'REPORTABLE'

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2558 OF 2005

COMMISSIONER OF INCOME TAX, KERALA ... Appellant

VERSUS

M/S. TRAVANCORE SUGARS & CHEMICALS LTD. ... Respondent

J U D G M E N T

R. F. NARIMAN, J.

The respondent-assessee is engaged in the manufacture and sale of foreign liquor and sugar. The assessee filed its return of income for assessment year 1990-1991 declaring an income of Rs. 15,84,398/-. The assessee had itself shown that a vend fee of Rs. 22,87,512/- was disallowable under Section 43B of the Income Tax Act (hereinafter referred to as 'Act') since it was not actually paid before the expiry of the relevant previous year.

On 30.04.1993, the assessing officer completed the assessment for the year 1990-1991 and *inter alia* confirmed disallowance of the vend fee. Against this, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals), who, by his order dated 24.05.1993, deleted the disallowance under Section 43B and allowed the appeal of the respondent-assessee. Aggrieved by the said order, the Revenue preferred an

appeal before the Income Tax Appellate Tribunal, which confirmed the aforesaid order of the Commissioner (Appeals) by its judgment and order dated 15.04.1998. Against the said order, the Revenue preferred a Reference Application before the Income Tax Appellate Tribunal under Section 256(1) of the Act, which referred two questions of law to the High Court. In the present appeal, we are concerned with Question No. 2 which reads as follows: -

> "2. "Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in upholding the deletion of disallowance under S. 43B of the I.T. Act in respect of the vend fee of Rs. 22,87,512/- outstanding as a liability payable to the Government of Kerala as on the last day of the accounting year?"

Section 43B of the Income Tax Act allows certain deductions only to be on actual payment. Section 43B reads as follows: -

> "43B. Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of-
> (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
> (e) any sum payable by the assessee as

interest on any loan or advances from a scheduled bank in accordance with the terms and conditions of the agreement governing such loan or advances, or

(f) any sum payable by the assessee as an employer in lieu of any leave at the credit of his employee,

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 such sum is actually paid by him:"

A reading of the Section after it was substituted by Finance Act, 1988 with effect from 01.04.1989 shows that sub clause (a) in Section 43B has been considerably widened by the amendment by the addition of the words "by whatever name called". It is clear, therefore, that to attract this section any sum that is payable whether it is called tax, duty, cess or fee or called by some other name, becomes a deduction allowable under the said Section provided that in the previous year, relevant to the assessment year, such sum should be actually paid by the assessee.

Shri Arijit Prasad, learned counsel appearing on behalf of the appellant, has submitted before us that the judgment under appeal has missed the purport of the 1988 Finance Act amendment to the Income Tax Act. He also claimed that whether a particular vend fee is called "privilege" in law, thanks to certain judgments

of this court, makes no difference in view of the amendment, and whether it is a fee *stricto sensu* as understood in the legislative lists in the Seventh Schedule to the Constitution of India or it is called by some other name would not make any difference. Further, he argued before us that reliance placed on a judgment of the Karnataka High Court reported in 246 ITR 750 in the year 2000 '*Commissioner of Income Tax v. Sri Balaji and Co.*' was also misplaced inasmuch as the Karnataka High Court, in holding that kist or rentals paid to the Government in respect of vending, toddy/ arracks is not a duty, tax, cess or fee so held only because this case pertains to a period prior to the amendment made with effect from 01.04.1989.

Shri C. N. Sreekumar, learned counsel on behalf of the respondent, referred us to the counter affidavit filed in this Court and to an Annexure to the said counter affidavit. His argument was that it is clear that the so-called vend fee in the present case is nothing but a consensual arrangement by which ultimately machinery and equipment used by sugar mills which were very old and which require urgent repair / replacement could be so repaired or replaced. According to him, the aforesaid vend fee not being a compulsory exaction by the State, would not, therefore, fall within any of the

expressions used in Section 43B(a) of the Act.

Having heard learned counsel for the parties, we think there is force in the submission made by Shri Arijit Prasad on behalf of the Revenue. First and foremost, he is correct in saying that the impugned judgment does not refer to the amendment made in Section 43B with effect from 1.4.1989 at all. The assessment year with which we are involved on facts in the present case is 1990-1991 which would clearly attract the amendment so made. Secondly, he is also correct in stating that the Karnataka High Court judgment referred to supra, decided a question arising under Section 43B in respect of assessment years 1984-1985, i.e., it was a judgment relating to an assessment year prior to the amendment made on 01.04.1989. It was in these circumstances that the Karnataka High Court held:

> **"The provisions of section 17 of the Karnataka Excise Act, 1965, have referred to the power to grant lease of the right to manufacture. Section 24 has conferred the additional power on the State Government to accept payment of a sum or levy such licence fee or privilege fee as may be prescribed, in consideration of grant of lease or licence or both, by or under this Act. This power is in addition to any excise duty or countervailing duty leviable under sections 22 and 23. If the Legislature has used specific language then it cannot be stretched to include certain sums which are not in the nature of payment mentioned by the Legislature. Payment of lease money/ rental may be a statutory liability but however any statutory liability does not come within the purview of section 43B. It is only that the statutory liability which is in the**

nature of tax, duty, cess or fee to which the provisions of section 43B are attracted. Since the kist/rental could not be considered to be falling under either of the items, the provisions of section 43B cannot be attracted and as such we are of the view that the Tribunal was justified in law in holding that the kist amount payable to the Government by the assessee could not be brought within the purview of the provisions of section 43B of the Income Tax Act, 1961. It is a different matter that the licensees are not paying the rent in time for which it is only the Legislature which could intervene and not the courts."

Shri Arijit Prasad also referred us to the Notes on clauses which preceded the 1989 amendment which reads as follows: -

"21.2 The words "tax" and "duty" have been the subject matter of judicial interpretation and there is a controversy as to whether they cover statutory levies like cess, fees, etc. Some appellate authorities have held that such cess or fees cannot be covered by the expressions "tax" or "duty". Such an interpretation is against the legislative intent and, therefore, by way of clarification, an amendment has been carried out to provide that cess or fees by whatever name called, which have been imposed by any statutory authority, including a local authority, will be allowed as a deduction only if these are actually paid."

On a reading of the document on which Shri C. N. Sreekumar has placed reliance, namely, a Government of Kerala order dated 28.04.1988, what becomes clear is that the Government proposed to impose and then imposed a levy on three sugar mills by way of collecting of vend fee of Rs. 0.50 paisa per bulk litre of arrack sold by them which would go into a fund which would then be used for the repair / replacement of old machinery and

equipment in these three mills. This document shows that the vend fee collected from the three mills is, in fact, a fee in the classic sense of the term as used in '*Commissioner, Hindu Religious Endowments* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*' reported in [1954 SCR 1005]. It is clear, on a reading of this document, that the State compulsorily takes from the three mills, a vend fee for the purpose of conferring a special benefit on the said three mills, viz., the repair and replacement of existing machinery and equipment.

On facts in the present case, it is clear that the amendment made to Section 43B is attracted. Even if the vend fee that is paid by the respondent to the State does not directly fall within the expression 'fee' contained in Section 43B(a), it would be a 'fee' by 'whatever name called', that is even if the vend fee is called 'privilege' as has been held by the High Court in the judgment under appeal. This being the case, we find that question No. 2 which was answered in favour of the assessee and against the Revenue by the High Court was not answered correctly.

We therefore, set aside the aforesaid judgment and allow the present appeal in favour of the Revenue. In case the respondent has actually paid the aforesaid fee

in a previous year relevant to some other assessment year, he will be entitled to claim the benefit of Section 43B for that particular assessment year in accordance with law. The appeal stands disposed of in the aforesaid terms.

....., J.
[A.K. SIKRI]

....., J.
[ROHINTON FALI NARIMAN]

New Delhi;
May 07, 2015.