Commissioner Income Tax Vs BLB Ltd.

Court: Delhi High Court

Date of Decision: Dec. 3, 2010

Acts Referred: Finance Act, 1988 â€" Section 43B
Income Tax Act, 1961 â€" Section 43B

Citation: (2011) 183 DLT 481 : (2012) 347 ITR 139

Hon'ble Judges: Suresh Kait, J; A.K. Sikri, J

Bench: Division Bench

Advocate: Prem Lata Bansal, for the Appellant; C.S. Aggarwal Parkash Kumar and K.C. Jain, for the Respondent

Judgement

Suresh Kait, J.
The Revenue has preferred the instant appeal, challenging the order dated 29th January, 2010 passed by the Income Tax

Appellate Tribunal (ITAT) proposing the following questions of law that u/s 88E of the Act, the Assessee is entitled for payment of income tax of

profits and gains of business or provision arising from Taxable Securities Transaction computed in the manner provided in Sub-Section 2 of an

amount equal to the Security Transaction Tax paid in respect of the taxable Securities Transaction.

a) Whether ITAT was correct in law in allowing deduction of Rs. 3,84,01,630/- to the Assessee being SEBI registration fee holding that the same

was statutory fee, allowable as deduction u/s 43B of the Act?

b) Whether provisions of Section 43B are applicable to the SEBI registration fee?

c) Whether SEBI registration fee is statutory liability in the nature of ""Fee"" within the meaning of Section 43B(a) of the Act?

d) Whether ITAT was correct in law in holding that the payment was made by the Assessee during the year and therefore, deduction was

allowable in the year under consideration applying provisions of Section 43B of the Act?

e) Whether order passed by ITAT is perverse in law and on facts?

2. The facts in brief of this case are that Assessee filed the return declaring income at Rs. 8,92,070/-, which was revised on 30.03.2007 declaring

income at Rs. 7,45,34,674/-. During the assessment proceedings, the Assessing Officer noticed that the Assessee had claimed a sum of Rs.

3,94,16,470/- being SEBI registration fee as expense in the Profits & Loss account. The Assessing Officer required the Assessee to justify as to

why the same be not disallowed as it was in the nature of prior period expense.

3. The Assessee replied that the said payment was made as one time settlement fees to SEBI under Securities & Exchange Board of India

(Internal Liability Regularization) Scheme 2004. As per the scheme all the brokers of BSE and NSE were required to pay turnover fees at a

prescribed rate for an initial period of 5 years. For non-payments, SEBI had charged interest on the amount payable. The brokers were

representing to the Board that the fee was arbitrary and excessive. In this process of confrontation, brokers went to the Court to get relief and

matter went to the Apex Court which vide its judgment in the case of B.S.E. Brokers Forum, Bombay and Others etc. Vs. Securities and

Exchange Board of India and Others etc., , upheld the regulations of SEBI, holding the fees as reasonable and valid.

4. Even after the verdict in the aforesaid judgment by the Apex Court in 2001, the non-compliance from the brokers continued for non payment.

As a result thereof, SEBI came out with a Scheme of ''one time settlement'' for the brokers which they could avail only if they paid the registration

fee on the annual turnover fees along with 20% of the total interest before a specified date i.e. 15.11.2004. The Assessee also opted for one time

settlement and paid the amount. It was claimed as deduction on the ground that since the liability was quantified in that year and therefore the

expense was allowable during the year under consideration. Further he contended that since the amount was paid during the year the same was

allowed even as per the provisions of Section 43B of the Act.

5. The aforesaid contentions could not convince the Assessing Officer. He observed that:

(i) The Assessee was legally bound to pay annual regulatory fees based on turnover to SEBI,

(ii) The liability was contested before the Court and therefore, the same was unascertained till the Appeal was pending,

(iii) With the final verdict by the Hon''ble Supreme Court in the year 2001, the whole of the liability (principal + interest) became ascertained

liability,

(iv) Since the liability became final and got crystallized in February, 2001, the same was to be claimed by the Assessee in assessment year 2001-

02,

(v) Since the liability got finalized and crystallized even on payment basis as it belonged to prior period,

(vi) By making the payment in 2004, the Assessee Company discharged its liability in the year 2004 though it accrued in the year 2001.

6. AO relied on the judgment of this Court in Delhi Tourism v. CIT ITA No. 634/2006 wherein it was held that the Assessee was not entitled to

claim the deduction in the year under consideration for prior period expenses. On this basis, the assessing officer disallowed the deduction of Rs.

3,84,01,623/- as claimed by the Assessee.

7. The Assessee being aggrieved be the aforesaid disallowance, preferred an appeal before the CIT(A) on the contentions as under:

(a) The disallowance of the expenditure incurred was neither justified on facts nor could have been disallowed in law since the said sum was to be

allowed as a deduction u/s 43B of the Act.

(b) The assessing officer had erred in restricting the claim of rebate u/s 88E of the Act, at Rs. 2,76,81,059/- (as against the claim which should

have been allowed on Rs. 8,35,86,315/-).

(c) There was no dispute that the Assessee had paid a sum of Rs. 8,35,86,315/- i.e. Securities Transaction Tax which was the sum levied on each

transaction purchase and sale made by the Assessee broker or any other inter-mediatory on the stock exchange with effect from 01.10.2004. It

may be clarified that in so far as the sum of Rs. 3,84,01,623/- is a distinct ''fee'' and represents turnover ''fee''.

8. The CIT(A), for the reasons stated in its order held that the Assessing Officer was not justified in disallowing the claim of expenditure incurred.

He was of the opinion that payment of Rs. 3,84,16,023/- to the SEBI as registration ''fee'' was nothing but ''a fee'' under Regulation 10 of the

(stock brokers and sub-brokers) Regulation Act 1992 and since it is the ''fee'', it had to be allowed as a deduction in terms of Section 43B of the

Income Tax Act. Even if it is held that it pertained to prior period and not falling in the assessment year or even is the liability and accrued in the

years when the transactions were entered and could be held as non-contingent.

9. The CIT(A) has also held that the calculations made by the Assessing Officer was not correct and the Assessee ought to have been allowed the

deduction of Rs. 3,95,27,704/-, and not only of Rs. 2,76,81,059/- as calculated by the assessing officer.

10. Aggrieved by this order, the Revenue/Department filed an appeal before ITAT who relied on the order passed by ITAT Mumbai Bench in

case of ITO v. Suresh Chand Jain 100 ITD 435 and another in case of K. Holding Co. (P) Ltd. v. DCIT 32 SOT 586 wherein it had been held

that SEBI turnover fee, being a statutory liability was allowable u/s 43B of the Act. Accordingly, in the present case ITAT held that same as ''fee;''

is falling u/s 43B in the year under consideration as the payment was made during the year.

11. The ITAT has come to the conclusion on the following basis:

(i) The SEBI is a nodal agency for regulating the stock market, brokers, sub-brokers, and other brokers and intermediaries who have registered

themselves with the SEBI.

(ii) The SEBI Act 1992, empowers SEBI to levy "fee" for registration for registering brokers/sub-brokers called as SEBI registration "fee".

(iii) The SEBI Regulations also prescribe the basis for charging of SEBI registration "fee" which is relatable to the turnover of the Assessee.

(iv) The brokers however were representing to the Board that the "fee" was arbitrary and excessive.

(v) The brokers forum went to the Supreme Court who vide its judgment dated 7th February, 2011 upheld the regulations of SEBI and held that

the "fee" levied by SEBI was reasonable and valid.

(vi) In the meantime, the SEBI came out with one time settlement "fee"s along with interest for non-late payment of SEBI registration "fee". There

was a case of Lalit Kumar Marodia Vs. Union of India (UOI) and Others, wherein an interim order was passed by the High Court on 20th May,

2004, where after the payment was made by the Appellant.

12. The Revenue/Department has taken a ground that the order passed by the ITAT is not sustainable in law, inter-alia, for the following reasons:

a) Because the order passed by ITAT is not in accordance with law.

b) Because ITAT has erred in deleting the addition of Rs. 3,84,01,623/- made by the assessing officer by disallowing deduction of SEBI

registration fees claimed by the Assessee.

c) Because ITAT erred in holding that SEBI registration fee was a statutory liability and it was a fee within the meaning of Section 43B and

therefore, was allowable on payment basis.

d) Because the ITAT did not appreciate that the Assessee was bound to pay annual regulatory fees based on turnover to SEBI as per its

regulations. The liability became ascertained in the year 2001 when the Supreme Court gave the final verdict holding the fee reasonable and valid.

Accordingly, the Assessee had to claim it in the assessment year 2001-02 since the liability accrued in the year 2001, it could not have been

allowed in the year under consideration even on payment basis being a prior period expense.

e) Because the judgment of this High Court in case of Delhi Tourism v. CIT (Supra) is clearly applicable to the present case wherein it is held that

the electricity charges for electricity consumed were a non-liability to the Assessee and the Assessee could make a provisions for every year of

assessment, on the basis of average, even if no bill was received in a particular year; if the Assessee failed to provide for a known expenditure, the

same could not be claimed in a subsequent year.

f) Because in the present case, the Assessee has failed to provide for a known liability and therefore, it could not have been allowed in the year of

payment.

g) Lastly because the SEBI registration fee was not a statutory liability or statutory fee within the meaning of Section 43B(a) of the Act, rather it

was a contractual liability as whosoever wanted to become member of stock exchange, he was under an obligation to pay registration fee to the

SEBI.

13. On the other hand, the learned Counsel Mr. C.S. Aggarwal, Sr. Advocate appeared on behalf of the Assessee who submits as under:

i) The Assessee is a public limited company, mainly dealing in buying and selling of shares on its own account. The company also acts as a share

broker, and is a member of National Stock Exchange and Bombay Stock Exchange.

ii) On 29.10.2005 the Assessee furnished its return of income declaring at Rs. 8,92,070/-. The Assessee revised its return of income on

30.03.2007 and declared therein was at Rs. 7,43,34,674/- as per original Profit & Loss Account.

iii) The Assessing Officer issued questionnaire directing the Assessee to furnish certain details in compliance thereto, necessary details, as were

directed were duly furnished by the Assessee on 06.08.2007.

The Assessee further filed additional reply dated 15.10.2007. In his submission made before the Assessing Officer, an amount claimed as an

expenditure of Rs. 3,95,27,704/- since represents "fee" is to be allowed as a deduction as provided u/s 43B of the Income Tax Act. It was further

stated that amount paid aggregating to Rs. 3,94,16,470/- was settlement "fee" payable to SEBI and was the sum allowable as a deduction u/s 43B

of the Act. The Assessing Officer however disallowed a sum of Rs. 3,84,01,623/- out of the amount incurred and paid and allowed only Rs.

10,14,847/-

14. Further the Assessee stated the nature of payment was "fee". In this context, the Assessee company referred to the provisions of Regulation

10 of the (stock Brokers and sub-Brokers) Regulation 1992, the assessing company had also furnished the details of its income for the assessment

year 2002-03 to 2004-05 which is detailed below:

Asstt. Year Returned Income Assessed Income Remarks

2002-2003 1,52,33,614/- 1,52,33,610/- 143(1)

2003-2004 2,24,47,176/- 2,24,47,176/- 143(3) 115JB

2004-2005 14,27,77,827/- 14,27,77,830/- 143(3) 115JB

15. Counsel for the Assessee further argued that the aforesaid sum of Rs. 3,84,01,623/- was not really onetime payment which is an incorrect

expression used since such turnover "fee" had to be paid on yearly basis, and is being regularly paid thereafter. He further pointed out that BSE

Brokers Forum Bombay and others had challenged the levy of ''fee'' and the Supreme Court held, by its judgment dated 11th February, 2001 that

under SEBI regulations, SEBI has the power to levy such a ''fee''.

16. Counsel for the Assessee pointed out that the Revenue Department has also placed on record Schedule III of Securities and Exchange Board

of India, which provides the liability to pay ''fee'' by every broker in respect of its annual turnover. Further, he submits that in the instant case, the

Petitioner company made the payment of Rs. 3,94,16,407/- in the instant year. As submitted by him that the aforesaid sum was paid on the basis

of the notified scheme duly gazetted in part II Schedule III published by Securities and Exchange Board of India dated 15.07.2004 and was

designated as ''SEBI'' (Interest Liability Regulation) Scheme 2004. In fact, the assessing officer allowed Rs. 10,14,847/- which represented the

payment made out of current years liability. The Assessing Officer, however framed an assessment on 19.12.2007, whereby allowing the claim of

expenditure incurred by way of ''fee'' as an allowable deduction. In fact, while making the disallowance Assessing Officer did not consider the

provisions of Section 43B of the Act. In other words the assessment had been framed at an income of Rs. 11,29,36,297/- by disallowing the claim

of expenditure aggregated at Rs. 3,84,01,623/- out of SEBI registration ''fee'' and otherwise accepting the income returned as per its revised

computation of income. The Assessing Officer further did not correctly compute the rebate allowable u/s 88E of the Act.

17. Counsel for the Assessee has pointed out that the aforesaid sum of fee has been paid by the assessee company before the due date i.e.

15.11.2004 as per details. The said sum of expenditure incurred was paid on the basis of ""quantification"", made by SEBI, in accordance with the

scheme formulated on 15.07.2004, requiring the share brokers to make a payment on or before 15.11.2004.

18. The learned Counsel for the Assessee further submitted that it cannot be disputed that the said sum of expenditure had been incurred in the

course of business and represents ''fee'' levied by SEBI, which regulates the mechanism of stock market and protects the investors, stock brokers

and other intermediaries for which registration ''fee'' is charged by it, in accordance with the central enactment. As submitted that the said sum paid

by the Assessee was a ''fee'' under the law, formulated by the SEBI and it is a central enactment and has legal force. On the basis of above

argument, he concluded his arguments and submitted that there can be no justification on the part of Revenue to have disallowed the said sum of

expenditure which has been found to be allowed by the CIT(A) which falls strictly, within the provisions of Section 43B of the Income Tax Act. It

is further submitted that merely because expenditure pertains to preceding years can be no ground to disallow the claim since u/s 43B of the

Income Tax Act, where expenditure has been incurred by way of tax "fee" etc. The sum of liability is to be allowed only when the payment is

actually made and is not allowed in the year to which it pertains.

19. Learned Counsel further points out that Section 43B(a) of the Act was substituted by the Finance Act, 1988 with effect from 01.04.1989.

Prior to the substitution, "cess" and "fees" were not included in the definition. However, according to the perception of the Income Tax

Department as contained in Circular No. 528 dated 16.12.1988 was that, the disallowance to be made was to cover any amount payable, to any

statutory authority including local authority and could be allowed only in the year in which such an amount is paid. In view therefore, the

amendment was made and it was clarified that such an amount would also be allowed only on actual payment irrespective of the previous year in

which liability to pay such sum was incurred.

20. Counsel for the Respondent has further drawn our attention that on the identical issue which arose before the Income Tax Tribunal where in the

similar deduction was allowed. It was held in case of (2006) 100 ITD 435 by the Tribunal that the registration "fee" paid to SEBI is a "fee" and

falls u/s 43B of the Income Tax Act.

21. After hearing both the parties, we are of the view that the Assessee on query replied to the Assessing Officer that the said payment in question

was made as one time settlement fees to SEBI under Securities & Exchange Board of India (Internal Liability Regularization Scheme, 2004). As

per the Scheme, all the Brokers of BSE and NSE were required to pay turnover fees at a prescribed rate for an initial period of five years. For

non-payments, SEBI has charged interest on the above payment. Against the said charges the brokers approached the Board that the fee was

arbitrary and excessive. In this process of confrontation brokers went to the Court to get relief and matter went to Apex Court who vide its

judgment dated 01.02.2001 in the case of BSE Brokers Forum v. SEBI (Supra) has upheld the regulations of SEBI, holding the fees as

reasonable and valid. As a result thereof, SEBI came out with a Scheme for one time settlement by the brokers which they would be able to avail

only if they pay the registration fee on the annual turnover fees along with 20% of the total interest before a specified date i.e. 15.11.2004. The

Assessee, in this case, also opted for one time settlement, owned the contention that since the liability was quantified during the year and therefore

the expense was allowable during the year under consideration. Further, since the amount was paid during the year, the same was allowed even as

per the provisions of Section 43B of the Act. The AO also did not appreciate that the Assessee was bound to pay the annual regulatory fees

based on turnover to SEBI as per its regulations.

22. The aforesaid sum in question was paid on the basis of the notified scheme duly Gazetted in Part-II Schedule III published by Securities &

Exchange Board of India dated 15.07.2004 and was designated as "SEBI" (Interest Liability Regulation) Scheme, 2004. In fact, the Assessing

Officer has allowed Rs. 10,14,847/- which represented the payment made out of current years liability. Having observed that the Assessing Officer

has however framed an assessment on 19.12.2007, where he has allowed as stated above, the claim of expenditure incurred by way of "fee" as an

allowable deduction.

23. According to the perception of the Income Tax Department as contained in Circular No. 528 dated 16.12.1988, the disallowance was to

cover any amount payable to any statutory authority including local authority and could be allowed only in the year in which such an amount is paid.

In that view, therefore, the amendment was made and it was clarified that such an amount would also be allowable only on actual payment

irrespective of the previous year in which liability to pay such sum was incurred. In view thereof, the amendment was made and it was clarified that

such an amount would also be allowable only on actual payment irrespective of the previous year in which liability to pay such sum was incurred.

24. Keeping in view the above discussion, we find that no question of law has arisen in the instant appeal. We are not inclined to interfere with the

order/Judgment passed by the ITAT. The instant appeal filed by the Revenue accordingly dismissed with no order as to costs.