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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ ITA 487/2004

COMMISSIONER OF INCOME TAX Appellant
Through: Mr. Rahul Chaudhary, Sr. Standing
Counsel.

versus

M/S KWALITY RESTAURANT AND ICE CREAM Respondent
Through: Ms. Kavita Jha with Mr. Vaibhav
Kulkarni, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

% **ORDER**
02.01.2017

The question of law framed in this case is as follows: -

“Whether the sum of Rs.200 lakhs received by the assessee under the agreement is rightly held as a capital receipt not liable to tax or is it a business income as held by the CIT (Appeals)?”

The assessee declared ₹57,25,510/- as its total income; it mentioned about a strategic alliance agreement entered into with Brooke Bond Lipton India Limited (BBLIL) on 14.10.1994. The arrangement included a non-compete agreement entered into on the same date whereby the assessee received ₹ 2 Crores as compensation which was sought to be treated as capital of the assessee. The assessment was originally completed under Section 143 (1) but later

an assessment notice was issued on 19.02.2001 under Section 147/148 of the Income Tax Act, 1961; the AO completed the assessment treating the receipt as goodwill. The Commissioner (Appeal) set aside the AO's finding and held the receipt to be revenue in nature and, therefore, business income. The ITAT, thereafter, was of the opinion that having regard to the facts, the amount appropriately fell in the capital side and, therefore, granted relief to the assessee.

Learned counsel for the revenue urges that the impugned order is erroneous and relies upon the terms of the agreements. It is submitted that there was nothing in the agreement which barred the assessee from carrying on its business; rather it merely agreed to place an embargo upon the exercise of its rights including distribution rights for a period of ten years for which one lump sum amount was received. This could be the aggregation of the annual receipts which otherwise the assessee could very well have derived in the normal course of its activities.

Counsel for the assessee, on the other hand, urges that the Tribunal's findings are correct and relied upon paragraph 20 of the impugned order. She relied upon clause 10 of the strategic alliance agreement and said that of the amounts agreed in terms of another separate non-compete agreement, entered into on the same date, ₹ 2 Crores was paid. This was with the specific object of ensuring that the combined business did not face any competition in respect of marketing and selling of ice cream by the assessee. Counsel also sought reliance on the judgment of the Supreme Court in *Guffic Chem*

(P.) Ltd. v. Commissioner of Income Tax, (2011) 332 ITR 602 (SC).

In the present case, as is evident from the factual discussion, the assessee along with several others entered into a strategic alliance agreement on 14.10.1994. This Court is not concerned with the stipulations in the strategic alliance agreement *per se* but rather with the other agreement entered into between the assessee and BBLIL on the same day. That agreement was really to further the objects of the strategic alliance agreement and specifically provided for two things, i.e., that the assessee would desist from engaging in the business of selling and marketing ice cream and other related items for ten years and secondly in lieu of such restriction a sum of ₹2 Crores would be received by it. The relevant condition is as follows: -

“I, in consideration of a sum of Rs.2 crores (Rupees two crores only) being paid by the BBLIL in the manner hereinbelow of KRIC, KRIC hereby surrender in favour of BBLIL all its marketing rights in respect of ice cream, ice lollies and dairy and non dairy based frozen desserts and hereby further undertake subject to clause 10 of the strategic alliance agreement that he will desist from doing any business of marketing and selling ice cream, ice lollies and dairy and non dairy based frozen desserts for ten years from the effective date, directly or indirectly.....”.

The Revenue’s contention is that the assessee never really went out of business but rather it agreed to suspend its right to market, sell and distribute ice creams and related products.

This Court is of the opinion that the technicalities upon which the revenue’s argument is premised do not further its case. There cannot be a set formula or manner in which commercial entities

engaged in business can be said to behave. In the present case, the assessee along with other business entities came together. The assessee used to carry on a restaurant business and was also distributing ice cream and related products. The agreement not to engage in the latter meant that it had ceased from doing so for ten years which can by no means of imagination be called temporary. In business parlance ten years can be as permanent as completely excluding oneself given the fast changing nature of the goods industry. It is quite likely that at the end of ten years, the assessee might itself not be interested in creating a distribution network and engaging in the same activity or conversely the agreement and compensation might be to defer competition which may deter it from entering into the same business. Whatever be the reasons, its desisting from the business on the one hand and agreeing to receive compensation on the other clearly points to the fact that the sum of ₹2 Crores was paid as non-compete fee. Therefore, it fell in the capital stream.

For the above reasons, the Court is of the opinion that the question of law has to be answered in favour of the assessee and against the revenue. The appeal is, therefore, dismissed.

S. RAVINDRA BHAT, J

NAJMI WAZIRI, J

JANUARY 02, 2017/*vikas*/