2025 INSC 1247

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

Civil Appeal Nos. 4395-4397/2010

Pride Foramer S.A. Appellant(s)

VERSUS

Commissioner of Income Tax & Anr. Respondent(s)

J U D G M E N T

Joymalya Bagchi, J.

1. These appeals are directed against common judgment and order dated 12.06.2009 passed by the High Court of Uttarakhand in Income Tax Appeal Nos. 49 of 2005, 91 & 98 of 2006 (Assessment Years 1997-98, 1996-97 and 1999-2000, respectively) whereby the High Court set aside the orders passed by the ITAT[1] and affirmed the orders passed by CIT (Appeals) whereby the CIT (Appeals) had disallowed the deduction of business expenditure under Section 37 of the Income Tax Act 1961[2], as well as carrying

[1] Income Tax Appellate Tribunal, New Delhi.
[2] Hereinafter, 'the Act'.

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forward of unabsorbed depreciation under Section 32(2) of the Act for the Assessment Years 1996-1997, 1997-1998 and 1999-2000.

FACTS:

2. Relevant facts for adjudication of the appeals are set out hereinunder:

a. Appellant is a non-resident company incorporated in France and is engaged in oil drilling activities. In 1983, the appellant was awarded a 10-year contract for drilling operations in offshore Mumbai from 1983 till 1993.

b. Thereafter, the appellant was awarded another drilling contract in October, 1998, which came to be formalised in January, 1999.

c. In the *interregnum* i.e., during the relevant assessment years, though no drilling contract was awarded, the appellant carried on business correspondences with ONGC from its office at Dubai and headquarters at France and had also submitted a bid for oil exploration in 1996.

d. During this period, appellant undertook various expenditures including administrative charges, audit fees etc. with the

intention of carrying out its business activities as well as realising tax refunds from the Income Tax Department.[3]

e. For the relevant assessment years, the appellant filed its return showing 'NIL' income. The only income credited was under the head 'Income from Business' on account of interest received on income tax refunds amounting to Rs. 1,69,57,395/- for Assessment Year 1996-1997, Rs. 5,49,628/- for Assessment Year 1997-1998 and Rs. 11,29,957/- for Assessment Year 1999-2000.

f. Against this, business expenditures aggregating to Rs. 2,50,000/-, Rs. 5,55,152/- and Rs. 11,29,957/-, respectively, were claimed as deductions and appellant also claimed set-off against unabsorbed depreciation on furniture and fixtures brought forward from earlier years.

FINDINGS OF ASSESSING OFFICER AND CIT (APPEAL):

3. The Assessing Officer[4] disallowed deduction of business expenditure as well as carry forward of unabsorbed depreciation on the ground that the appellant was not carrying on any business

[3] Hereinafter, 'Department'.
[4] Hereinafter, 'AO'.

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during the relevant assessment years. The findings of the AO were upheld by CIT (Appeals).

FINDINGS OF THE ITAT:

4. ITAT, however, reversed the findings of the CIT (Appeals), holding a temporary lull in business for whatever reason cannot be termed as cessation of business. It proceeded to hold as follows:

> "**6**..... In the present case, undoubtedly, after 1992-93, the assessee did not have any business activity. However, there is enough evidence on record to suggest that the assessee had not completely gone out of business. Copies of correspondence dated 1996 with ONGC show that the assessee was in constant touch with ONGC for supply of manpower in respect of expert key personnel for deep water drilling and a tender in this regard was in fact submitted in September 1996. This proves that even after the completion of the earlier contract in 1993, the assessee was contemplating to bid for another contract. The efforts of the assessee finally culminated in a firm contract being awarded to it in 1998 which was formalized in 1999. A copy of the said contract is on record. As held by the Bombay High Court in the case of Hindustan Chemical Works Ltd. V. CIT in 124 ITR 561, there is a marked distinction between "lull in business" and "going out of business". A temporary discontinuance of business may, in certain circumstances, give rise to an inference that a business is going through a lean period of transition and it could be revived if proper circumstances arise. In the present case, the period between 1993 and 1998 was of such temporary discontinuance only which can be

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termed as a "lull in business". Thus, when the intention of the assessee was never to go completely out of business, it cannot be concluded that the assessee had discontinued its business. To our mind, it makes no difference if the correspondence was by the Dubai Office of the assessee or by its office in France as was one of the contentions of the ld. DR. In fact, in the accounting year 1995-96, the assessee had also paid consultancy Charges to follow up the aforesaid ONGC bid. Further, the receipts from this contract were offered for taxation in assessment year 2000-03 as reflected by the copy of the statement of total income placed on record. Another factor which weighed with the revenue authorities to conclude that the assessee had discontinued business in India, was the so called admission by the assessee that it had no permanent establishment in India. No doubt, the authorized representative had averred in the affidavit dated 22.1.01 that the assessee did not establish nor had any existing permanent establishment in India. However, the revenue authorities have considered this affidavit out of context. The affidavit had to be sworn in context of the assessee's claim for concessional rate of tax with regard to interest income. Since the assessee had claimed concessional rate of tax, the Assessing Officer inferred that there was a permanent establishment in India. On account of this wrong inference, the assessee had to swear an affidavit denying the existence of a permanent establishment in India. However, taking this as the base, the Assessing Officer and the CIT(A) concluded that since there was no permanent establishment in India, the assessee was out of business. It is not well appreciated by the authorities below that whether there is a permanent establishment in India or not, has to be determined as per the provisions of the relevant DTAA. As per the DTAA, the

> assessee may not have a permanent establishment in India, but that does not necessarily lead to the conclusion that the assessee is not in business. The assessee can be in business, depending upon the facts and circumstances of the case de hors' the permanent establishment which we do find in the present case. Thus, considering all the facts and circumstances of the case, we hold that the assessee was in business during the period relevant to the assessment year in question."
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> (emphasis supplied)

5. In light of such finding that the appellant had not ceased to carry on business, the Tribunal though holding income on account of interest on tax refunds was chargeable under the head 'Income from Other Sources' and not 'Income from Business', allowed set off of the expenses on account of administrative charges, legal professional fees undertaken by the appellant as business expenses from 'income from other sources' under Section 71 of the Act. For similar reason unabsorbed depreciation from previous years was allowed under Section 32(2) of the Act.

FINDINGS OF THE HIGH COURT:

6. The Department challenged the ITAT orders in appeals arising out of Assessment Years 1996-1997 and 1999-2000 before the High Court. The High Court reversed the ITAT orders which were challenged before the Apex Court and remanded for fresh

consideration[5]. Thereupon, the appeals arising out of all the Assessment Years 1996-1997, 1997-1998 and 1999-2000 were reheard analogously and disposed of by the impugned order.

7. The High Court while agreeing with the proposition that mere lull in business does not mean the assessee had ceased to do business in India, reversed the finding of ITAT, holding as follows:

> "..when the assessee has neither permanent office, nor any other office in India, nor any contract was in execution during the relevant period, it cannot be said that they were in business in India, as such, it cannot be said that assessee was entitled to set off claimed by it under Section 71 of the Act."

ISSUE:

8. Having heard learned counsel for the parties, we are of the opinion that the moot issue which falls for our consideration is:

'Whether, in the facts of the case, the appellant can be said to have been carrying on business during the relevant period, so as to avail deduction of business expenditure under Section 37(1) read with Section 71 of the Act, and carry forward unabsorbed depreciation of previous years under Section 32(2) of the Act?'

[5] Vide order dated 13.10.2008 in SLP(C) No. 4510 of 2008.

ANALYSIS:

9. Section 37(1), *inter alia*, provides any expenditure (not being an expenditure in the nature described in Section 30 to 36 or in the nature of capital expenditure or personal expenses of the assessee) which is undertaken wholly and exclusively for the purpose of business and profession shall be allowed to be deducted in computing income chargeable under the head 'Profits and Gains from Business and Profession' and consequently, may be set off as loss against income under any other head subject to the conditions provided in Section 71 of the Act.

10. Section 32(2) provides unabsorbed depreciation allowance of a previous year may be carried forward and set off against income of the following assessment years in the manner and subject to the conditions provided therein. The first proviso to the said sub-section further provided such depreciation allowance can be carried forward if the business or profession for which the depreciation allowance was originally computed, continued in the previous year relevant to the assessment year in question. It may be apposite to note that the said proviso has since been omitted by the Finance Act, 2001 w.e.f. 1st April, 2002.

11. It is evident that to avail the benefit of the aforesaid provisions, the appellant had to demonstrate that it was carrying on business in India during the relevant period. While the Tribunal was of the view mere failure to procure a business contract or maintain a permanent establishment in India was not a *sine qua non* to demonstrate the assessee's intention to carry on business, the High Court held to the contrary and disallowed the claim of the appellant.

12. In the present case, the appellant, a non-resident company had been awarded 10 years' drilling contract by ONGC in 1983. The contract continued till 1993. Thereafter, the appellant failed to procure another contract till October, 1998. But ample materials have been placed on record to show during the *interregnum*, the appellant had continuous business correspondences with ONGC with regard to hiring of manpower services in respect of expert key personnel for drilling in deep waters and had even unsuccessfully submitted a bid in 1996.

13. Whether failure to procure the drilling contract with ONGC was owing to the appellant's disinterest to carry on business during relevant period and amounted to cessation of business or not must be construed from the appellant's conduct. If such conduct, from the standpoint of a prudent businessman, evinces intention to

carry on business, mere failure to obtain a business contract by itself would not be a determining factor to hold the appellant had ceased its business activities in India.[6]

14. The Tribunal rightly noted a business going through a lean period of transition which could be revived if proper circumstances arose, must be termed as lull in business and not a complete cessation of the business.

15. The word 'business' has a wide import and connotes some real, substantial and systemic or organised course of activity or activity with a set purpose.[7] In *CIT v. Malayalam Plantations Ltd.*[8] this Court further underlined that the expression 'for the purpose of business' is wider in scope than the expression 'for the purpose of earning profits' and would encompass in its fold "many other acts incidental to the carrying on of a business". The Bench observed as follows:

> "The expression 'for the purpose of business' is wider in scope than the expression 'for the purpose of earning profits'. Its range is wide: it may take in not only the day-to-day running of a business but also the rationalisation of its administration and modernisation of its machinery; it may include measures for preservation of

[6] CIT v. Vikram Cotton Mills, (1988) 169 ITR 597 (SC), para 15.
[7] Narain Swadeshi Weaving Mills v. Commissioner of excess Profits Tax (1954) 2 SCC 546.
[8] (1964) 53 ITR 140 (SC).

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> business and for protection of its assets and property from expropriation, coercive process or assertion of hostile title; it may also comprehend payment of statutory dues and taxes imposed as a pre-condition to commence or for carrying on a business; it may comprehend many other acts incidental to the carrying on of a business."
>
> (emphasis supplied)

16. Continuous correspondences between the appellant and ONGC with regard to supply of manpower for oil drilling purposes and its unsuccessful bid in 1996 demonstrates various acts aimed at carrying on business in India which unfortunately did not fructify in procuring a contract.

17. In this factual backdrop, the High Court erred in holding that the appellant was not carrying on business as it had no subsisting contract with ONGC during the relevant period.

18. The other issue on which the High Court misdirected itself was to infer as the appellant did not have a permanent establishment and corresponded with ONGC from its foreign office, it cannot be said to carry on business in India. This view is wholly fallacious and contrary to the very scheme of the Act which does not require a non-resident company to have a permanent office within the country to be chargeable to tax on any income accruing in India.

19. A combined reading of the charging provisions under Section 4 and Section 5(2) of the Act read with Section 9(1)(i) makes it amply clear that a non-resident person shall be liable to pay tax on income which is deemed to accrue or arise in India. Under Section 9(1)(i), income accruing or arising, directly or indirectly, through or from any business connection in India is deemed to accrue or arise in India and is accordingly chargeable to tax as business income under Section 28 of the Act. None of these provisions make it mandatory for a non-resident assessee to have a permanent establishment in India to carry on business or have any business connection in India. The issue of 'permanent establishment' may be relevant for the purposes of availing the beneficial provisions of the Double Tax Avoidance Agreement (DTAA) between India and France which is not a relevant consideration for the purposes of this case.

20. In an era of globalisation whose life blood is trans-national trade and commerce, the High Court's restrictive interpretation that a non-resident company making business communications with an Indian entity from its foreign office cannot be construed to be carrying on business in India is wholly anachronistic with India's commitment to Sustainable Development Goal relating to 'ease of doing business' across national borders.

CONCLUSION:

21. For the aforesaid reasons, we allow the appeals and set aside the judgment and order of the High Court. Orders passed by the ITAT are revived and Assessing Officer is directed to pass fresh Assessment Orders for the relevant Assessment Years in terms of the ITAT orders.

……, J
(**MANOJ MISRA**)

……, J
(**JOYMALYA BAGCHI**)

New Delhi,
October 17, 2025

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