(2024) 05 ITAT CK 0059

Income Tax Appellate Tribunal (Delhi G Bench)

Case No: Income Tax Appeal No. 318/DEL/2018

Sukhma Sons & Associates — APPELLANT

Vs

JCIT — RESPONDENT

Date of Decision: May 30, 2024

Acts Referred:

- Income Tax Act, 1961 - Section 28, 36(1)(iii), 43B, 143(3)

Hon'ble Judges: Vikas Awasthy, J; Avdhesh Kumar Mishra, (AM)

Bench: Division Bench

Advocate: Mahavir Singh, Anuj Garg

Final Decision: Partly Allowed

Judgement

1. This appellant/assessee appealed against the order dated 23.10.2017 passed by the Commissioner of the Income Tax(Appeals)-20, New Delhi [In short 'the CIT(A)'].Vide this appeal, the appellant/assessee challenged the disallowances/additions sustained by the CIT(A) by raising following grounds: -

"1. On the facts and in the circumstances of the case and in law the learned Commissioner of Income-tax (Appeals)-20, New Delhi erred in confirming the addition made by the A.O. on account of disallowance of payment of additional service tax and interest thereon at Rs. 15,00,327/-, without appreciating that the law has been settled that where interest is levied on account of deprivation of the benefit of the tax for the period during which it has remained unpaid, the same is compensatory in nature, and is not imposed by way of penalty.

2. On the facts and in the circumstances of the case and in law the learned Commissioner of Income-tax (Appeals)-20, New Delhi erred in confirming the addition made by the A.O. on account of disallowance of interest to the extent of

Rs. 8,73,336/-out of total disallowance of Rs. 27,25,315/- on account of interest attributable to the interest free loans without appreciating that the law has been settled that the interest free loans to sister concerns or subsidiary company for the purpose of their business for commercial expediency falls in the category of commercial expediency. It has been clearly laid down now that commercial or business expediency does not mean for business of assessee itself only.

3. On the facts and in the circumstances of the case and in law the Learned Commissioner of Income-tax (Appeals)-20, New Delhi erred in confirming the addition made by the A.O. on account of disallowance of late payment of Haryana Labour Welfare Funds of Rs. 168720/- u/s 43B of income Tax Act, without appreciating that the law has been settled that the amount was paid before due date as per Haryana Labour Welfare Act.

4. On the facts and in the circumstances of the case and in law the Learned Commissioner of Income-tax (Appeals)-20, New Delhi erred in confirming the addition made by A.O. on account of disallowance of labour welfare on adhoc basis at Rs. 3,00,000/-without appreciating that the law has been settled that no disallowance can be made on adhoc basis without bearing in mind that expenses are essential for the business of the assessee.

5. On the facts and in the circumstances of the case and in law the learned Commissioner of Income Tax (Appeals) erred in confirming the addition 23379/- out of disallowance of depreciation on vehicles which is fixed charge as par as vehicle insurance which is allowed by the Ld. CIT(A).”

2. The relevant facts, in brief, are that the appellant/assessee, a partnership firm, is engaged in the business of supplying manpower to various companies, firms, etc. The appellant/assessee filed its return of income for the relevant year on 17.9.2014 declaring income of Rs.52,95,462/-. The assessment was completed u/s 143(3) of the Income Tax Act, 1961 [In short ‘the Act’] determining income at Rs.1,00,85,190/-. The Assessing Officer [In short ‘the AO’] made various disallowances/additions. The AO disallowed the additional service tax of Rs.15,00,327/- holding that the appellant/assessee failed to demonstrate that the additional service tax was non-penal in nature and such demand was raised by the Service Tax Department. The second disallowance of Rs.27,25,315/- made by the AO is out of interest expenses under section 36(1)(iii) of the Act on the reasoning that the appellant/assessee had advanced its interest-bearing fund to its sister concern as interest free advances for non-business purposes. Out of the disallowance of interest of Rs.27,25,315/-made under section 36(1)(iii) of the Act, the CIT(A) gave relief of Rs.18,41,950/-. Hence, the grievance of the disallowance of interest is of Rs.8,73,336/- only. The third disallowance is of Rs.1,68,720/-under section 36(1)(iii) of the Act. Part of labour welfare expenses and

business promotion expenses were also disallowed by the AO. In first appeal, the appellant/assessee succeeded partly.

3. We have heard the rival parties at length. We perused the case records and orders of the subordinate authorities.

4. The first ground of appeal is in respect of disallowance of the additional service tax of Rs.15,00,327/-. The Ld. Counsel, placing emphasis on the Challan Head/Code of the service tax, contended that the sum of Rs.15,00,327/-paid under the Challan Head/Code "00440060" was nothing but the additional service tax only as the Challan Head/Code'00440060' of service tax is for depositing tax only and not for depositing any penal charge/levy. The Challan Head/Code '00441310' is for depositing penalty. On specific query, the Ld. Counsel agreed for verification of the nature of payment of the service tax of Rs.15,00,327/- under reference by the AO. To which, the Ld. DR appears in agreement.

5. We have considered the facts of the case in entirety. In view of the above and in the interest of justice, we are of the considered view that this issue (service tax of Rs.15,00,327/-) is fit for remitting back to the AO for deciding this matter afresh after affording reasonable opportunities of being heard to appellant/assessee. Accordingly, we order so. However, we are refraining from commenting on merit of this issue. The AO is free to call/enquire/verify, in this regard, from anyone including the Service Tax Department for ascertaining the true nature of payment of Rs.15,00,327/-made by the appellant/assessee.

6. The AO, observing that the appellant/assessee had diverted some of its interest-bearing fund for non-business purposes as interest-free loans to its sister concerns, disallowed interest of Rs.27,25,315/-. In first appeal, the appellant/assessee got relief of Rs.18,41,950/- on this score. The remaining disallowance of interest of Rs.8,73,336/- under section 36(1)(iii) of the Act is in challenge in this appeal.

7. We have heard the rival parties and considered the material available on the record. The Ld. Counsel, contending that the interest-free advances (relatable to the interest of Rs.8,73,336/) given to the sister concerns of the appellant/assessee out of capital & interest free fund of the appellant/assessee; submitted that the interest disallowance of Rs.8,73,336/-sustained by the CIT(A) was unjustified. Whereas the Ld. DR, placing emphasis on para 4.4 of the assessment order and page 03-8 of the order of the CIT(A), contended that the commercial expediency of loan and advances was neither established before the AO nor the CIT(A). The Ld. DR contended that there was no factual finding by the Ld. CIT(A) that the assessee/appellant had given loans/advances to its sister concerns for commercial expediency. Hence, the Ld. DR prayed for reversing the finding of the CIT(A) on this score.

8. The issue in dispute here is that whether the interest-free fund, relatable to the interest of Rs.8,73,336/-, given to the sister concerns of the appellant/assessee is out of the borrowed fund and for non-commercial expediency.

9. As regards the disallowance of interest of Rs. 8,73,336/- under section 36(1)(iii) of the Act, the Ld. AO held that the appellant/assessee failed to establish that loans/advances given by it to its sister concerns were for any commercial expediency. The Ld. AO had also specifically mentioned that there was no business transaction between the appellant/assessee and its sister concerns whom loans/advances were given. In the case of S.A. Builders Ltd. (288 ITR 1, the Hon'ble Supreme Court considered an almost identical situation. The Hon'ble Supreme Court held that if the amount has been advanced as a measure of commercial expediency, the interest on funds borrowed by the assessee should be allowed as deduction under Section 36(1)(iii) of the Act.

10. We have heard the rival parties and considered the material available on the record. The question involved vide ground no. 2 in this case is about the allowability of the interest on borrowed funds. The Section 36(1)(iii) of the Act states that "the amount of the interest paid in respect of capital borrowed for the purposes of the business or profession" has to be allowed as a deduction in computing the income under Section 28 of the Act. The expression "for the purpose of business" occurring under the provision is wider in scope than the expression "for the purpose of earning income, profits or gains," and this has been the consistent view of the Hon'ble Courts.In the present case, the appellant/assessee borrowed the fund from the bank and lent some of it to its sister concerns as interest-free loans. The test, in our opinion, in such a case is really whether this was done as a measure of commercial expediency. The expression "commercial expediency" is an expression of wide import and includes such expenditure as prudent businessman incurs for the purpose of business. The expenditure may not have been incurred under any legal obligation, but yet it is allowable as a business expenditure if it was incurred on grounds of commercial expediency (Madhav Prasad Jatia AIR 1979 SC 1291).

11. In the present case, the Ld. CIT(A) had not examined whether the amounts advanced to the sister concerns of the appellant/assessee were by way of commercial expediency. The CIT(A) simply relied upon her predecessor's decision. None of the subordinate authorities have examined the purpose for which the appellant/assessee advanced the money to its sister concerns, and what the sister concerns did with that money, in order to decide whether it was for commercial expediency. It is true that the borrowed amount in question was not utilized by the appellant/assessee in its own business, but had been advanced as interest-free loans to its sister concerns. What is relevant here is whether such loans/advances given by the assessee/appellant to the sister concernsis for commercial expediency. The Hon'ble Delhi High Court in Dalmia Cement (Bharat) Ltd. 254 ITR 377 has held that once it is established that there is nexus

between the expenditure and the purpose of the business, the interest expenses have to be allowed. Here, we have to see the transfer of the borrowed funds to a sister concern from the point of view of commercial expediency and not from the point of view whether the amount was advanced for earning profits.

12. We wish to make it clear that it is not our opinion that in every case interest on borrowed loan has to be allowed if the assessee advances it to a sister concern. It all depends on the facts and circumstances of the respective case. For instance, if the partners/proprietor/directors of the sister concerns utilize the amount advanced to the firm/company by the assessee for their personal benefit, obviously it cannot be said that such money was advanced as a measure of commercial expediency. Hence, the issue of disallowance of interest of Rs.8,73,336/- under section 36(1)(iii) of the Act, in our opinion, is required to be examined afresh from the angle of commercial expediency. In view of the above and in the interest of justice, we are of the considered view that this issue (disallowance of interest of Rs.8,73,336/-) is fit for remitting back to the AO for deciding this matter afresh after affording reasonable opportunities of being heard to appellant/assessee. Accordingly, we order so. However, we are refraining from commenting on merit of this issue.

13. The next issue is in respect of the disallowance of payment of Rs.1,68,720/- made into Haryana Labour Fund under section 43B of the Act. The Ld. Counsel argued that the payment of Rs.1,68,720/- disallowed by the AO was not justified as the same had been deposited well within the due time and also before filing of the return of income. It was further contended by the Ld. Counsel that the sum of Rs.1,68,720/- was paid in the statutory time period as prescribed in the Haryana Labour Fund Act as this Act provides payment of Labour Welfare Fund of one calendar year in the subsequent calendar year before the due date. Hence, the Ld. Counsel prayed for deletion of the disallowance of Rs.1,68,720/-on the reasoning that the same had been paid in the statutory fund within the time period provided under the Haryana Labour Fund Act.

14. The issue of disallowance of Rs.1,68,720/-under section 43B of the Act, in our opinion, is required to be verified that whether same had been paid within the statutory time period. In view of the above and in the interest of justice, we are of the considered view that this issue (disallowance of Rs.1,68,720/-) is fit for remitting back to the AO for deciding this matter afresh after affording reasonable opportunities of being heard to appellant/assessee. Accordingly, we order so. In case the AO find that the same has been paid as per the law, it has to be allowed accordingly in accordance with the provision of section 43B of the Act.

15. Regarding the disallowances of Rs.3,00,000/- out of Labour Welfare expenses concerned, it was submitted by the Ld. Counsel that this disallowance had been made on adhoc basis and no specific finding or defects in the books of accounts of the

appellant/assessee had been noticed by the AO. Hence, the Ld. Councel prayed for deletion of this adhoc disallowance.

16. The claim of the appellant/assessee before us was that the expenditure had been incurred in the course of carrying on the business. Further, complete vouchers were maintained by the appellant/assessee in this regard and there was no merit in disallowing the said expenditure of Rs.3,00,000/-. The impugned expenditure under reference had been incurred by the appellant/ assessee while carrying on its business. The AO, by allowing major portion of the expenditure, had accepted the fact that these expenses had been incurred for the business purposes. However, the disallowance was made in the hands of the appellant/ assessee because of self-made vouchers and cash expenditure. We find no merit in the adhoc disallowance made by the AO in the absence of any evidence found to prove that the expenditure is not relatable to the business of the appellant/assessee. Accordingly, we reverse the order of CIT(A) and direct the AO to allow the said expenditure in entirety.

17. Regarding the disallowances of part of depreciation on vehicle used for non-business purposes, it was submitted by the Ld. Counsel that thisis fixed and statutory deduction; therefore, no disallowance should be made. Hence, the Ld. Counsel prayed for deletion of this disallowance.We find merit in the finding of the CIT(A). Hence, we decline to interfere.

18. In view of the above, the appeal of appellant/assessee is partly allowed.