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**(1993) 06 CAL CK 0045**

**Calcutta High Court**

**Case No:** IT Reference No. 106 of 1990

Commissioner of Income Tax

APPELLANT

Vs

Associated Pigments Ltd.

RESPONDENT

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**Date of Decision:** June 11, 1993

**Acts Referred:**

- Income Tax Act, 1961 - Section 256(1)

**Citation:** (1993) 71 TAXMAN 244

**Hon'ble Judges:** Shyamal Kumar Sen, J; Ajit K. Sengupta, J

**Bench:** Division Bench

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### **Judgement**

Ajit K. Sengupta, J.

In this reference u/s 256(1) of the income tax Act, 1961 ("the Act"), the following questions of law have been referred by the Tribunal for the assessment year 1985-86:

1. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in law in holding that since the assessee had not made any provision in respect of sales-tax liability but had credited the sales-tax collection and debited the sales-tax payment in a separate sales-tax account, the provisions of section 43B of the income tax Act, 1961 would not be applicable in the case?
2. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in law in holding that the provisions of section 43B of the income tax Act, 1961 would not be applicable in the case and thereby deleting the addition of Rs. 77,439 made under that section?
3. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in upholding the Commissioner of income tax (Appeals) "s order directing the Assessing Officer to allow the deduction of Rs. 1,23,704 on account of sales-tax?

The assessee is a limited company and the assessment year involved is 1985-86. The facts of the case are that during the assessment proceedings the ITO noticed that a sum of Rs. 2,50,100 represented the assessee's liability towards sales-tax. According to him, the provisions of section 43B of the Act would be applicable to this case and, therefore, the difference between the said sum of Rs. 2,50,100 and Rs. 1,72,661, being the amount disallowed last year but paid during the current year of account, must be added to the assessee's income. He, therefore, added the sum of Rs. 77,439.

2. Being aggrieved, the assessee carried the matter in appeal before the Commissioner (Appeals) and argued that it was maintaining a separate ledger account for sales-tax, that the amounts realised from the customers were debited to that account, that the amounts paid to the Government were debited to that account, that the net credit/debit balance was reflected in the balance sheet and that the profit and loss account was not affected in any fashion. It was also pointed out that the sales-tax account started with an opening credit balance of Rs. 3,61,816. During the relevant previous year ending on 31-3-1985 a sum of Rs. 16,44,077 was collected from the customers and credited to that account. At the same time, during the said accounting year a sum of Rs. 17,67,781 was paid to the Government leaving a credit balance of Rs. 2,38,112. The collection made during the year as and by way of sales-tax being Rs. 16,44,077 and the payment made being Rs. 17,67,781, there was an excess payment of Rs. 1,23,704 during the year. It was also stated that in the immediately preceding year of account an amount of Rs. 2,26,629 was disallowed and the excess payment made this year of Rs. 1,23,704 was attributable to the said figure of Rs. 2,26,629. Since the said sum was disallowed in the previous year, the assessee was entitled to a revenue deduction in respect of the sum of Rs. 1,23,704. Further, the addition of Rs. 77,439 made by the ITO should also be deleted. The Commissioner (Appeals) accepted the arguments advanced on behalf of the assessee and directed the ITO to allow deduction of Rs. 1,23,704 and also to delete the addition of Rs. 77,439.

Before the Tribunal, the learned departmental representative has argued that the Commissioner (Appeals) was not justified in the direction given by him to the ITO in view of the clear provisions of section 43B which fully support the ITO's action. On the other hand, the learned counsel for the assessee strongly supported the impugned order of the Commissioner (Appeals).

3. The Tribunal considered the rival submissions. The sales-tax account as maintained by the assessee was also duly considered. Since the assessee collected sales-tax which was credited to a separate sales-tax account and the sales-tax paid was debited to the said account, section 43B is not applicable. The addition of Rs. 77,439 made by the ITO was held to be deleted.

4. The Tribunal has further considered the amount of Rs. 1,23,704 claimed as a revenue deduction by the assessee and allowed by the Commissioner (Appeals). It

was found that the assessee paid the sum of Rs. 1,23,704 over and above the aggregate sum collected during the year. It was considered whether the assessee is entitled to a revenue deduction in respect of the said amount. The Commissioner (Appeals) has taken a view that the above amount formed part of the sum of Rs. 2,26,629 disallowed in the assessment for the assessment year 1984-85 under the head "Sales-tax". The Tribunal has taken a view that the excess sales-tax collected over the sales-tax actually paid during the year requires to be straightway added to the assessee's income on the only ground that sales-tax forms part of the turnover. It was also found that the amount added back in the last assessment year under the head "Sales-tax" is larger than the amount of Rs. 1,23,704. The Commissioner (Appeals) was justified in directing the ITO to allow the said amount as a revenue deduction.

5. We have heard the rival contentions. The Tribunal has supported the assessee's contention that where the assessee does not debit the sales-tax to the profit and loss account by way of any provision but credits the sales-tax collection and debits the payment thereof in a separate sales-tax account, liability, thus, appearing in the balance sheet, the provisions of section 43B cannot have application. It is not permissible for the Assessing Officer to include the sales-tax in the sales while completing the assessment of the income by invoking the said provisions.

6. According to the assessee, the Assessing Officer cannot presume a provision for sales-tax liability in the profit and loss account when there is none therein. Thus, the disallowance on the hypothesis that a provision is there in the profit and loss account is not within the terms of section 43B.

It is submitted on behalf of the revenue that the sales-tax is part of the turnover and is, therefore, a revenue receipt. The essential character of the sales-tax collection as a revenue receipt is not obliterated by the assessee's maintaining the accounts in a manner not treating the sales-tax as its receipt as part of the sales proceeds but as a mere collection credited to a separate suspense account and thereby taking the collection as a liability in the balance sheet. This device of not entering the sales-tax in the sales and the profit and loss account cannot avoid the mischief of section 43B.

7. The reliance was placed on the decisions of the Supreme Court in [Chowringhee Sales Bureau \(P\) Ltd. Vs. Commissioner of Income Tax, West Bengal](#), and [Sinclair Murray and Co. \(P\) Ltd. Vs. The Commissioner of Income Tax, Calcutta](#), for the proposition that a tax or duty is part of the dealer's trading or business receipt even if the tax or duty is charged separately or credited to a separate account in the dealer's books.

8. We are in agreement with the contention of the counsel for the revenue that it is immaterial whether the assessee brings the sales-tax collection to its sales account or not. Therefore, where the assessee credits the sales-tax collection and debits the

payments thereof in a separate account maintained for sales-tax, the inherent effect is that the collection is being credited and at once debited to the profit and loss account by way of provision. It is of no effect that such credit of the collection as well as the debit of the provision of the equivalent amount is invisible. The crediting and debiting the suspense account merely hide the true nature of the transaction.

9. Therefore, we answer the first question in the negative and against the assessee. The other two questions are practically the offshoot of the assessee's claim that in the assessee's case, the provision of section 43B cannot apply by reason of the manner of accounting treatment meted out to sales-tax collection and payment. In the instant previous year ending on 31-3-1985, the sales-tax account had an opening credit balance of Rs. 3,51,816 and during the year sales-tax collected stood at Rs. 16,44,077, the aggregate credit being Rs. 20,05,893 while the payments made were of the aggregate sum of Rs. 17,67,781, thus, the unpaid liability remains Rs. 2,38,112. The ITO, however, found that during the year the assessee was liable to pay to sales-tax authorities a sum of Rs. 2,50,100 but out of the amount disallowed last year the assessee paid during the year to the sales-tax authorities Rs. 1,72,661. Thus, according to the Assessing Officer, the unpaid collection of the current year was Rs. 77,439 which is disallowed. The assessee does not contest the correctness of the figures of the Assessing Officer as regards collection and payment but challenges the addition of Rs. 77,439 on the ground that in its case section 43B cannot have any application. Therefore, as a consequence to our answer to question No. 1, question No. 2 is also to be answered in the negative and against the assessee holding that the addition of Rs. 77,439 was correct. The assessee, however, contended that the collection made during the year was Rs. 16,44,077 and the payment Rs. 17,60,781, thus, there was an excess payment of Rs. 1,23,704 but this excess payment is in the context of the current collection and current payment without taking into account the opening unpaid collection. This contention is also accepted by the Tribunal irrespective of whether the figures are correct or not, insofar as it is based upon the same premise that section 43B is not applicable and there was no case for any addition whatsoever out of the sales-tax payments. The Tribunal is directed to sort out the figures of collection payment and the disallowable amounts on the basis of the principle we have laid down. The matter is remanded to the Tribunal in this respect. There will be no order as to costs.

Sen, J.

I agree.