HON'BLE SRI JUSTICE DILIP B. BHOSALE
AND
HON'BLE SRI JUSTICE A. RAMALINGESWARA RAO

<u>ITTA No. 201 OF 2003</u>

<u>JUDGMENT</u>: (per the Hon'ble Sri Justice A. Ramalingeswara Rao)

Heard learned Standing Counsel for the Revenue. None appears for the respondent even though served.

This appeal arises out of the order dated -08-2002 passed by the Income Tax Appellate Tribunal, Visakhapatnam Bench, Visakhapatnam (for short, 'the Tribunal') in I.T.A No.1355/H/97, for the assessment year 1988-89.

The appellant raised the following substantial questions of law:

> "1. Whether on the facts and in the circumstances of the case the order of the Tribunal suffers from perversity?
>
> 2. Whether on the facts and in the circumstances of the case the Tribunal is correct in holding that sales promotion commission of Rs.20,09,980/- alleged to have been paid by the assessee to M/s.SFTPL is wholly and exclusively for the purposes of business of the assessee?
>
> 3. Whether on the facts and in the circumstances of the case the Tribunal is correct in holding that a sum of Rs.20,09,980/- paid as sales promotion commission is allowable expenditure?"

The facts of the case are that the assessment of the asseesee was completed on 26-03-1991 and the claim of sales promotion expenditure amounting to Rs.30,76,960/- for the assessment year 1988-89 paid to M/s. Suvarna Filters and Tobacco Products Limited (in short, 'SFTPL) was disallowed. Challenging the said disallowance, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals), Vijayawada who by his order dated 30-10-1991 had set aside the assessment and directed the assessing officer to pass a fresh order of assessment, after allowing an opportunity to the assessee to cross examine the witnesses whose statements were used against him and also keeping in view the directions earlier given by him for the previous assessment years and the observations made therein. Pursuant to the said order, some witnesses were summoned by the assessing officer and they were subjected to cross examination. The assessing officer held that the assessee failed to discharge the onus cast on him and that SFTPL has not rendered any services to the assessee in the field of marketing survey as claimed and the payment was therefore not liable to be allowed as admissible expenditure. Challenging the said order of assessment, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals). The appellate authority held that the marketing agency has rendered services to promote the sale of IMFL products distributed by the appellant which is reflected in the huge turnover of Rs.4.21 Crores and Rs.2.86 Crores for the respective assessment years 1987-88 and 1988-89 in the competitive IMFL trade. He, accordingly, held that the assessing officer was not at all justified in drawing adverse inference and rejecting the claim of the appellant and consequent additions of Rs.20,09,980 for the assessment year 1987-88 and Rs.30,76,960/- for the assessment year 1988-89 being the disallowance of sales commission paid to SFTPL towards sales promotion, were deleted. Challenging the order of the Commissioner of Income Tax (Appeals), the Revenue preferred an appeal before the Tribunal. The Tribunal after considering rival contentions held that the department has drastically failed to disprove the contention of the assessee that neither the assessee has/had any share in SFTPL nor any director of SFPTL happens to be the relative of the assessee. It was also held that it is a settled proposition of law that necessity of a particular expenditure is best decided by a businessman and it is not for the department to sit in judgment over the necessity or otherwise of an expenditure. The burden is on the department to prove that the said expenditure is not genuine if they want to disallow the same for some reason or other.

Accordingly, it upheld the order of the Commissioner of Income Tax (Appeals) allowing the claim of the assessee in deleting the addition on that count. Challenging the order of the Tribunal, the present appeal is filed by the Revenue.

The Tribunal passed common order in respect of the assessment years 1987-88 and 1988-89 and the present appeal is filed only against the order passed in ITA No.1355/H/97 relating to the assessment year 1988-89.

Learned Standing Counsel for the Revenue submitted that in spite of her best efforts, she could not get information with regard to filing of appeal against the order in ITA No.1354/H/99 relating to the assessment year 1987-88. However, at the time of arguments, she fairly submitted that the issue raised in this appeal is already decided by this Court in ITTA No.46 of 2003 wherein identical questions of law were considered and the appeal filed by the Revenue was dismissed by judgment dated
27-08-2014.

In view of the submission of the learned Standing Counsel for the Revenue, as per the decision of this Court in ITTA No.46 of 2003, dated 27-08-2014, wherein identical issue was decided, we also dismiss the present appeal answering the questions of law in favour of the assessee and against the Revenue.

Miscellaneous petitions, if any, also stand closed. There shall be no order as to costs.

DILIP B. BHOSALE, J

A. RAMALINGESWARA RAO, J

19-02-2015
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