REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.2939 OF 2006

Commissioner of Income Tax, Udaipur
Rajasthan ...Appellant

Versus

Mcdowell & Co. Ltd. ...Respondent

J U D G M E N T

Dr. ARIJIT PASAYAT, J.

1. Questioning correctness of the judgment rendered by a Division Bench of the Rajasthan High Court at Jodhpur, this appeal has been filed. The questions raised before the High Court are as follows:

(1) Whether on the facts and in the circumstances of the case, the I.T.A.T. was justified in holding that the unpaid amount of bottling fee has, on furnishing of the bank guarantee, to be treated as actual payment and accordingly allowing the deduction in respect of the same under Section 43B of the Act, even though the sum has not been actually paid before the due date of filing the return under Section 139(1) of the Act.

(2) Whether on the facts and in the circumstances of the case, the I.T.A.T. was justified in allowing the depreciation on research & development assets which related to the closed business of fast food division/unit of the assessee-company as such not used during the previous year?

(3) Whether on the facts and in the circumstances of the case, the I.T.A.T. was justified in deleting the addition of Rs.2,77,887/-

being made treating the expenditure incurred in purchase of new transformer as capital expenditure even when the old transformer still exists in the blocks of asset and not sold, discarded or demolished or destroyed?

2. The dispute in essence related to the applicability of Section 43B of the Income Tax Act, 1961 (in short the 'Act') The High Court held that the provision has no application.

3. The dispute relates to the assessment year 1992-93. So far as the first two questions are concerned, we have dealt with the issues in Civil Appeal No.3511 of 2007 relating to the assessment year 1991-92. Therefore, the answers given in respect of those questions shall apply so far as the present assessment year is concerned.

4. The last question relates to the nature of expenditure in purchase of new transformers. According to the revenue, the expenditure incurred is in the nature of capital expenditure when the old transformers are still included in the block of assets and not sold or discarded or demolished or destroyed.

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5. Learned counsel for the revenue placed strong reliance on Commissioner of Income Tax, Madurai and Ors. v. Saravana Spinnig Mills (P) Ltd. (2007 (7) SCC 298). It was highlighted that in Liquidators of Pursa Ltd. v. Commissioner of Income Tax, Bihar (1954 (25) ITR 265), it was held that the test is whether it is actually used.

6. Learned counsel for the assessee on the other hand submitted that the Saravana's case (supra) related to a case under Section 31, obviously relatable to current repairs. The assessee's claim on the other hand is relatable to Section 37 of the Act. Strong reliance is placed on a decision of this Court in Commissioner of Income Tax v. Ramaraju Surgical Cotton Mills ((2007)(294) ITR 328 (SC)). It is fairly accepted by learned counsel for the assessee that nomenclature in respect of the claim made is not really relevant, and what is relevant, is the nature of the transaction and the expenditure made. Since neither the Tribunal nor the High Court dealt with the factual aspect in detail, we remit the matter to the Assessing Officer to consider the respective stands in the background of what has been stated by this Court in Saravana and Ramaraju cases (supra).

7. The appeal is accordingly disposed of.

…………………………………….J.
(Dr. ARIJIT PASAYAT)

…………………………………….J.
(Dr. MUKUNDAKAM SHARMA)

New Delhi,
May 08, 2009

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.3471 OF 2007

Commissioner of Income Tax, Udaipur
Rajasthan ...Appellant

Versus

Mcdowell & Co. Ltd. ...Respondent

J U D G M E N T

Dr. ARIJIT PASAYAT, J.

1. Questioning correctness of the judgment rendered by a Division Bench of the Rajasthan High Court at Jodhpur this appeal has been filed. Originally following questions were framed for adjudication by order dated 24.5.2002:

> 1. Whether on the facts and in the circumstances of the case, the ITAT was justified in deleting the addition of Rs.5,61,462/- by holding that unpaid amount of bottling fee has, on furnishing of bank guarantee, to be treated as actual

payment and accordingly the deduction in respect of the same cannot be deemed under section 43B of the IT Act, 1961?

2. Whether, on the facts and in the circumstances of the case, the ITAT was justified in deleting the addition of Rs.61,412 made by the Assessing Officer on account of disallowance of landscaping expenses not recovered u/s Section 35(1)(iv) of the Income Tax Act by wrongly relying on the decision in ITA No.1546/JP95 dtd. 30.03.2001?"

2. Subsequently a third question was framed which reads as follows:

3. "Whether, in the facts and circumstances of the case, bottling fees chargeable from the assessee under the Rules framed under the Rajasthan Excise Act, 1950 and interest chargeable on late payment of bottling fees, amounts to tax, duty, cess or fees within the meaning of Section 43B of IT Act, 1961, so as to attract the said provisions while considering allowability of deduction of such expenses."

3. The first dispute in essence related to the applicability of Section 43B of the Income Tax Act, 1961 (in short the 'Act') The High Court held that the said provision has no application.

4. The second question was decided in favour of the revenue so far as it relates landscaping expenses. That has become final.

5. The dispute relates to assessment year 1988-89. The question arose in the background of the view Assessing Officer as well as the Commissioner of Income Tax (Appeals), Jodhpur (in short 'Commissioner') that the assessee was not entitled to deductions in terms of Section 43B of the Act. The amount in question related to payability of excise duty on wastages. The assessee took the stand that the provision for excise duty made on wastage of IMFL in transit which is debited to the customers account and credited to this account does not bring in application of Section 43B of the Act. The Income Tax Officer as well as the Commissioner held that the assessee's stand was not acceptable. An appeal was filed before the Income-tax Appellate Tribunal, Jodhpur Bench, Jodhpur (in short 'ITAT') which decided the issues in favour of the assessee.

6. Before the High Court the assessee took the stand that a bank guarantee has been furnished in respect of the amount and, therefore, there was no scope for applying Section 43B of the Act. It was also submitted that Section 43B of the Act applies to payments relatable to tax, duty, cess, or fee. But bottling fees chargeable from the assessee under the Rajasthan Excise Act, 1950 (in short the 'Excise Act') and Rajasthan Excise Rules, 1962 (in short the 'Rules') and the interest chargeable for late payment of

Rs.40,000/- does not amount to tax, duty and cess. The High Court held that such fees are not covered under the ambit of Section 43B.

7. The revenue is in appeal against the said view of the High Court which nevertheless held that furnishing of bank guarantee is not the same as making payment as stipulated in Section 43B of the Act.

8. We shall first deal with the question whether furnishing of bank guarantee amounts to actual payment and fulfils the conditions stipulated in section 43B of the Act. The requirement of Section 43B of the Act is the actual payment and not deemed payment as condition precedent for making the claim for deduction in respect of any of the expenditure incurred by the assessee during the relevant previous year specified in Section 43B. The furnishing of bank guarantee cannot be equated with actual payment which requires that money must flow from the assessee to the public exchequer as required under Section 43B. By no stretch of imagination it can be said that furnishing of bank guarantee is actual payment of tax or duty in cash. The bank guarantee is nothing but a guarantee for payment on some happening and that cannot be actual payment as required under Section 43B of Act for allowance as deduction in the computation of profits. Section 43B after

amendment w.e.f. 1.4.1989 refers to any sum payable by assessee by way of tax, duty or fee by whatever name called under any law for the time being in force. The basic requirement, therefore, is that the amount payable must be by way of tax, duty and cess under any law for the time being in force. The bottling fees for acquiring a right of bottling of IMFL which is determined under the Excise Act and Rule 69 of the Rules is payable by the assessee as consideration for acquiring the exclusive privilege. It is neither fee nor tax but the consideration for grant of approval by the Government as terms of contract in exercise of its rights to enter a contract in respect of the exclusive right to deal in bottling liquor in all its manifestations.

9. Section 43B as it stood on 1.4.1989 reads as follows:

> "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 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 term loan 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:

Provided that nothing contained in this section shall apply in relation to any sum referred to in Clause (a) or Clause (c) or Clause (d) or Clause (e) or Clause (f) 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."

10. It would be pertinent to note that the expression now used in Section 43B (i)(a) is "Tax, Duty, Cess or fee or by whatever name called". It denotes

that items enumerated constitute species of the same genus and the expression 'by whatever name called' which follows preceding words 'Tax', 'Duty', 'Cess' or 'fee' has been used ejusdem generis to confine the application of the provisions not on the basis of mere nomenclatures, but notwithstanding name, they must fall within the genus 'taxation' to which expression 'Tax', 'Duty', 'Cess' or 'Fee' as a. group of its specie belong vis. compulsory exaction in the exercise of State’s power of taxation where levy and collection is duly authorised by law as distinct from amount chargeable on principle as consideration payable under contract.

11. The principle of statutory interpretation is well known and well settled that when particular words pertaining to a class, category or genus are followed by general words, the general words are construed as limited to things of the same kind as those specified. This rule is known as the rule of ejusdem generic. It applies when:

(1) the statute contains an enumeration of specific words;

(2) the subjects of enumeration constitute a class or category;

(3) that class or category is not exhausted by the enumeration;

(4) the general terms follow the enumeration; and

(5) there is no indication of a different legislative intent.

12. Reference in this connection may be made to Amar Chandra v. Collector of Excise, Tripura (AIR 1972 SC 1863) and Housing Board of Haryana v. Haryana (AIR 1996 SC 434)

13. The 'Tax', 'Duty', 'Cess' or 'fee' constituting a class denotes to various kinds of imposts by State in its sovereign power of taxation to raise revenue for the State. Within the expression of each specie each expression denotes different kind of impost depending on the purpose for which they are levied. This power can be exercised in any of its manifestation only under any law authorising levy and collection of tax as envisaged under Article 265 which uses only expression that no 'tax' shall be levied and collected except authorized by law.

14. It in its elementary meaning coveys that to support a tax legislative action is essential, it cannot be levied and collected in the absence of any legislative sanction by exercise of executive power of State under Article 73 by the Union or Article 162 by the State. Under Article 366(28) “Taxation” has been defined to include the imposition of any tax or impost whether general or local or special and tax shall be construed accordingly. "Impost" means compulsory levy.

15. The well known and well settled characteristic of 'Tax' in its wider sense includes all imposts. Imposts in the context have following characteristics:

(i) The power to tax is an incident of sovereignty.

(ii) 'Law' in the context of Article 265 means an Act of legislature and cannot comprise an executive order or rule without express statutory authority.

(iii) The term 'Tax' under Article 265 read with Article 366(28) includes imposts of every kind viz., tax, duty, cess or fees.

(iv) As an incident of sovereignty and in the nature of compulsory exaction, a liability founded on principle of contract cannot be a "tax' in its technical sense as an impost, general, local or special.

16. This Court in the light of decisions starting from State of Bombay v. F.N. Balsara (AIR 1951 SC 318) held that the expression "fee" is not used in the State excise laws or rules in the technical sense of the expression. By 'licence fee' or 'fixed fee' under excise laws relating to potable

liquors/intoxicant is meant the price or consideration which the Government charges to the licences for parting with its exclusive privilege and granting them to the licencees. There is no fundamental right to do trade or business in intoxicants. The State under its regulatory powers has the right to prohibit absolutely every form of activity in relation to intoxicants, its manufacture, storage, export, import, sale and possession in all their manifestations these rights are vested in the State. The decision was re-iterated in Har Shankar v. Dy. Excise and Taxation Commissioner (AIR 1975 SC 1121) and State of U.P. v. Sheopat Rai (AIR 1994 SC 813).

17. In Ahmedabad Urban Development Authority v. Sharad Kumar Jayantgi Kumar Pasawalla (AIR 1992 SC 2038) it was held that the crucial expression in Section 43B is "by way of". Therefore, it was the duty of revenue authorities to ascertain whether the deduction which is to be tested on the touchstone of Section 43B(a) is the amount payable is by way of tax or duty or fee or cess. The High Court was justified in holding that the amount does not fall within the purview of Section 43B. The High Court's view is correct.

18. The appeal is dismissed.

…………………………………..J.
(Dr. ARIJIT PASAYAT)

………………………………….J.
(Dr. MUKUNDAKAM SHARMA)

New Delhi,
May 08, 2009

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.3472 OF 2007

Commissioner of Income Tax, Udaipur
Rajasthan ...Appellant

Versus

Mcdowell & Co. Ltd. ...Respondent

J U D G M E N T

Dr. ARIJIT PASAYAT, J.

1. Questioning correctness of the judgment rendered by a Division Bench of the Rajasthan High Court at Jodhpur this appeal has been filed. The questions raised before this Court are as follows:

> 1. Whether the unpaid amount of Rs.12,67,656/- furnishing of bank guarantee could be allowed as a deduction under Section 43B of the IT Act, 1961?

2. Whether the furnishing of bank guarantee can be treated as actual payment for the purpose of Section 43B of the IT Act, 1961?

3. Whether the High Court erred in law in not following its earlier decision in Commissioner of Income Tax v. Rajasthan Patrika Ltd. (258 ITR 300) and thereby holding that furnishing of bank guarantee was actual payment?

4. Whether the bottling fee payable by the assessee and chargeable under the Rajasthan Excise Act, 1950 and the Rules framed there under being the consideration receivable by the State for parting with its exclusive privilege to deal in potable liquor, was in the nature of any sum payable by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force had to be actually paid in cash or by cheque for claiming deduction under Section 43B of the IT Act, 1961?

2. The questions raised before the High Court are as follows:

(1) Whether on the facts and in the circumstances of the case the ITAT was justified in deleting the addition of Rs. 12,67,656/- by holding that unpaid amount of bottling fee has, on furnishing of bank guarantee, to be treated as actual payment and accordingly the deduction in respect of the same cannot be denied U/s. 43B of the Income-tax Act, 1961?

(2) Whether on the facts and in the circumstances of the case the ITAT was justified in deleting the addition of Rs. 38,442/- made by the Assessing Officer on account of disallowance of Research and Development expenses not covered U/s. 35(1)(iv) of the Income-tax Act, by wrongly relying on the decision in ITA No.1546/JP/95 dated 30.03.2001?

(3) Whether on the facts and in the circumstances the ITAT is justified in allowing the depreciation on research & Development assets which related to the closed business of Fast Food Division/unit of the assessee company and as such not used during the previous year?"

(4) Whether in the facts and circumstances of the case bottling fees chargeable from the assessee under the Rajasthan Excise

Act, 1950 and interest chargeable on late payment of bottling fees amount to tax, duty, cess or fees within the meaning of section 43B of I.T. Act, 1961 so as to attract the said provisions while considering allowability of deduction of such expenses?

3. The dispute relates to assessment year 1995-96. First dispute in essence related to the applicability of Section 43B of the Income Tax Act, 1961 (in short the 'Act'), the High Court held that provision has no application.

4. The said issue in the present appeal is revolving round the applicability of Section 43B of the Act. In view of our decision in Civil Appeal No.3471 of 2007 relating to the assessment year 1988-89 which has been disposed of today, the said issue is answered in favour of the assesseee and against the revenue.

5. So far as the second issued is concerned in Civil Appeal No.3511 of 2007 relating to assessment year 1991-92 and Civil Appeal no.3473 of 2007 relating to the assessment year 1993-94, matter has been remitted to the

Assessing Officer for factual adjudication of the rival stands. Similar direction is given in the present case.

6. The appeal is disposed of accordingly.

……………………………………J.
(Dr. ARIJIT PASAYAT)

……………………………………J.
(Dr. MUKUNDAKAM SHARMA)

New Delhi,
May 08, 2009

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REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.3473 OF 2007

Commissioner of Income Tax, Udaipur
Rajasthan ...Appellant

Versus

Mcdowell & Co. Ltd. ...Respondent

J U D G M E N T

Dr. ARIJIT PASAYAT, J.

1. Questioning correctness of the judgment rendered by a Division Bench of the Rajasthan High Court at Jodhpur, this appeal has been filed. The questions raised before this Court are as follows:

1. Whether the Division Bench of the High Court has not grossly erred in law in framing an additional question which was not referred in the appeal filed by the petitioner herein?

2. Whether in the facts and circumstances of the case, the Division Bench of the High Court was not justified in law in affirming the findings of the ITAT whereby ITAT deleted the addition of Rs.6 lakhs by holding the unpaid amount of bottling fee, has on furnishing bank guarantee to be treated as actual payment and accordingly holding that the deduction in respect of the same cannot be denied under section 43B of the IT Act, 1961?

3. Whether the Division Bench of the High Court has not erred in law in holding that deduction of an amount of liability of the assessee to pay bottling fee under the Rajasthan Excise Act, 1950 read with Rule 69 of the Rajasthan Excise Rules was not a fee in its technical sense and was allowable as revenue expenditure as price paid to State for parting with its exclusive privilege as an incident of trading activities by the State for the assessment year in question?

4. Whether in the facts and circumstances of the case, the Division Bench of the High Court was justified in law in affirming the findings of the ITAT whereby it deleted the addition of Rs.6,69,743/- made by the Assessing Officer on account of disallowance of Research and development expenses holding that the same were not covered under Section 35(1)(iv) of the IT Act, 1961 by wrongly relying on the decision in ITA 1546/JP/95 dated 30.3.2001?

5. Whether in the facts and circumstances of the case, the Division Bench of the High Court was justified in law in affirming the findings the ITAT allowing the depreciation on research and development assets which related to the closed business of Fast Food Division/Unit of the assessee company as such not used during the previous year?

6. Whether in the facts and circumstances of the case, the Division Bench of the High Court was justified in law in affirming the findings of the ITAT deleting the addition of Rs.6,69,743/- made by the Assessing Officer on account of disallowance of Research and development Expenses not covered under Section 35(1)(iv) of the IT Act, 1961 by

wrongly relying on the decision in ITA1546/JP/95 dated 30.3.2001?

2. Before the High Court following questions were raised:

> 1. "Whether on the facts and, in the circumstances of the case the ITAT was justified in deleting the addition of Rs.6 lacs by holding that unpaid amount of bottling fee has, on furnishing of Bank Guarantee, to be treated as actual payment and accordingly the deduction in respect of the same can not be denied under section 438of the I.T. Act. 1961?"
>
> 2. “whether on the facts and in the circumstances of the case the ITAT was justified in allowing the depreciation on Research and Development Assets which related to the closed business of Fast Food Division/Unit of the Assessee company any as such not used during the previous year"?
>
> 3. "Whether on the facts and in. the circumstances of the case the ITAT was justified in deleting the addition of Rs.6,69,743/- made by the Assessing officer on account of Disallowance of Research and Development expenses not covered under section 35(1)(iv) of the Income Tax Act, by wrongly relying on the decision in the ITA No.1546/JP/95 dated 30.03.2001”?
>
> 4. "Whether on the facts and in the circumstances of the case the Hon'ble ITAT was justified in deleting the disallowance of Rs.15,62,580/- holding that the technical service charges (royalty] payment under consideration is allowable based on

> subsequent agreement dated 10.04.1992 at higher rate then that based on earlier agreement entered into in December, 1990 even though earlier agreement entered into in December, 1990 was to be effective upto 2000, and had neither been substituted nor rescinded"?

3. The dispute in essence related to the applicability of Section 43B of the Income Tax Act, 1961 (in short the 'Act') The High Court held that the said provision has no application.

4. The dispute relates to the assessment year 1993-94. In addition to the issues which are common to assessment year 1992-93 which was the subject matter in Civil Appeal No.3511 of 2007 and Civil Appeal No.2939 of 2006 relatable to the assessment year 1992-93, our answers to the questions given in relation to Section 43B and depreciation on research and development machinery and replacement of transformers shall apply to the facts of the present case also. The additional issue here relates to technical service charges. According to learned counsel for the revenue, the principles of novatio are applicable here and there was no commercial expediency for entering into a fresh contract and there is no financial benefit. We find that the High Court has noted that it is not the case of the revenue that the assessee has not actually paid Rs.30 lacs to McDowell. It is pointed out that

though in two years the payments made under the new agreement were more than what would have fallen due under the original agreement, but for the subsequent years' transactions, the business expediency claim of the assessee proved to be right. It has been noticed that for the assessment year 1995-96 under the old agreement, the assessee would have been required to pay Rs.45.56 lacs towards technical services charges to Mcdowell, and during the assessment year 1996-97 it would have been required to pay Rs.107.323 lacs as per the old agreement whereas the assessee has during these two years paid Rs.30 lacs for each year. The Tribunal and the High Court recorded a finding that the new agreement in April, 1992 was not a subterfuge or clandestine device to reduce the tax liability but was an expenditure incurred on business expediency and the decision of the parties to enter into an agreement was based on commercial consideration. The finding is essentially a finding of fact based on cogent assessment of the factual scenario. We find nothing infirm in the decision of the Tribunal and the High Court to warrant interference. The challenge of the revenue on that ground fails.

5. The appeal is disposed of accordingly.

……………………………………J.
(Dr. ARIJIT PASAYAT)

……………………………………J.
(Dr. MUKUNDAKAM SHARMA)

New Delhi,
May 08, 2009

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.3511 OF 2007

Commissioner of Income Tax, Udaipur
Rajasthan ...Appellant

Versus

Mcdowell & Co. Ltd. ...Respondent

J U D G M E N T

Dr. ARIJIT PASAYAT, J.

1. Questioning correctness of the judgment rendered by a Division Bench of the Rajasthan High Court at Jodhpur, this appeal has been filed.

2. The assessment year involved was 1991-92. The questions raised before the High Court are as follows:

> 1. Whether on the facts and in the circumstances of the case, the ITAT was justified in holding that he unpaid amount of bottling fee has, on furnishing of the bank guarantee to be treated as actual payment and accordingly allowing the deduction in respect of the same under Section 43B of the Act,

even though the sum has not been actually paid before the due date of filing the return under Section 139(1) of the Act?

2. Whether on the facts and in the circumstances of the case, the ITAT was justified in allowing the depreciation on research and development assets which related to the closest business of fast food division/unit of the assessee company as such not used during the previous year?

3. The dispute in essence related to the applicability of Section 43B of the Income Tax Act, 1961 (in short the 'Act') The High Court held that the said provision has no application.

4. The High Court following its earlier view in respect of the assessment year 1988-89 held that the amount of bottling fees which remain unpaid did not attract applicability of Section 43B of the Act. The same question has been considered by us in Civil Appeal No.3471 of 2007 disposed of separately today. The view expressed in relation to Section 43B of the Act applies to this case also. The first question has therefore to be decided against the revenue.

5. Coming to the second question, it relates to claim of depreciation on research and development assets. Stand of the revenue is that machinery in respect of R & D centre related to the fast food unit which was closed and

therefore the assessee was not entitled to any depreciation because there was no actual user of the machinery.

6. Stand of the assessee on the other hand is that the machinery was used in respect of both the fast food and the liquor units. This aspect needs to be factually examined.

7. We find that the basic issue as to whether it related to both the units or only to fast food unit which is admittedly closed has not been examined in detail. We, therefore, remit the matter to the Assessing Officer to examine this aspect. The assessee shall be permitted to place material in support of its claim that the machinery was used for both the units. If it is established by material that whole or part of the machinery was being used for the liquor unit, whether partly or fully in respect of those machineries, the deduction can be made, as permissible in law otherwise not. The matter is therefore remitted to the assessing officer for doing necessary exercise.

8. The appeal is disposed of accordingly.

……………………………………..J.
(Dr. ARIJIT PASAYAT)

…………………………………….J.

(Dr. MUKUNDAKAM SHARMA)

New Delhi,
May 08, 2009

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.3512 OF 2007

Commissioner of Income Tax, Udaipur
Rajasthan ...Appellant

Versus

M/s Udaipur Distillary Co. Ltd., Udaipur ...Respondent

J U D G M E N T

Dr. ARIJIT PASAYAT, J.

1. Questioning correctness of the judgment rendered by a Division Bench of the Rajasthan High Court at Jodhpur this appeal has been filed. The questions raised before this Court are as follows:

> 1. Whether the High Court is right in laws and on the facts of the case in dismissing the appeal of the revenue?

2. Whether the High Court has failed to consider the following substantial questions of law:

A. Whether on the facts and in the circumstances of the case, the ITAT was justified in deleting the addition of Rs.5,51,262/- by holding that unpaid amount of bottling fee has, on furnishing of bank guarantee to be treated as actual payment and accordingly the deduction in respect of the same cannot be denied under section 43B of the IT Act, 1961?

B. Whether in the facts and in the circumstances of the case, the ITAT was justified in law in deleting the addition of Rs.38,442/- made by the assessing officer on account of disallowance of research and development expenses not covered under Section 35(1)(iv) of the IT Act, 1961 by wrongly relying on the decision in ITA 1546/JP/95 dated 30.3.2001?

C. Whether in the facts and in the circumstances of the case, the Division Bench of the High Court was justified in law in affirming the findings of the ITAT allowing the depreciation on research and development assets which related to the closed business of Fast Food Division/Unit of

the assessee company as such not used during the previous year?

D. Whether in the facts and in the circumstances of the case, the Division Bench of the High Court was justified in affirming the findings of ITAT deleting the disallowance of Rs.14,51,100/- holding that the technical service charges (royalty) payment under consideration is allowable based on subsequent agreement dated 10.4.1992 at higher rate than that based on earlier agreement entered into in December, 1990 even though earlier agreement entered into in December, 1990 was to be effective upto 2000 and had neither been substituted nor rescinded?

3. The question raised before the High Court are same as raised for assessment years 1991-92 and 1992-93.

4. The dispute in essence related to the applicability of Section 43B of the Income Tax Act, 1961 (in short the 'Act') The High Court held that the said provision has no application.

5. The dispute relates to the assessment year 1994-95. In addition to the issues which are common to assessment year 1991-92, 1992-93 which are the subject matter in Civil Appeal No.3511 of 2007 and Civil Appeal No.2939 of 2006, our answers to the questions given in relation to Section 43B and depreciation on research and development machinery and replacement of transformers shall apply to the facts of the present case also. The additional issue here relates to technical service charges. According to learned counsel for the revenue the principles of novatio are applicable here and there was no commercial expediency for entering into a fresh contract and there is no financial benefit. We find that the High Court has noted that it is not the case of the revenue that the assessee has not actually paid Rs.30 lacs to McDowell. It is pointed out that though in two years the payments made under the new agreement were more than what would have fallen due under the original agreement but for the subsequent years' transactions, the business expediency claim of the assessee proved to be right. It has been noticed that for the assessment year 1995-96 under the old agreement, the assessee would have been required to pay Rs.45.56 lacs towards technical services charges to Mcdowell and during the assessment year 1996-97 it would have been required to pay Rs.107.323 lacs as per the old agreement

whereas the assessee has during these two years paid Rs.30 lacs for each year. The Tribunal and the High Court recorded a finding that the new agreement in April, 1992 was not a subterfuge or clandestine device to reduce the tax liability but was an expenditure incurred on business expediency and the decision of the parties to enter into an agreement was based on commercial consideration. The finding is essentially a finding of fact based on cogent assessment of the factual scenario. We find nothing infirm in the decision of the Tribunal and the High Court to warrant interference. The challenge of the revenue on that ground fails.

6. The appeal is disposed of.

……………………………………J.
(Dr. ARIJIT PASAYAT)

……………………………………J.
(Dr. MUKUNDAKAM SHARMA)

New Delhi,
May 08, 2009
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