

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
INCOME TAX REFERENCE No. 155 of 1995

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COMMISSIONER OF INCOME TAX - Applicant(s)
Versus
GUJARAT URJA VIKAS NIGAM LTD. - Respondent(s)

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Appearance :

MR BB NAIK for Applicant(s) : 1,
MR MANISH J SHAH for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA

and

HONOURABLE MR.JUSTICE Z.K.SAIYED

Date : 04/02/2008

ORAL ORDER

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1 The Income Tax Appellate Tribunal, Ahmedabad Bench 'B' has referred the following question for the opinion of this Court under Section 256(1) of the Income Tax Act, 1961 (the Act) at the instance of the Commissioner of Income Tax :

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“Whether on the facts and in the circumstances of the case the Tribunal is right in holding that the liabilities on electricity duty tax payable to government amounting to Rs.49,65,181/- on sale of electricity cannot be considered as inadmissible item u/s. 43B of the I.T.Act and the same is outside the purview of adjustment under sec.143(1)(a) of the I.T.Act?”

2 For Assessment Year 1991-92 the relevant accounting period is F.Y. 1990-91. The return of income was filed on 31.12.1990 which was later on revised on 28.02.1992. The Assessing Officer made adjustments and issued an intimation under Section 143(1)(a) of the Act in relation to various items disallowable under Section 43B of the Act, one of them being Rs.41,65,12,181/-, being the amount of electricity duty payable to the State Government by the assessee on sale of electric power. The assessee moved an application u/s. 154 of the Act on 30.09.1992, relying on a letter issued by the Under Secretary to the Government of India, Energy and Petrochemicals Department to contend that the electricity duty payable had been adjusted against other amounts receivable from the Government and hence, the adjustment made u/s. 143(1)(a) of the Act and levy of additional tax u/s.143(1A) of the Act was not warranted. The Assessing Officer negatived the claim made by the assessee holding that there was no proof of such adjustment having been made within the stipulated period. The assessee carried the matter in appeal before CIT (Appeals) but did not succeed.

3 In Second Appeal before the Tribunal the assessee

contended that the issue was squarely concluded in favour of the assessee by virtue of Tribunal's order dated 29.07.1988 rendered in case of *Ahmedabad Electricity Company Ltd. Vs. I.T.O. In ITA No. 378/AHD/1988* for A.Y. 1984-85. The Tribunal accepted the submissions of the assessee in the following terms :

"4.1 In our view the sum of Rs.49,65,12,181/- cannot be considered as an inadmissible item of expenditure and is outside the purview of sec. 143(1)(a) of the Act and the a.o. was not justified in making the adjustment of the said sum to the loss declared. We are holding so on the basis of the order passed by this Tribunal in the case of Ahmedabad Electricity Co. Ltd. Supra and direct the a.o. to delete adjusted amount of Rs. 49,65,12,181/-".

4 Mr. B.B. Naik, learned Standing Counsel for applicant-revenue submitted that the decision of the Tribunal in case of Ahmedabad Electricity Co. (supra) has since been reversed by this Court in the case of *CIT Vs. Ahmedabad Electricity Co. Ltd.* (2003) 262 ITR 97 and it has been held by the High Court that provisions of Section 43B of the Act are applicable to the duty payable to the Government.

5 On behalf of the respondent-assessee Shri M.J.Shah, learned Advocate placed strong reliance on decision of the Apex Court in the case of *CIT V/s. Hindustan Electro Graphites Ltd.* (2000) 243 ITR 48 to submit that once the Apex Court had come to the conclusion that the additional tax was in nature of penalty, no such additional tax could be levied on an assessee who had adopted a law prevalent on the date of filing of the return. For this purpose attention was invited to the fact that decision of the Tribunal was dated 29.07.1988 whereas the return of income had been filed on 31.12.1990. It was also submitted that in any view of the matter, the issue was debatable and Section 143(1)(a) of the Act would not be attracted and no adjustment was permissible.

6 In rejoinder, Shri Naik contended that the issue before the Apex Court in the case of *CIT Vs. Hindustan Electro Graphites Ltd.* pertained to amendment of the law which was made retrospectively applicable, but in a case where the jurisdictional High Court had pronounced upon law which was already existing, the issue would stand on a different footing and the ratio laid down by the Apex Court cannot be pressed into service.

7 For the present, it is not necessary for the Court to enter into the larger controversy for the simple reason that there is no finding by the Tribunal as regards the adjustment in question being debatable in nature as no such issue was raised before the lower authorities by the assessee. In fact, the finding of the Tribunal as reproduced hereinbefore makes it clear that the Tribunal has not recorded any independent opinion as to applicability or otherwise of provisions of Section 43B in relation to the electricity duty payable in light of earlier order of the Tribunal in case of *Ahmedabad Electricity Co. Ltd.* Hence, the contention raised on behalf of the assessee does not arise out of the impugned order of the Tribunal dated 14.10.1990.

8 In the circumstances, the question referred to this Court for opinion is answered in the negative i.e. in favour of the revenue and against the assessee on the basis of earlier decision rendered by this Court in the case of *CIT Vs. Ahmedabad Electricity Co. Ltd.* (supra) wherein it is held that electricity duty on sale of electricity has to be considered as an inadmissible item under Section 43B of the Act. In so far as the remaining contentions are concerned it is left open to the parties to raise the same in accordance with law, if permissible,

before the Tribunal.

9 The Reference stands disposed of accordingly with no order as to costs.

(D.A. Mehta, J.)

(Z.K. Saiyed, J.)

M.M.BHATT

