

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION**

Civil Appeal No(s). 5347/2010

THE COMMISSIONER OF INCOME TAX, AHMEDABAD

Appellant(s)

VERSUS

M/S GUJARAT CYPROMET LTD.

Respondent(s)

O R D E R

We have heard Mr. Sanjay Jain, learned ASG appearing for the appellant. Despite service, no one is present on behalf of the respondent.

This appeal has been filed against the judgment dated 31.08.2006 passed by the High Court of Gujarat in Tax Appeal No. 231 of 2006, whereby the High Court dismissed the Tax Appeal filed by the appellant.

The respondent - assessee filed a return of income showing total loss of Rs.3,76,70,656 on 31.10.2001. The said return was processed and the statutory notice was issued. The assessment order was passed on 17.03.2004 for the assessment year 2001-02. In the present case, the High Court had admitted the appeal only on the following question of law:

“Whether on the facts and circumstances of the case, the Appellate Tribunal was right in law and on facts in deleting the addition made u/s 43B of the Income Tax Act, 1961 on conversion of unpaid interest into a funded interest loan treating the same as interest payment?”

The Assessing Officer disallowed the deduction claimed by the assessee with regard to payment of interest amounting to Rs.2,51,31,154/- to the IDBI Bank. The Assessing Officer has referred to Circular dated 16.12.1988 as well as the judgment of Madhya Pradesh High Court in Eicher Motors Ltd. v. CIT [(2009) 315 ITR 312].

The assessee, aggrieved by the order of the Assessing Officer, filed an appeal before the Commissioner of Income Tax (Appeals), which was partly allowed. It is useful to refer to para 2.2 of the CIT (Appeals) order, which is to the following effect:-

"2.2 I have perused the case laws cited and also the above sanction letter from IDBI and also the auditor's note referred by the Assessing Officer. I have perused Schedule 3 of the balance sheet as on 31.03.2001 and find that the above loan appears as on 31.03.2001 and is part of the total secured loans of Rs.75,26,10,769/-. The fact that the entry pertaining to the interest element outstanding to financial institutions referred at page 2 of the order by the Assessing Officer has been reversed after receipt of funds of Rs.8 crores from IDBI substantiates the contention of the appellant company that the entries relating to interest outstanding with reference the above institutions have been squared up and its place a new credit entry of loan of IDBI is now appearing in the balance sheet as on 31.03.2001. The plea of the appellant's counsel Shri Tanna that since no interest payment is outstanding now and the amount is paid off, the expenditure of interest is allowable u/s 43 B. It is further added that in case the loan had been disbursed in 2 parts - one to meet the interest outstanding and the balance for financial assistance still the entries in the books of account would have remain the same and the outstanding interest would have

been NIL. Having regard to the above facts and also the case laws cited by the appellant's representative, I am inclined to hold that the disallowance made by the Assessing Officer is contrary to the substance of the transaction and the provisions of Section 43B of the Income Tax Act and the same cannot be sustained and therefore directed to be deleted."

An appeal was filed before the ITAT against the order of the CIT (Appeals), which was dismissed by the ITAT on 24.06.1985. It is against the order of the ITAT, the appeal was filed in the High Court.

Shri Sanjay Jain, learned ASG appearing for the appellant contends that the High Court has not adverted to the statutory provision of Explanation 3C to Section 43B which was inserted by the Finance Act of 2006 w.e.f. 01.04.1989, which statutory provision re-stated what was earlier contained in the Circular relied by the Assessing Officer. It is submitted that Explanation 3C to Section 43B was added to take care of such claim of payment of interest which actually are not paid and camouflage in way of loan or other type of financial advance. He submits that in the facts of the present case, the assessee instead of payment of interest liability occurring in the year in question has got sanctioned further loan of Rs.8 crores and claims that the interest was adjusted in the said loan which is squarely covered by Explanation 3C to Section 43B. He has placed reliance on the judgment of Madhya Pradesh High Court in *Eicher Motors Limited v. Commissioner of Income Tax* [(2009) 315

ITR 312] and the judgment of Delhi High Court in *Commissioner of Income Tax, Delhi v. MM Aqua Technologies Ltd.* [(2015) 376 ITR 498]. He submits that the High Court erred in relying on the judgment of Gujarat High Court in *Commissioner of Income Tax v. Bhagwati Autocast Ltd.* [261 ITR 481], which was a case not referring to Section 43B(d) and was not appropriate to be relied on in the facts of the present case. He further submits that the case of *Bhagwati Autocast Ltd.* (supra) relates to deferment of sales tax under State Government scheme falling under Section 43B(a).

We have considered the submissions made by learned counsel for the appellant and perused the record.

Section 43B, which is relevant for the present case, is as follows:

"43B Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of

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(a) any sum payable by the assessee by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force, or

(b) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees, or

(c) any sum referred to in clause (ii) of sub-section (1) of Section 36, or

(d) any sum payable by the assessee as interest on any loan or borrowing from any public financial institution or a State financial corporation or a State industrial investment corporation in accordance with the terms and conditions of the agreement governing such loan or borrowing, or

shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in section 28 of that previous year in which sum is actually paid by him."

As noted above, Explanation 3C was inserted by the Finance Act, 2006 w.e.f. 01.04.1989 which is to the following effect:

"Explanation 3C - For the removal of doubts, it is hereby declared that a deduction of any sum, being interest payable under clause (d) of this section, shall be allowed if such interest has been actually paid and any interest referred to in that clause which has been converted into a loan or borrowing shall not be deemed to have been actually paid."

The Appellate Authority has noticed the facts in para 2.2 as extracted above which needs no repetition.

The interest liability which accrued during the relevant assessment year was not actually paid back by the assessee rather was sought to be adjusted in the further loan of Rs.8 crores which was obtained by the IDBI Bank.

The judgment of Delhi High Court relied upon by learned counsel for the appellant refers to Section 43B as well as Explanation 3C and held that Explanation 3C having retrospective effect with effect from 01.04.1989 shall be applicable to the year in question. The Delhi High Court in its judgment has referred to the judgment

of Madhya Pradesh High Court in *Eicher Motors Limited* [supra]. It is useful to refer to paras 11 and 12 of the Judgment:

11. In so concluding, this Court is supported by the decision of the Madhya Pradesh High Court in [Eicher Motors Ltd. v. Commissioner of Income Tax](#), 315 ITR 312 and subsequently, the judgment of the High Court of Telangana and Andhra Pradesh in *Commissioner of Income Tax v. Pennar Profiles Limited*, (ITA No. 289 of 2003, decided on 11.02.2015). In *Eicher Motors*, the Court noted:

"7. As observed supra, the Expln. 3C has now in clear terms provided that such conversion of interest amount into loan shall not be deemed to be regarded as "actually paid" amount within the meaning of [Section 43B](#). In view of clear legislative mandate removing this doubt and making the intention of legislature clear in relation to such transaction, it is not now necessary for this Court to interpret the unamended [Section 43B](#) in detail, nor it is necessary for this Court to take note of facts in detail as also the submissions urged in support of various contentions except to place reliance on Expln. 3C to [Section 43B](#) and answer the questions against the assessee and in favour of Revenue."

The Court in *Pennar Profiles Limited* (supra) considered the decisions in *Mahindra Nissan* (supra), *Vinir Engineering* (supra) and *Eicher Motors* (supra) and held as follows:

"8. In this backdrop, we have perused the provisions contained in [Section 43B](#) of the Act, in particular, Explanation 3C thereof, which was inserted by the [Finance Act](#), 2006 with retrospective effect from 01.04.1989. This provision was inserted in 2006 and ITA 110/2005 Page 10 hence, this Court in *Mahindra Nissans* case, had no occasion to deal with the case in the light

of this provision. Insofar as the Karnataka High Court is concerned, though this provision was existing on the date of judgment, it appears that it was not brought to the notice of learned Judges and hence, the Division Bench proceeded to consider and decide the appeal of the assessee without referring to Explanation 3C appended to [Section 43B](#) of the Act.

9. As a matter of fact, from reading of Explanation 3C, in our opinion, the question as raised in the present appeals stands answered without further discussion. This provision was inserted for removal of doubts and it was declared that deduction of any sum, being interest payable under clause (d) of [Section 43B](#) of the Act, shall be allowed if such interest has been actually paid and any interest referred to in that clause, which has been converted into a loan or borrowing, shall not be deemed to have been actually paid. Thus, the doubt stands removed in view of Explanation 3C. This provision was considered by the Madhya Pradesh High Court in [Eicher Motors Limited v. Commissioner of Income Tax](#) to hold that in view of the Explanation 3C appended to [Section 43B](#) with retrospective effect from 01.04.1989, conversion of interest amount into loan would not be deemed to be regarded as actually paid amount within the meaning of [Section 43B](#) of the Act."

12. In light of the introduction of Explanation 3C, this Court does not consider it necessary to discuss the precedents relied upon by the assessee delivered prior to the enactment of [Finance Act, 2006](#). As regards the decision in *Shakti Spring Industries* (supra), the interest due in that case was offset against a subsidy which the assessee was entitled to, and it did not involve an instance where it was "converted into a loan or borrowing" within the meaning of Explanation 3C. It is perhaps for this reason that Explanation 3C was not discussed."

In the impugned judgment, the Gujarat High Court has relied upon *Bhagwati Autocast Ltd.* (supra) which was not a case covered by Section 43B (d) rather was a case of

Section 43B (a). The provision of Section 43B covers a host of different situations. The statutory Explanation 3C inserted by the Finance Act, 2006 is squarely applicable in the facts of the present case. It appears that the attention of the High Court was not invited to Explanation 3C, we are, thus, of the view that the Assessing Officer has rightly disallowed the deduction as claimed by the assessee. The Appellate Authority, ITAT and the High Court erred in reversing the said disallowance.

As a result, the appeal is allowed. The question of law is answered in favour of Revenue.

.....J.
[ASHOK BHUSHAN]

.....J.
[K.M. JOSEPH]

NEW DELHI;
FEBRUARY 21, 2019.

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal No(s). 5347/2010

COMMR.OF INCOME TAX,AHMEDABAD

Appellant(s)

VERSUS

M/S GUJARAT CYRPOMET LTD.

Respondent(s)

Date : 21-02-2019 This appeal was called on for hearing today.

CORAM : HON'BLE MR. JUSTICE ASHOK BHUSHAN
HON'BLE MR. JUSTICE K.M. JOSEPHFor Appellant(s) Mr. Sanjay Jain, ASG
Mr. Rupesh Kumar, Adv.
Mr. Arjun Garg, Adv.
Mr. Devansh Srivastava, Adv.
Mr. Yuvraj Sharma, Adv.
Ms. Saniya Scott, Adv.
Mrs. Anil Katiyar, Adv.
Mr. B. V. Balaram Das, AOR

For Respondent(s)

UPON hearing the counsel the Court made the following

O R D E R

The appeal is allowed in terms of the signed order.

Pending application, if any, stands disposed of.

(MEENAKSHI KOHLI)
COURT MASTER(RENU KAPOOR)
COURT MASTER

[Signed order is placed on the file]