A MARUTI SUZUKI INDIA LTD.

(EARLIER KNOWN AS MARUTI UDYOG LTD.)

v.

COMMISSIONER OF INCOME TAX, DELHI

B (Civil Appeal No. 11923 of 2018)

FEBRUARY 07, 2020

[ASHOK BHUSHAN AND NAVIN SINHA, JJ.]

Income Tax Act, 1961 – Proviso to s.43B – Allowable C *deduction u/s.43B in respect of unutilised MODVAT credit – Appellant-assessee manufactures automobiles chargeable to Excise Duty under the 1944 Act– It acquires excisable raw materials & inputs, which are used in manufacturing of vehicles, on which it was also taking benefit of MODVAT credit – At the end of assessment* D *year 1999-2000, Rs.69,93,00,428/- was left as unutilised MODVAT credit – Assessee claimed deduction u/s.43B and also claimed deduction of Rs.3,08,88,171/- in respect of Sales Tax Recoverable Account – Assessing Officer disallowed both claims of deductions – Upheld by Commissioner of Income Tax & ITAT – High Court answered questions relating to the aforesaid disallowance in favour* E *of Revenue – Held: Under s.43B(a), deduction is allowed on "any sum payable by the assessee by way of tax, duty, cess or fee" – Credit of Excise Duty earned by appellant under MODVAT scheme as per 1944 Rules is not sum payable by the assessee by way of tax, duty, cess – Scheme u/s.43B is to allow deduction when a sum is* F *payable by assessee by way of tax, duty & cess and had been actually paid by him – Excise Duty leviable on appellant on manufacture of vehicles was already adjusted in the concerned assessment year from the credit of Excise Duty under MODVAT scheme – Unutilised credit in the MODVAT scheme cannot be treated as sum actually paid by appellant – Assessee when pays the cost of* G *raw materials where the duty is embedded, it does not* ipso facto *mean that assessee is the one who is liable to pay Excise Duty on such raw material/inputs – It is merely the incident of Excise Duty that has shifted from manufacturer to purchaser and not the liability to the same – Unutilised credit under MODVAT scheme does not qualify for deductions u/s.43B – Proviso to s.43B takes care of the* H

situation when liability to pay a sum has incurred but could not be paid in the year in question and has been paid in next financial year before the date of submission of the Return – In the present case, the liability to pay Excise Duty of the assessee is incurred on the removal of finished goods in the subsequent year i.e. year beginning from 01.04.99 and what the Court is concerned with is unutilised MODVAT Credit as on 31.03.1999 on which date the asseessee was not liable to pay any more Excise Duty– Present is not a case where appellant can claim benefit of proviso to s.43B – High Court correctly answered both the questions against the appellant and in favour of Revenue– Central Excise Act, 1944– Central Excise Rules, 1944 – rr.57A-57F.

Central Excise Act, 1944 – Statutory liability to pay Excise Duty – Appellant-assessee manufactures automobiles chargeable to Excise Duty under the 1944 Act – It acquires excisable raw materials & inputs which are used in manufacturing of vehicles – Held: Excise duty is levied under 1944 Act and collected as per 1944 Rules – Assessee in reference to the 1944 Rules is Assessee as defined in r.2(3) – Manufacture of the raw materials or inputs used by the appellant are the excisable items within the meaning of 1944 Rules – Liability to pay Excise Duty is not fastened on two entities as per the scheme of 1944 Act and 1944 Rules – It is the manufacturer of raw materials and inputs which are used by appellant who has statutory liability to pay Excise Duty – Appellant is not assessee within the meaning of 1944 Act, with reference to raw materials and inputs manufactured by the entities from which appellant had purchased the raw materials – Central Excise Rules, 1944 – r.2(3).

Dismissing the appeals, the Court

HELD: 1.1 Section 43B of the Act the provision indicates that deduction thereunder is to be allowed on fulfilment of the following conditions: (a) there should be an actual payment of Excise Duty whether "by way of tax, duty, cess or fee, by whatever name"; (b) such payment has to be "under any law for the time being in force"; (c) the payment of such sum should have been made by the assessee; (d) irrespective of the method of accounting regularly employed by the assessee, deduction shall be allowed while computing the income tax for the previous year

"in which sum is actually paid" by the assessee; (e) the expression "any such sum payable" refers to a sum for which the assessee incurred liability in the previous year even though such sum might not have been payable within that year under the relevant law. [Para 11][667 F-H; 668-A-B]

1.2 The crucial words in Section 43B(a) are "any sum payable by the assessee by way of tax, duty, cess or fee...". The Excise Duty is levied under the Central Excise Act, 1944 and collected as per the Central Excise Rules, 1944. The assessee in reference to the Central Excise Rules, 1944 is Assessee as defined in Rule 2(3) which is to the following effect. The taxable event is manufacture and production of excisable articles and payment of duty is relatable to date of removal of such article from the factory. The manufacture of the raw materials or inputs which have been used by the appellant are the excisable items within the meaning of Central Excise Rules, 1944. The Excise Duty is leviable on the manufacturer of raw materials and inputs. The supplier of raw materials or inputs includes the Excise Duty paid on such articles in his sale invoices. The appellant when purchases raw materials and inputs for manufacture of vehicles it maintains a separate account containing the Excise Duty as mentioned in sale invoices. The credit of such Excise Duty paid by the appellant is to be given to the appellant by virtue of Rule 57A to 57F of Central Excise Rules, 1944 as it then existed. The appellant was fully entitled to discharge his liability to pay Excise Duty on vehicles manufactured by adjusting the credit of Excise Duty earned by it as per MODVAT scheme. The liability to pay Excise Duty is not fastened on two entities as per the scheme of Central Excise Act and Central Excise Rules. It is the manufacturer of raw materials and inputs which are used by appellant who has statutory liability to pay Excise Duty. The appellant is not assessee within the meaning of Central Excise Act, 1944, with reference to raw materials and inputs manufactured by the entities from which appellant had purchased the raw materials and entities. [Paras 13-15][668-D-H; 669-A-C]

1.3 As per Section 43B(a) of Income Tax Act, deduction is allowed on "any sum payable by the assessee by way of tax, duty,

cess or fee." The credit of Excise Duty earned by the appellant under MODVAT scheme as per Central Excise Rules, 1944 is not sum payable by the assessee by way of tax, duty, cess. The scheme under Section 43B is to allow deduction when a sum is payable by assessee by way of tax, duty and cess and had been actually paid by him. Furthermore, the deductions under Section 43B is allowable only when sum is actually paid by the assessee. In the present case, the Excise Duty leviable on appellant on manufacture of vehicles was already adjusted in the concerned assessment year from the credit of Excise Duty under the MODVAT scheme. The unutilised credit in the MODVAT scheme cannot be treated as sum actually paid by the appellant. The assessee when pays the cost of raw materials where the duty is embedded, it does not ipso facto mean that assessee is the one who is liable to pay Excise Duty on such raw material/inputs. It is merely the incident of Excise Duty that has shifted from the manufacturer to the purchaser and not the liability to the same. The unutilised credit under MODVAT scheme does not qualify for deductions under Section 43B of the Income Tax Act. [Paras 16-18][669-B-F]

1.4 The High Court had rightly answered the above question in favour of the Revenue relying on its discussion with respect to Question No.1. The sales tax paid by the appellant was debited to a separate account titled 'Sales Tax recoverable account'. The assessee could have set off sales tax against his liability on the sales of finished goods i.e. vehicles. No infirmity is found in the view of the High Court answering the above question. The proviso to Section 43B provides that nothing contained in the Section shall apply in relation to any sum which is actually paid by assessee on or before due date applicable in his case for furnishing the return in respect of the previous year in which the liability to pay such sum was incurred. The crucial words in the proviso to Section 43B are "in respect of the previous year in which the liability to pay such sum was incurred". The proviso takes care of the situation when liability to pay a sum has incurred but could not be paid in the year in question and has been paid in the next financial year before the date of submission of the Return. In the present case, there was no liability to adjust the unutilised MODVAT credit in the year in question since had there been

A **liability to pay Excise Duty by the appellant on manufacture of vehicles, the unutilised MODVAT credit could have been adjusted against the payment of such Excise Duty. In the present case, the liability to pay Excise Duty of the assessee is incurred on the removal of finished goods in the subsequent year i.e. year beginning from 01.04.1999 and what the Court is concerned with is unutilised MODVAT Credit as on 31.03.1999 on which date the asseessee was not liable to pay any more Excise Duty. Hence, present is not a case where appellant can claim benefit of proviso to Section 43B. High Court correctly answered both the questions against the assessee-appellant and in favour of the Revenue. [Paras 32, 34 and 35][674-E-F; 675-A-E]**

Eicher Motor Ltd. and Another v. Union of India and Others **(1999) 2 SCC 361 : [1999] 1 SCR 295;** *Collector of Central Excise, Pune and Others v. Dai Ichi Karkaria Ltd. and Others* **(1999) 7 SCC 448 : [1999] 1 Suppl. SCR 360;** *Berger Paints India Ltd. v. Commissioner of Income Tax* **2004 (266) ITR 99 – distinguished.**

Lakhan Pal National Ltd. v. ITO **(1986) 162 ITR 240 – referred to.**

Case Law Reference

[1999] 1 SCR 295	**distinguished**	**Para 19**
[1999] 1 Suppl. SCR 360	**distinguished**	**Para 25**
2004 (266) ITR 99	**distinguished**	**Para 28**
(1986) 162 ITR 240	**referred to**	**Para 28**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 11923 of 2018.

From the Judgment and Order dated 07.12.2017 of the High Court of Delhi at New Delhi in ITA No. 31 of 2005.

With

Civil Appeal No. 11924 of 2018.

Arijit Prasad, S. Ganesh, Sr. Advs., S.A. Haseeb, Diksha Rai, Mrs. Anil Katiyar, Ms. Kavita Jha, Ms. Devika Jain, Anant Mann, Advs. for the appearing parties.

The Judgment of the Court was delivered by

ASHOK BHUSHAN, J.

1. By these appeals the assessee has challenged the judgment of the High Court of Delhi dated 07.12.2017 deciding the Income Tax Appeal No.31 of 2005. ITA No.31 of 2005 related to Assessment year 1999-2000 and ITA No.442 of 2005 related to Assessment year 2000-2001, in both the appeal similar questions were answered against the assessee. For deciding these two appeals it is sufficient to notice the facts in CA No.11923 of 2018 for Assessment Year 1999-2000. The High Court by the impugned judgment has affirmed the views of Income Tax Appellate Tribunal on the questions which have been raised in this appeal. The Assessing Officer as well as the Commissioner of Income Tax (Appeals) has not accepted the claim of the appellant. The appellant (hereinafter referred to as the "assessee") is engaged in the business of manufacturing automobiles, which are chargeable to Excise Duty under the Central Excise Act, 1994. The assessment year in question is assessment year 1999-2000. The assessee, a Company, has been engaged in manufacturing and sale of various Maruti Cars and also trades in spares and components of the vehicles. It acquires exiceable raw materials and inputs which are used in the manufacturing of the vehicles. The assessee had also been taking benefit of MODVAT credit on the raw material and inputs used in the manufacturing. At the end of the Assessment year 1999-2000 an amount of Rs.69,93,00,428/- was left as unutilised MODVAT credit. In the return it was claimed that the Company was eligible for deduction under Section 43B of the Income Tax Act as an allowable deduction. Similarly, the Company claimed deduction under Section 43B of an amount of Rs. 3,08,88,171/- in respect of Sales Tax Recoverable Account.

2. The Assessing Officer passed assessment order dated 28.03.2002. The Assessing Officer disallowed the claim of deduction of Rs.69,93,00,428/- as well as Rs.3,08,99,171/-. Aggrieved by the assessment order, the assessee filed an appeal before the Commissioner of Income Tax. The Commissioner of Income Tax also sustained the disallowance of the above two items. An appeal to ITAT met the same fate. The ITAT took the view that the advance payment of Excise Duty which represented unutilised MODVAT credit without incurring the liability of such payment is not an allowable deduction under Section 43B. The assessee filed an appeal under Section 260A of the Income

A Tax Act in the High Court. The High Court answered question Nos.(ii) and ((iii) relating to the above noted disallowance in favour of the Revenue. Aggrieved by the judgment of the High Court, these appeals have been filed.

3. The two questions which were answered by the High Court in
B favour of the Revenue which were subject matter of this appeal are question Nos.(ii) and (iii) as framed by the High Court are to the following effect:

> "(ii) Whether the ITAT had committed an error of law in upholding the disallowance of the amount of Rs.69,93,00,428/- which
C represented MODVAT credit of Excise Duty that remained unutilised by 31st March, 1999 i.e. the end of the relevant accounting year ?
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> (iii) Whether the ITAT has committed an error of law in upholding the disallowance of Rs.3,08,99,171/- in respect of Sales Tax
D Recoverable Account, under Section 43B of the Income-tax Act?"

4. We have heard Shri S. Ganesh, learned senior counsel for the appellant-assessee and Shri Arijit Prasad, learned senior counsel for the Revenue.

E 5. Shri Ganesh submits that the amount paid by way of Excise Duty by the assessee to its suppliers of raw materials and inputs, is accepted as Excise Duty under the provisions of Central Excise Act and Rules. Consequently, when the said payments are made by the assessee to its suppliers, they should be treated as payments of Excise Duty which straightaway qualify for deduction under Section 43B of the Income
F Tax Act, irrespective of whether or when the MODVAT credit arising from such payments is utilised to make payment of Excise Duty on the products manufactured by the assessee. The High Court erroneously held that the above payments made by the assessee are mere contractual payments and not payments by way of Excise Duty. As soon as the raw
G materials and inputs are received in the appellant's factory, the assessee becomes entitled to avail of MODVAT credit in respect of Excise Duty paid on the raw materials and inputs and which is mentioned in the manufacturer-supplier's invoice. The assessee was clearly entitled for deduction of unutilised MODVAT credit balance as on 31.03.1999.

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6. Shri Ganesh in alternative submits that questions are squarely covered in favour of the assessee by the 1st proviso to Section 43B. The assessee's Excise Returns establish that while the untilised MODVAT credit as on 31.03.1999 was Rs. 69.30 crores, the entire amount was utilised in April, 1999 itself. Consequently, the assessee is entitled to the deduction under the 1st proviso to Section 43B. The object and purpose of Section 43B of the Act is to ensure that an assessee does not get deduction in respect of an amount unless and until the amount has been received by the Government. In the present case the full amount of Excise Duty was paid into the coffers of Government when the manufacturer of raw material/inputs had cleared the same from his factory gate for supply to the assessee. The basic object of Section 43B of the Act is fully subserved and deduction should have been granted as claimed by the assessee.

7. Shri Arijit Prasad, learned senior counsel for the Revenue refuting the submissions of the learned counsel for the assessee contends that deduction under Section 43B is allowable only when the amount of tax, cess etc. are due and payable and the assessee actually pays the same. In the present case the Excise Duty becomes due and payable only when the assessee removes the finished product from the factory gate, at the point in time when the assessee makes payment to the suppliers the Excise Duty is not due and payable. It is not in dispute that the assessee was entitled to the duty paid by it to the manufacturer under Rule 57A to Rule 571 of the Central Excise Rules, 1944. Further it is not in dispute that the assessee was entitled to utilise MODVAT credit towards payment of Excise Duty leviable on the final products manufactured by it. The liability under the Central Excise Act to pay Excise Duty is only on the manufacture of the excisable goods. The assessee is not one who is liable to pay Excise Duty on the raw materials/ inputs. It is merely the incidence of Excise Duty that has shifted from the manufacturer to the purchaser and not the liability to pay the same. Answering the submission of counsel for the assessee based on proviso to Section 43B, it is submitted that liability to pay Excise Duty of the assessee is incurred on the removal of the finished goods in the subsequent year, therefore, on 31.03.1999, the assessee was not liable to pay the Excise Duty and, therefore, the proviso will also not come to the aid of the assessee.

A 8. We have considered the submissions of the learned counsel for the parties and perused the records.

9. The two issues which need to be answered by us in these appeals are:

B "(i) Whether the ITAT had committed an error of law in upholding the disallowance of the amount of Rs.69,93,00,428/- which represented MODVAT credit of Excise Duty that remained unutilised by 31st March, 1999 i.e. the end of the relevant accounting year ?

C (ii) Whether the ITAT has committed an error of law in upholding the disallowance of Rs.3,08,99,171/- in respect of Sales Tax Recoverable Account, under Section 43B of the Income-tax Act?"

10. We need to first notice the provisions of Section 43B under which deduction is sought to be claimed. Section 43B is as follows:

D **"43B.Certain deductions to be only on actual payment.-** 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 E 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

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(*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 G 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 [*or a co-operative bank other than a primary agricultural credit society or a* H *primary co-operative agricultural and rural development*

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, or

(*g*) any sum payable by the assessee to the Indian Railways for the use of railway assets,

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 :

Provided that nothing contained in this section shall apply in relation to any sum which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return.

..."

11. The untilised MODVAT credit on 31.03.1999 to the credit of the assessee was Rs.69,93,00,428/-. The MODVAT credit was accumulated to the account of the assessee due to payment of Excise Duty on raw materials and inputs which were supplied to it by the suppliers and reflected in the invoices by which raw materials and inputs were supplied. There is no denial to the fact that the appellant was entitled to utilise this credit in payment of Excise Duty to which the assessee was liable in payment of Excise Duty on manufacture of its products. When we analyse provision of Section 43B of the Act the provision indicates that deduction thereunder is to be allowed on fulfilment of the following conditions:

"a. there should be an actual payment of Excise Duty whether "by way of tax, duty, cess or fee, by whatever name";

b. such payment has to be "under any law for the time being in force";

c. the payment of such sum should have been made by the assessee;

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d. irrespective of the method of accounting regularly employed by the assessee, deduction shall be allowed while computing the income tax for the previous year "in which sum is actually paid" by the assessee;

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e. the expression "any such sum payable" refers to a sum for which the assessee incurred liability in the previous year even though such sum might not have been payable within that year under the relevant law."

12. The fulfillment of the above statutory conditions is necessary for allowing deduction under Section 43B. We have to examine the facts of the present case to find out as to whether all the conditions which are necessary for permissible deduction under Section 43B are present here or not.

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13. The crucial words in Section 43B(a) are "any sum payable by the assessee by way of tax, duty, cess or fee...". We need to examine as to whether unutilised credit under MODVAT Scheme was sum payable by the assessee.

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14. The Excise Duty is levied under the Central Excise Act, 1944 and collected as per the Central Excise Rules, 1944. The assessee in reference to the Central Excise Rules, 1944 is Assessee as defined in Rule 2(3) which is to the following effect:-

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"Rule 2(3). "assessee" means any person who is liable for payment of duty assessed and also includes any producer or manufacturer of excisable goods or a registered person of a private warehouse in which excisable goods are stored;"

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15. The taxable event is manufacture and production of excisable articles and payment of duty is relatable to date of removal of such article from the factory. The manufacture of the raw materials or inputs which have been used by the appellant are the excisable items within the meaning of Central Excise Rules, 1944. The Excise Duty is leviable on the manufacturer of raw materials and inputs. The supplier of raw materials or inputs includes the Excise Duty paid on such articles in his sale invoices. The appellant when purchases raw materials and inputs for manufacture of vehicles it maintains a separate account containing the Excise Duty as mentioned in sale invoices. The credit of such Excise Duty paid by the appellant is to be given to the appellant by virtue of Rule 57A to 57F of Central Excise Rules, 1944 as it then existed. The

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appellant was fully entitled to discharge his liability to pay Excise Duty on vehicles manufactured by adjusting the credit of Excise Duty earned by it as per MODVAT scheme. The liability to pay Excise Duty is not fastened on two entities as per the scheme of Central Excise Act and Central Excise Rules. It is the manufacturer of raw materials and inputs which are used by appellant who has statutory liability to pay Excise Duty. The appellant is not assessee within the meaning of Central Excise Act, 1944, with reference to raw materials and inputs manufactured by the entities from which appellant had purchased the raw materials and entities.

16. As per Section 43B(a) of Income Tax Act, deduction is allowed on "any sum payable by the assessee by way of tax, duty, cess or fee." The credit of Excise Duty earned by the appellant under MODVAT scheme as per Central Excise Rules, 1944 is not sum payable by the assessee by way of tax, duty, cess. The scheme under Section 43B is to allow deduction when a sum is payable by assessee by way of tax, duty and cess and had been actually paid by him.

17. Furthermore, the deductions under Section 43B is allowable only when sum is actually paid by the assessee. In the present case, the Excise Duty leviable on appellant on manufacture of vehicles was already adjusted in the concerned assessment year from the credit of Excise Duty under the MODVAT scheme. The unutilised credit in the MODVAT scheme cannot be treated as sum actually paid by the appellant. The assessee when pays the cost of raw materials where the duty is embedded, it does not ipso facto mean that assessee is the one who is liable to pay Excise Duty on such raw material/inputs. It is merely the incident of Excise Duty that has shifted from the manufacturer to the purchaser and not the liability to the same.

18. We thus, conclude that the unutilised credit under MODVAT scheme does not qualify for deductions under Section 43B of the Income Tax Act.

19. Shri Ganesh has relied on judgment of this Court in ***Eicher Motors Ltd. and another versus Union of India and others, (1999) 2 SCC 361,*** and submits that facility of credit is as good as tax paid, hence, it be accepted that by payment of Excise Duty although which is part of sale invoice issued by manufacturer or producer of raw material or inputs, the payment by appellant was Excise Duty which qualified for deduction under Section 43B.

20. In ***Eicher Motors Ltd. and another,*** the challenge to the validity of scheme as modified by introduction of Rule 57F of Central Excise Rules, 1944 was under consideration. According to Section 57-F(4A) of Central Excise Rules, 1944, credit which was lying unutilised on 16.03.1995 with the manufacturers, stood lapsed, Rule 57-F(4-A) has been extracted in paragraph 2 of the judgment which is to the following effect: -

*"**2.** The relevant Rule reads as follows:*

"57-F. (4-A) Notwithstanding anything contained in sub-rule (4), or sub-rule (1) of Rule 57-A and the notifications issued thereunder, any credit of specified duty lying unutilised on the 16th day of March, 1995 with a manufacturer of tractors, falling under Heading No. 87.01 or motor vehicles falling under Heading No. 87.02 and 87.04 [or chassis of such tractors or such motor vehicles under Heading No. 87.06] of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) shall lapse and shall not be allowed to be utilised for payment of duty on any excisable goods, whether cleared for home consumption or for export:

Provided that nothing contained in this sub-rule shall apply to credit of duty, if any, in respect of inputs lying in stock or contained in finished products lying in stock on the 16th day of March, 1995."

21. This Court in reference to 57-F(4-A) took the view that right to credit had become absolute at any rate when the input is used in the manufacture of the final products. This court held that the scheme sought to be introduced cannot be made applicable to the goods which had already come into existence in respect of which the earlier Scheme was applied. Following observations have been made by this Court in paragraph 5 of the above judgment:-

"As pointed out by us that when on the strength of the Rules available, certain acts have been done by the parties concerned, incidents following thereto must take place in accordance with the Scheme under which the duty had been paid on the manufactured products and if such a situation is sought to be altered, necessarily it follows that the right, which had accrued to a party such as the availability of a scheme, is affected and, in particular, it loses sight of the fact that the

provision for facility of credit is as good as tax paid till tax is adjusted on future goods on the basis of the several commitments which would have been made by the assessees concerned. Therefore, the Scheme sought to be introduced cannot be made applicable to the goods which had already come into existence in respect of which the earlier Scheme was applied under which the assessees had availed of the credit facility for payment of taxes. It is on the basis of the earlier Scheme necessarily that the taxes have to be adjusted and payment made complete. Any manner or mode of application of the said Rule would result in affecting the rights of the assessees."

22. The observations in the above paragraph that facility of credit is as good as tax paid till tax is adjusted on future goods were made in context of 57-F(4-A) of Central Excise Rules,1944.

23. The above observation cannot be read to mean that payment of Excise Duty by the appellant which was component of sale invoice purchasing the raw material/inputs by the appellant is also payment of Excise Duty on raw material/inputs.

24. By payment of component of Excise Duty as included in sale invoice is benefit which is given to appellant by virtue of credit as envisaged in statutory scheme of Rule 57-A to 57-I of Central Excise Rules, 1944. The above judgment thus in no manner supports the submissions of the appellant for the purposes of the present case.

25. Next judgment relied by Shri Ganesh in ***Collector of Central Excise, Pune and others versus Dai Ichi Karkaria Ltd. and others; (1999) 7 SCC 448.*** In the above case, this Court had occasion to consider Section 4 of Central Excise Act, 1944, which provides for valuation of raw material covered by MODVAT Scheme. Referring to Rule 57-A(1) and Rule 57-F(1), this Court laid down following in paragraph 18, 19 and 20: -

"18. It is clear from these rules, as we read them, that a manufacturer obtains credit for the Excise Duty paid on raw material to be used by him in the production of an excisable product immediately it makes the requisite declaration and obtains an acknowledgment thereof. It is entitled to use the credit at any time thereafter when making payment of Excise Duty on the excisable product...

A *19. It is, therefore, that in the case of Eicher Motors Ltd. vs. Union of India, this Court said that a credit under the MODVAT Scheme was as good as tax paid.*

20. With this in mind, we must now determine whether the Excise Duty paid on the raw material should form part of
B *the cost of the excisable product for the purposes of Section 4(1)(b) of the Act read with Rule 6 of the Valuation Rules."*

26. In the above case, this Court held that in determining the cost of the excisable product covered by MODVAT Scheme under Section 4(1)(b) of the Act read with Rule 6 of the Valuation Rules, the Excise
C Duty paid on raw material covered by MODVAT Scheme is not to be included. The question which was answered in the above case was entirely different to one which has arisen in the present case.

27. This Court as noted above in the above case has laid down that credit for the Excise Duty paid for the raw material can be used at
D any time when making payment of Excise Duty on excisable product. The user of such credit is at the time of payment of Excise Duty on the excisable product i.e. at the time when appellant is to pay Excise Duty on its manufactured vehicle.

28. The judgment of this Court in ***Berger Paints India Ltd. versus Commissioner of Income Tax, 2004 (266) ITR 99***, has also been
E referred to. The assessee company in the above case had claimed that under Section 43B of the Income Tax Act, it was entitled to deduction of the entire sum being the duties actually paid during the relevant previous years. The appellant in the year in question had incurred expenditure on account of customs and Excise Duty aggregating to Rs.5,85,87,181/-
F which was duties debited to the profit and loss account of the company for the relevant previous year. In assessment proceedings the company's claim that it was entitled to deduct the entire sum of Rs.5,85,87,181/- being the duties actually paid during the relevant year was accepted. The Commissioner of Income Tax initiated proceedings under Section
G 263 of the Act claiming that Assessing officer had wrongly allowed the claim for deduction. The Commissioner held that assessing officer incorrectly relied on judgment of Gujarat High Court in **Lakhan Pal National Ltd. versus ITO (1986) 162 ITR 240,** ITAT also. ITAT referred a question to the High Court. The High Court answered the question in favour of Revenue against which the appeal was filed. The
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relevant facts have been noticed in the judgment of this Court in following words: -

"...In the assessment proceedings of the assessment year 1984-85, the Inspecting Assistant Commissioner of Income-tax allowed the appellant-assessee's claim that it was entitled to deduct the entire sum of Rs.5,85,87,181/- being the duties actually paid during the relevant year previous to the assessment year 1984-85. The Commissioner of Income-tax initiated proceedings under section 263 of the Act on the ground that the Assessing Officer had wrongly allowed the claim for deduction of an amount of Rs.98,25,833/- towards customs and Excise Duty paid during the previous year but credited to the profit and loss account in closing stock of goods under the provisions of Section 43B. the assessee relied upon the judgment of the Gujarat high Court in Lakhanpal National Ltd. Vs. ITO[1986] 162 ITR 240[hereinafter referred to as "Lakhanpal National Ltd.'s case"] in support of its claim. The Commissioner of Income-tax took the view that the Gujarat High Court's decision was distinguishable on facts and, therefore, made an order under section 263 of the Act disallowing the claim of the assessee. On appeal to the Tribunal, the Tribunal held that the Gujarat high court's judgment in Lakhanpal National Ltd.'s case [1986] 162 ITR 240 was distinguishable and confirmed the order of the Commissioner of Income-tax. On an application made under section 256(1) of the Act at the instance of the appellant-assessee, the Tribunal, inter alia, referred the following question of law for the opinion of the High Court (see [2002] 253 IT 738, 739):

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in rejecting the assessee's claim for deduction of the excise and customs duties of Rs.98,25,833 paid in the year of account and debited in the profit and loss account, on the ground that the crediting of the profit and loss account by the value of the closing stock, which included the aforesaid duties, did not have the effect of wiping out the debit to the profit and loss account?"

The High Court by its judgment dated September 24, 2001, in I.T.R.No.213 of 1993 (see [2002] 253 ITR 738), answered the question referred in favour of the Revenue and against the assessee."

29. This Court in ***Berger Paints Ltd. (Supra)*** upheld the view of assessing officer and decided the question in favour of the assessee. This Court held that the Commissioner of Income Tax has incorrectly distinguished the judgment of Lakhan Pal National Ltd. Case.

30. As noted above in the above case, the claim of the assessee was that entire sum of Rs.5,85,87,181/- was the duties actually paid during the relevant previous year. The above was not a case for unutilised MODVAT credit, hence, the said case cannot be held to lay down any ratio with respect to allowable deduction under Section 43B in respect of unutilised MODVAT credit.

31. Now coming to the second question i.e. with regard to disallowance of Rs.3,08,79,171/- in respect of Sale tax recoverable amount,the High Court in paragraph 52 of the judgment has noticed relevant facts in above reference in following words: -

> *"52. The facts are the Assessee pays sales tax on the purchase of raw materials and computers used in the manufacture of cars. Though, the sales-tax paid is part of the cost of raw material, the Assessee debits the purchases net of sales tax; the sales tax paid is debited to a separate account titled 'Sales-tax Recoverable A/c". Under the Haryana General Sales Tax Act 1973, the Assessee cold set off such sales-tax against its liability on the sales of the finished goods i.e. cars. Whenever the goods are sold, the tax on such sales is credited to the aforesaid account."*

32. The High Court had rightly answered the above question in favour of the Revenue relying on its discussion with respect to Question No.1. The sales tax paid by the appellant was debited to a separate account titled 'Sales Tax recoverable account'. The assessee could have set off sales tax against his liability on the sales of finished goods i.e. vehicles. We do not find any infirmity in the view of the High Court answering the above question.

33. The next submission which has been advanced by Shri Ganesh is on the first proviso to Section 43B. It has been submitted that Return for the assessment year in question was to be filed before 30.09.1999 and unutilised credit in fact was fully utilised by 30.04.1999 itself. It is submitted that since the unutilised credit was utilised for payment of Excise Duty on the manufactured vehicles, the said amount ought to have been allowed as permissible deduction under Section 43B.

34. The proviso to Section 43B provides that nothing contained in the Section shall apply in relation to any sum which is actually paid by assessee on or before due date applicable in his case for furnishing the return in respect of the previous year in which the liability to pay such sum was incurred. The crucial words in the proviso to Section 43B are "in respect of the previous year in which the liability to pay such sum was incurred". The proviso takes care of the situation when liability to pay a sum has incurred but could not be paid in the year in question and has been paid in the next financial year before the date of submission of the Return. In the present case, there was no liability to adjust the unutilised MODVAT credit in the year in question since had there been liability to pay Excise Duty by the appellant on manufacture of vehicles, the unutilised MODVAT credit could have been adjusted against the payment of such Excise Duty. In the present case, the liability to pay Excise Duty of the assessee is incurred on the removal of finished goods in the subsequent year i.e. year beginning from 01.04.1999 and what we are concerned with is unutilised MODVAT Credit as on 31.03.1999 on which date the asseessee was not liable to pay any more Excise Duty. Hence, present is not a case where appellant can claim benefit of proviso to Section 43B. The submissions of Shri Ganesh on proviso to Section 43B also does not support his claim.

35. In view of the foregoing discussions, we are of the view that High Court has correctly answered both the questions against the assessee-appellant and in favour of the Revenue. Consequently, the appeals are dismissed.

Divya Pandey Appeals dismissed.