

In The High Court At Calcutta
Special Jurisdiction (Income Tax)
Original Side

ITA No. 82 of 2004
ITA No. 110 of 2005
ITA No. 83 of 2004
ITA No. 84 of 2004

CESC LTD.

-Vs.-

C.I.T. – II, Kolkata

Before : The Hon'ble Chief Justice Manjula Chellur
&
The Hon'ble Justice Arijit Banerjee

For the appellant : Mr. J. P. Khaitan, Sr. Adv.
Mrs. Nilanjana Banerjee Pal, Adv.

For the respondent : Mrs. Soma Chatterjee, Adv.
Mr. R. N. Bandopadhyay, Adv.

Heard On : 18th December, 2014

Judgment On : 14/05/2015

Arijit Banerjee, J.:

(1) These income tax appeals arise out of an order dated 21st October, 2003 passed by the Income Tax Tribunal 'E' Bench, Kolkata in ITA Nos. 140, 141 and 142 (Kol)/02. By the order impugned the Ld. Tribunal dismissed the assessee company's appeals against three orders all dated 31st December, 2001 passed by the Commissioner of Income Tax (A) for the assessment years 1986-87, 1987-88 and 1989-90.

(2) The facts of the case, briefly stated are that the assessee company (appellant herein) did not include the unpaid electricity duty while computing disallowance to be made under Section 43 of the Income Tax Act. The electricity duty was realized by the assessee company from the consumers which is finally paid to the State Government. The assessing officer was of the view that the amount of electricity duty collected by the assessee company from its customers is to be treated as a part of sales proceeds and the amount actually paid to the company during the year was only to be allowed as expenditure. The assessing officer disallowed the amount of Rs. 36,01,942/-, Rs. 2,71,83,582/- and Rs. 2,85,57,061/- being amounts not paid to the Government during the three years under consideration.

(3) On appeal by the Government the Commissioner of Income Tax (A) noted that Section 3 (1) of the Bengal Electricity Duty Act 1935 levies a charge on the customers for payment of electricity duty. According to Section 5 (1) of the said Act, in the case of energy supply by a licensee, the licensee is statutorily obliged to collect and pay to the State Government at the prescribed time and in the prescribed manner the electricity duty payable under Section 3 on the energy supplied by the licensee to the consumers and the duty so payable constitutes first charge on the amount recoverable by the

licensee for the energy supplied by it. The Commissioner held that the electricity duty collected by the appellant licensee from the consumers falls within the purview of Section 43B of the Income Tax Act, 1961 and as such he dismissed the appeals of assessee-company and upheld the order of the assessing officer.

(4) The assessee company preferred appeal against the Commissioner's orders before the Income Tax Tribunal.

(5) In its order dated 21st October, 2003 the Ld. Tribunal observed that on a reading of the provisions of Section 5(1) of the Bengal Electricity Duty Act, 1935, it is clear that it is the obligation or duty of the licensee to pay electricity duty payable under Section 3 of the said Act in respect of the energy supplied by the licensee to the consumers unless the licensee is unable to recover his dues, i.e., the dues for the energy supplied by the licensee to the consumers. The provisions contained in Section 5(1) of the said Act also indicate that the duty so payable by the licensee in respect of energy supplied by it to the consumers shall be a first charge on the amount recoverable by the licensee for the energy supplied by it and shall be a debt due from it to the State Government. The electricity duty shall be a first charge on the amount recovered by the licensee for the energy supplied irrespective of whether or not the licensee recovers the amount of electricity

duty from the consumers. Thus, there is a primary and clear liability of the licensee who has recovered charges for the electricity supplied by it to the consumers, to pay the electricity duty to the State Government under the said Act. The Ld. Tribunal relied on a decision of the Gujarat High Court in the case of *CIT-vs.-Ahmedabad Electricity Co. Ltd. reported in (2003) 262 ITR 97*. The Ld. Tribunal further observed that an amount even though realized as sales tax is, in the hands of a trader, a trading receipt and as such chargeable to tax. Further, the trader shall be entitled to claim deduction in respect of an amount realized as sales tax or any part thereof as and when the sum is paid to the Government. The same principle applies to electricity duty and the nature of electricity duty collected by a licensee is that of a trading receipt. The collection and payment of electricity duty by the licensee under the Bengal Electricity Duty Act, 1935 is related to the trading sphere and to the business activities of generation and supply of electricity carried on by the assessee. The Ld. Tribunal concluded that it was a liability of the assessee to pay the electricity duty to the Government and consequently the deduction of electricity duty is allowable on actual payment as per provisions of Section 43B of the Income Tax Act. With those observations the Ld. Tribunal dismissed the appeals.

(6) Being aggrieved the assessee CSC Ltd. is before us by way of the instant appeals.

(7) Ld. Senior Counsel for the appellant advanced before us essentially the same arguments that were made before the Ld. Tribunal. He submitted that Section 43B of the Income Tax Act does not apply to electricity duty collected by the assessee-company as licensee, on behalf of the State Government inasmuch as the electricity duty which the assessee-company collects from the consumers is made over to the State Government and, as such, the same is not a tax, duty, cess or fee payable by the assessee-company and, as such, the provisions of Section 43B of the Income Tax Act are not applicable to the instant case. He contended that only the amounts which can be construed as payable by the assessee are covered by the provisions of Section 43B of the Income Tax Act. Section 43B does not cover all and every payment made by an assessee to the Government and covers only such payments which are chargeable to the assessee. Referring to Sections 2, 3 and 5 of the Bengal Electricity Duty Act, 1935, he contended that on a reading of the aforesaid provisions, it would be clear that the electricity duty is not a levy of tax/duty on the assessee but the role of the assessee as a licensee is to act as a mere collecting agent of the Government and the electricity duty is a charge on the consumers of

electricity for the energy consumed by them. He further submitted that the levy of electricity duty is not on the licensee for generation or distribution of electricity and the payment of electricity duty is not a primary liability of the assessee. The assessee is merely supplying energy to the consumers and is obliged to collect the duty from the consumers and make over the same to the State Government. He further pointed out that the assessee neither includes the electricity duty collected from the consumers in the credit balance of its profit and loss account nor is the said sum payable debited to the profit and loss account. He contended that the electricity duty is not akin to sales tax and hence, the principles laid down in respect of collection and payment of sales tax are not applicable to the case of collection and payment of electricity duty under the Bengal Electricity Act.

(8) Ld. Counsel for the appellant relied on a Division Bench decision of the Kerala High Court in the case of *Kerala State Electricity Board-vs.-Deputy Commissioner of Income Tax reported in (2010) 329 ITR 91*. In that case, the assessee had argued that Section 43B of the Income Tax Act is applicable only in those cases where any sum is payable by the assessee qua tax, duty cess or fee under any law for the time being in force. However, the amount in question not being an amount payable by the assessee qua tax but being an amount collected by the assessee as the agent of the State of Kerala

towards the tax payable by the consumers of electricity to the State of Kerala, Section 43B has no application. The first Appellate Authority accepted the stand of the assessee. However, the Income Tax Tribunal held that Section 43B can be properly invoked where the assessee has, in fact, collected the amounts from the consumers. Thus, submission of the assessee that the amount was collected on behalf of the State of Kerala pursuant to the statutory obligation to collect such an amount and the assessee is only an agent of the Government of Kerala holding the said amount and liable to account for and pay the said amount to the State of Kerala as an agent, but not as the assessee who has a primary liability to pay tax under the Kerala Electricity Duty Act, 1963, was not accepted by the Tribunal. The Kerala High Court reversed the decision of the Tribunal. The High Court observed that the words “by way of tax, etc.” are relevant as they are indicative of the nature of liability. The liability to pay and corresponding authority of the State to collect the tax is essentially in the realm of the rights of the sovereign. On the other hand, the obligation of the agent to account for and pay the amounts collected by him on behalf of the principal is purely fiduciary. The nature of the obligation continues to be fiduciary even in a case where the relationship of principal and agent is created by a statute. When Section 43B(a) of the Income Tax Act speaks of the sum payable by

way of tax, etc, the said provision is dealing with the amounts payable to the sovereign qua- sovereign, but not the amounts payable to the sovereign qua-principal. With those observations, the Kerala High Court held that Section 43B of the Income Tax Act cannot be invoked in making the assessment of the liability of the assessee under the Income Act with regard to the amounts collected by the assessee pursuant to the obligation cast on it under Section 5 of the Kerala Electricity Duty Act, 1963.

(9) Ld. Counsel for the appellant also relied on a Division Bench decision of the Andhra Pradesh High Court in the case of *Commissioner of Income Tax-vs.-Devatha Chandraiah & Sons reported in (1985) 154 ITR 893*. In that case the assessee was a registered firm dealing as commission agent in diverse agricultural commodities and was acting as the commission agent on behalf of the agriculturists, i.e., the agriculturists brought their produce to the assessee for sale and the assessee sold the same on behalf of the agriculturists to various parties. Under the Andhra Pradesh General Sales Tax Act, a commission agent is liable for sales tax if it is not able to prove that the sales made by it were on behalf of the agriculturist principals. However, if it proved that it was acting on behalf of the agriculturist principals, then such goods would be exempted from tax. After discussing various decisions of different High Courts as also of the Supreme Court, the

Andhra Pradesh High Court held that the money received towards sales tax by the assessee from the purchasers was so received on behalf of the agriculturist principals and the same did not constitute a trading receipt and as such, could not be included in the assessee's income for the purpose of computation of income tax.

(10) Ld. Counsel then relied on a Division Bench decision of this Court in the case of *A.W. Figgis & Co. Ltd.-vs.-Commissioner of Income Tax reported in (2002) 256 ITR 268*. The question that fell for determination in that case was whether in view of the fact that the applicant as a tea broker was neither the purchaser nor the seller of tea and the sale proceeds of tea were not the applicant's trading receipts, the Tribunal was correct in holding that the sales tax collected by the applicant as a tea broker was its income and the amount of sales tax collected but remaining unpaid at the end of the year was disallowable under Section 43B of the Income Tax Act. This court held that the amount received towards the sales tax by the assessee from the purchasers was received on behalf of the actual owner of tea and, therefore, the same could not constitute a trading and/or business receipt and, therefore, cannot be treated as an income of the assessee. The sales tax collected by the assessee as an auctioneer and a tea broker cannot be trading and/or business receipt when the sales price itself was not reflected in the

accounts of the assessee as the realization of the sale proceeds was not of its own.

(11) Finally, Ld. Counsel relied on a decision of the Hon'ble Supreme Court in the case of *Commissioner of Income Tax-vs.-D. Shankaraiah reported in (2001) 247 ITR 798*. The question which arose for consideration in that case was whether the sales tax collected by the assessee, who was a commission agent, from the purchasers and paid to the Sales Tax Department as well as the amount of refund of sales tax collected by the said assessee from the Department when it was found that the sales tax was not payable, could be treated as income in the hands of the assessee and the same is liable for payment of income tax. The Hon'ble Supreme Court held that the assessee was collecting sales tax only as a commission agent of the principal and the amount cannot be treated as its income.

(12) Appearing for the respondents, Ld. Counsel submitted that the amount of electricity duty collected by the assessee-company forms an integral part of the commercial transaction of supplying and distributing electricity and, as such, it is nothing but trading receipt. She contended that it is the nature and the quality of the receipts and not the head under which it is taken or entered in the accounts of the assessee that would be determinative and decisive. She further contended that merely because the electricity duty was

not credited in the sale account by the assessee-company in its book of account, the same would not alter or change the nature, character and quality of the amount collected by the assessee by way of electricity duty in the course of its business activities. It was further argued by the Ld. Counsel that perusal of the entire provisions of the Bengal Electricity Act, 1935 would show that it was the primary liability of the assessee-company to pay electricity duty to the Government under the provisions of the said Act. As such, she submitted that Section 43B of the Income Tax Act is very much attracted to the electricity duty collected by the assessee-company from the consumers but not paid to the Government. In this connection, Ld. Counsel relied on the Division Bench decision of the Gujarat High Court in the case of *Commissioner of Income Tax-Vs-Ahmedabad Electricity Co. Ltd. (Supra)* which was relied upon by the Ld. Tribunal as referred to hereinabove.

(13) In that case, the Gujrat High Court while considering the provisions of Bombay Electricity Duty Act, 1958, observed that it is the obligation of the licensee to pay electricity duty to the Government in respect of the energy supplied by the licensee to the consumers unless the licensee is unable to recover the dues for the energy supplied by it. If the licensee recovers his dues, but does not recover the amount of duty, in that event, the duty will be a first charge on the amount recovered by the licensee for the energy

supplied. In that clear liability of a licensee who has recovered the charges for the electricity supplied, it cannot be said that a licensee being an agent is not liable to pay the electricity duty to the State Government. He would not be liable to pay the duty unless if he is unable to recover his dues for the energy supplied by him. With the aforesaid observations, the Gujrat High Court held that it could not scribe to the observations of the Tribunal that Section 43B would not be applicable to the assessee's case on the ground that the electricity duty recovered by it did not belong to it, but it was retained for a short-time as an agent of the Government.

(14) We have considered the rival contentions of the parties.

(15) Section 43B(a) of the Income Tax Act provides that notwithstanding anything contained in any other provision of the Act, a deduction otherwise allowable under the Act in respect of 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, 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 the previous year in which such sum is actually paid by him. The object of Section 43B was to curb the mal-practice exercised by some taxpayers who did not discharge their statutory

liabilities even though they claimed those liabilities as a deduction on the ground that they maintain accounts on mercantile or accrual basis. The Section was intended to apply to cases where the statutory liability remained undischarged though the assessee in such a case claimed deduction on the ground that he maintained those accounts on mercantile business. The question that falls for determination by us is whether Section 43B applies to the electricity duty collected by the assessee company from the consumers of electricity in terms of the provisions of the Bengal Electricity Act, 1935.

(16) Sections 3, 5 and 8 of the Bengal Electricity Duty Act, 1985, in so far the same are relevant for the present purpose are reproduced hereunder:-

“S. 3(1) Subject to the provisions of sub-Section (2) and (3), there shall be charged, levied and paid to the State Government a duty (hereinafter referred to as ‘electricity duty’), on the units of energy consumed at the rates specified in the First Schedule.

..... 5(1) In the case of energy supplied by a licensee, the licensee shall collect and pay to the State Government at the prescribed time and in the prescribed manner, the electricity duty payable under Section 3 on the units of energy supplied by him to consumers. The duty so payable shall be a first charge on the amount recoverable by the licensee for the energy supplied by him and shall be a debt due by him to the State government.

Provided that the licensee shall not be liable to pay the duty in respect of any energy supplied by him for which he has been unable to recover his dues.

(2) Where any person fails or neglects to pay, at the prescribed time and in the prescribed manner the amount of electricity duty due from him, the licensee or the State Government, as the case may be, may, without prejudice to the right of the State Government to recover the amount under Section 8, and after giving not less than seven clear days' notice in writing to such person, cut off the supply of energy to such person; and may, for that purpose, exercise the power conferred on a licensee by sub-Section (1) of Section 24 of the Indian Electricity Act, 1920, for recovery of any charge or sum due in respect of energy supplied by him.

..... 8. Any sum due on account of electricity duty if not paid at the prescribed time and in the prescribed manner shall be recoverable, as a public demand- (a) in the case of energy supplied by a licensee, at the discretion of the State Government, either from the consumer, or, subject to the proviso to sub-Section (1) of Section 5, from the licensee.

.....”

(17) On a reading of the aforesaid provisions of the Bengal Electricity Duty Act, it is quite clear that the primary liability to pay electricity duty to

the State Government is that of the consumers of energy. The licensee/assessee merely acts as a collecting agent for the State Government. The licensee is obliged to collect the electricity duty from the consumers and pay the same to the State Government. The licensee merely acts as a conduit. The electricity duty is not chargeable to the licensee. If the intention of the legislature was to impose primary and absolute liability for electricity duty on the licensee, the proviso to Section 5 (1) of the Act would not have been there. The said proviso exempts the licensee from paying any duty in respect of any energy supplied by the licensee for which it has been unable to recover its dues. In our view, the first charge created by Section 5 (1) of the Act on the amount recoverable by the licensee for the energy supplied by him in respect of duty payable to the Government, is to induce the licensee to make every effort to recover the electricity duty from the consumers for payment to the Government. If the licensee recovers only the price of energy supplied from the consumers but not the electricity duty, then a secondary liability arises on the part of the licensee to make payment of the duty to the Government. However, if the licensee is unable to recover the energy charges as well as the electricity duty, there is no liability on the part of the licensee to pay any duty to the Government.

(18) The wording of Section 5 (1) of the 1935 Act to the effect that when any person fails or neglects to pay the electricity duty due from him, the licensee may disconnect power supplied to such person, also indicates that the primary liability of payment of duty is that of the consumer.

(19) Thus, in our view, the electricity duty, not being a sum payable by the assessee as a primary liability by way of tax, duty, cess or fee, Section 43B is not attracted to the licensee/assessee in respect of electricity duty collected by it for being passed on the State Government. On this point we are in respectful disagreement with the decision of the Gujarat High Court in the case of *Commissioner of Income Tax-vs.-Ahmedabad Electricity Co. Ltd.* (*Supra*) and we are in agreement with the decision of the Kerala High Court in the case of *Kerala State Electricity Board-vs.-Deputy Commissioner of Income Tax (supra)*. We are of the opinion that Section 43B of the Income Tax Act is attracted to a case where payment is to be made to the State Government in the capacity of the State as a sovereign and not to a case where payment is to be made to the State Government in its capacity as a principal by an agent. In the instant case, the relationship between the State and the licensee is of a principal and agent/fiduciary and not that of a sovereign and a subject.

(20) Looking at the issue from another angle, the electricity duty collected by the licensee from the consumers is so done by the licensee as an agent of the State and, hence, the same cannot be considered to a trading receipt in the hands of the licensee. It does not constitute income of the licensee and cannot be included in the licensee's income for the purpose of computation of income tax. It is not a business receipt of the licensee which the licensee collects on its own behalf in connection with its business of generating and supplying electricity. The licensee does not collect the electricity duty for its own consumption or utilization. If the licensee collects the duty but does not pay the same to the Government, the statute provides mechanism for the Government to recover the same from the licensee. Even in a case where the licensee is unable to recover the duty but recovers the energy charges, the statutes still provides a procedure for the Government to recover the duty either from the consumer or from the licensee. This view of ours finds support from the decision of the Andhra Pradesh High Court in the case of *Commissioner of Income Tax-vs.-Devatha Chandraiah (supra)*. Though the said case deals with sales tax, the principle laid down in that case supports our view. The mischief that Section 43B of the Income Tax Act intended to present, is taken care of by the provisions of the Bengal Electricity Duty Act itself.

(21) The orders of the Ld. Tribunal impugned before us are based almost wholly on the decision of the Gujarat High Court in the case of *Commissioner of Income Tax-vs.-Ahmedabad Electricity Co. Ltd. (supra)*. However, we have already said that we are unable to agree with the said decision of the Gujarat High Court.

(22) In view of the aforesaid, we are unable to sustain the orders impugned. These appeals succeed. The orders under appeal are set aside. We clarify that the provision of Section 43B of the Income Tax Act does not apply to the electricity duty collected by the licensee/assessee as per provisions of the Bengal Electricity Duty Act, 1935.

(23) The appeals are accordingly disposed of.

I agree.

(Manjula Chellur, CJ.)

(Arijit Banerjee, J.)