., holding that section 41(1) is not applicable because remitted amount is loan and not a tax amount as in the past, loan was not allowed as expenditure; therefore section 41(l) was not applicable. Further, in the case of Suzler Ltd., the assessee has credited remission of loan item directly in the balance sheet as capital reserve whereas, in this case, the assessee has shown the same as profit in P & L A/c. Thus, the assessee had expressed himself in his opinion in the form of audited balance sheet that it is revenue income which makes it a distinguished feature of present case with that of Suzler's case. One more question arises here which also distinguishes this case from Suzler Ltd. that whether section 41(l) is to be invoked on the basis of difference between existing liability and the amount at which it has been settled or the difference between the existing and future liability?"*
- (5) *"Moreover, in regard to applicability of section 28(iv), which may be only applicable where benefit is received, in which benefits was interpreted by High Court as "in kind". The question arises here when sales tax liability is converted into interest free loan, the assessee gets a right to enjoy liquidity for the period of loan and hence, this right is not a cash right and this right is in kind and is convertible into money, so considering that this benefit is covered*

under gains, thus business income and whether section 28(iv) should be applicable here or not?"

- (6) *"The remission of sales tax liability has arisen in the normal course of business and is out of business operation and u/s.28(i) and 28(iv) of the LT. Act, which is straightway taxable. This is because sales tax receipt is part of trading receipt and sales tax payment is a trading liability. Reduction in trading liability is profit under normal course of business."*
- (7) *"By conversion of sales tax into loan, the assessee gets the right to retain government money for the particular number of years without any interest liability, which is valuable right and thus capital asset within the meaning of section 2(14) of the Act. By settling the loan amount at a lower figure, this right gets extinguished and extinguishment of right is transfer within the meaning of section 2(47) of the Act. Therefore, whether this right when gets extinguished whatever consideration the assessee receives in lieu thereof is taxable as capital gain - long term or short term?"*
- (8) *"On the same issue, CBDT vide Circular No.496 on 25-09-1987 and later on through clarificatory Circular No.674 dated 29-12-1993 stated that the statutory liability of sales tax shall be treated to have been discharged for the purpose of section 43B. Further, the Board clarified that section 43B will not be invoked if unpaid sales tax is converted into loan. It is very categorically made in the Circular that conversion into loan may be allowed as deduction in the year in which conversion was made and that sales tax would be treated to have been paid for the purpose of section 43B. There are two main aspects of Circular :*
- (a) *That the circular is only for the limited purpose of section 438. In other words, the liability of sales tax does not remain sales tax liability for the limited purpose of disallowance u/s.43B but it remains sales tax liability for all other purposes of the I.T. Act.*
- (b) *Conversion of sales tax liability into loan though not a payment was treated as payment and allowed as a deduction in the assessment year relevant to the conversion."*

Now, in wake of the detailed decision of the jurisdictional High Court, all these arguments and grounds raised by the revenue have not much consequence, however we are admitting the said grounds purely on academic grounds. But we are of the opinion that the only issue involved here is addition of Rs. 5.29 crores on account of settlement of sales-tax deferral loan which issue is now squarely covered by the decision of Hon'ble jurisdictional High Court. Therefore, respectfully following the judicial precedence we confirm the order of the first appellate authority deleting the said

addition. Accordingly, the grounds raised by the revenue are treated as dismissed.

5. Now we will come to grounds raised in assessee's appeal in ITA No. 7560/Mum/2011.

6. At the outset, the Ld. Counsel submitted that, so far as the issue relating to ground no. 1 and 2, which relates to addition of Rs.3,05,97,461/-to the closing stock by Excise CENVAT at the year end; and disallowance of expenditure of Rs.4,22,692/- being foreign travel expenses incurred on the spouse of Chairman, same are covered against the assessee in assessee's own case for assessment year 2006-07.

7. After considering the finding given in the impugned order and order of the Tribunal in the earlier years we find that these issues have been decided against assessee, therefore, respectfully following the judicial precedence for the earlier years, ground no. 1 and ground no. 2 are treated as dismissed.

8. In ground no. 3, the assessee has challenged Rs.1,21,294/- being interest paid for delayed payment of statutory dues.

9. The AO has disallowed these expenses on the ground that these are penal in nature. The break-up of interest disallowed are as under:-

- | | | |
|----|---|--------------|
| a) | Interest paid for delayed payment
of excise duty on supplementary
invoices: | Rs. 83,203/- |
| b) | Interest for excess credit taken: | Rs. 1,727/- |
| c) | Interest for service tax excess credit
taken: | Rs. 698/- |
| d) | Interest on sales tax: | Rs. 35,666/- |

10. Before us, Ld. Counsel submitted that interest for delayed payment of excise duty and sales-tax on supplementary invoices cannot be treated as penalty or for any violation of law. In fact, the Tribunal in assessee's own case for the AY 2005-06 and 2006-07 on similar nature of disallowance of interest has decided this issue in favour of the assessee.

11. On the other hand, Ld. DR relied upon order of the CIT(A) who has confirmed the disallowance made by the AO.

12. After considering the rival contentions, we find that the natures of disallowance of interest are delayed payment on excise duty or delayed payment of sales-tax. These are more or less compensatory in nature and cannot be held as any infraction or violation of any law. Such a payment of interest on delayed payment or excess credit also cannot be disallowed as it is pure compensatory and accordingly, the order of the CIT(A) on this score is reversed. We find that the Tribunal in assessee's own case for AY 2005-06 has deleted the delayed payment of sales tax. Accordingly, on same reasoning we also allow these payments and thus, ground no. 3 raised by the assessee is allowed.

13 So far as issue raised in ground no. 4 , that is, on account of sales tax deferral loan of Rs.229 lakhs, same has been disallowed on the ground of sales-tax liability is trading liability and gain on account of settlement of the same does not amount to settlement of any loan. Now, this issue as held in the earlier part is admittedly covered by the decision of Hon'ble High Court, therefore, respectfully following the same, this issue is decided in favour of the assessee.

14. In the result, appeal of the assessee is partly allowed.

C.O. No. 237/Mum/2012 :

15. The Cross Objection as raised by the revenue wherein similar grounds have been raised, which has been raised by way of revised / modified / additional grounds as discussed in the revenue's appeal above. The grounds raised in the Cross Objection are treated as dismissed in view of the finding given therein.

16. Accordingly, C.O. raised by the revenue is dismissed.

To sum-up: Revenue's appeal for AY 2007-08 & CO no. 237/Mum/2012 for AY 2008-09 stands dismissed, whereas, the assessee's appeal for AY 2008-09 stands partly allowed.

Order pronounced in the open court on 30th October, 2015.

Sd/-

(डि. करुणाकर राव)

लेखा सदस्य

**(D. KARUNAKARA RAO)
ACCOUNTANT MEMBER**

Sd/-

(अमित शुक्ला)

न्याईक सदस्य

**(AMIT SHUKLA)
JUDICIAL MEMBER**

Mumbai, Date: 30th October, 2015

प्रति/Copy to:-

- 1) अपीलार्थी /The Appellant.
 - 2) प्रत्यर्थी /The Respondent.
 - 3) The CIT(A) -9, Mumbai.
 - 4) The CIT -5, Mumbai.
 - 5) विभागीय प्रतिनिधि "जी", आयकर अपीलीय अधिकरण, मुंबई/
The D.R. "G" Bench, Mumbai.
 - 6) गार्ड फाईल \
- Copy to Guard File.

आदेशानुसार/By Order

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उप/सहायक पंजीकार

आयकर अपीलीय अधिकरण, मुंबई

Dy./Asstt. Registrar
I.T.A.T., Mumbai

*चव्हान व.नि.स

*Chavan, Sr.PS