

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO.778 OF 2015

The Pr. Commissioner of Income Tax,
Central-I

.. Appellant

v/s.

M/s. Grasim Industries Ltd.

.. Respondent

Mr. Anil Singh, ASG a/w Mr. P.C. Chhotaray, Ms. Gitika Gandhi for the
appellant

Mr. Jehangir Mistri, Senior Counsel a/w Mr. Atul Jasani for the
respondent

**CORAM : AKIL KURESHI &
M.S. SANKLECHA, J.J.**

DATED : 18th DECEMBER, 2018.

P.C.

1. The Revenue is in appeal against the judgment dated 22nd October, 2014 of the Income Tax Appellate Tribunal ("the Tribunal" for short).

2. Following questions were presented for our consideration :-

(a) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in holding that the technical knowhow expenditure (technical assistance fees) is revenue expenditure ignoring the fact that as per amended provisions of section 32, technical knowhow is an intangible asset and the fee for obtaining the same is a capital expenditure

and not revenue expenditure?

(b) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in holding that the profit of US and UK branches is not taxable in India and should be excluded from the taxable profit of the assessee?

(c) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in restoring the issue of taxability of the sale tax exemption benefit of Rs.58 crores availed by the assessee to the file of the Assessing Officer for deciding afresh after considering the decision of the Special Bench of the ITAT in the case of DCIT V. Reliance Industries Ltd., 88 ITD 273, which has not been accepted by the Revenue?

(d) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in entertaining the additional ground without appreciating that the assessee had treated the amount of sales tax exemption benefit of Rs.58 crores as revenue receipt and had included this amount in the returned income and it had been taxed accordingly and the assessee did not raise this issue before the CIT(A) and the issue had attained finality?

3. We will first address the questions no. (c) and (d), which are different elements of the same issue. The respondent assessee had received a subsidy. It is undisputed that up to the level of Income Tax Appellate Tribunal, the assessee did not raise a contention that such subsidy was towards capital account and, therefore, not taxable. However, before the Tribunal such a contention was raised. The Tribunal by the impugned judgment relied upon its earlier judgment for

the Assessment Year 1999-2000 in case of this very assessee and restored the issue back to the Assessing Officer. In the earlier order, the Tribunal had remanded the issue to the file of the Assessing Officer "to decide the issue afresh after considering the decision of Special Bench of the Tribunal in the case of *Reliance Industries Ltd.* (supra)". Thus, the Tribunal remanded the issue back to the Assessing Officer to be decided in the light of the Special Bench judgment in the case of *Reliance Industries Ltd.* The Revenue's grievance in this respect is two fold. It was contended that the issue was raised for the first time before the Tribunal and the same should not have been permitted. Secondly, the view of the Tribunal in case of *Reliance Industries Ltd.* was challenged before the High Court. The High Court in a judgment dated 15.04.2009 in Income Tax Appeal No. 1299 of 2008 had held that no question of law in this respect arises and thereby confirmed the judgment of the Tribunal. It was pointed out that against this judgment of the High Court, the Department had approached the Supreme Court and the Supreme Court had held that a question of law did arise. The Supreme Court framed a question and placed the matter back before the High Court. We are informed that this appeal is still pending.

4. On the other hand, learned Counsel for the assessee firstly contended that the Tribunal had merely remanded the issue back to the Assessing Officer. In earlier orders, the Revenue had approached the Court against the similar orders of the Tribunal. The High Court on two occasions, in the order dated 27.09.2016 and 22.11.2016 passed in Income Tax Appeal Nos. 475 of 2014 and 102 of 2014 respectively had not entertained the challenge of the Revenue. In any case, it was contended that the facts on record are available and the Tribunal has merely asked the Assessing Officer to take a decision on the assessee's contention.

5. As long as the material exists on record, a contention raised by the assessee for the first time before the Tribunal, cannot be barred. So much is clear from series of judgments of various Courts including of this Court in case of *CIT Vs. Pruthvi Brokers and Shareholders P. Ltd. (2012) 349 ITR 336*. It is not the case of the Revenue that the assessee in the context of its contention on the nature of the subsidy, desired to produce additional evidence. It is true that the judgment of this Court confirming the order of the Tribunal in case of *Reliance Industries Ltd.* has been partially reversed by the Supreme Court. A question of law has been framed and placed for consideration of the

High Court. However, this does not mean that the judgment of the Tribunal as on today stands reversed or stayed. In any case, quite apart from the judgment in the case of Reliance Industries Ltd. of the Special Bench of the Tribunal, it is always been for the assessee to contend before the Assessing Officer by pointing out the relevant clauses of the subsidy that in law the subsidy cannot be treated to be towards revenue account. It would be equally open for the Revenue to oppose such a contention if so advised. The Assessing Officer and the Revenue authorities would have to take a decision in accordance with law. These questions, therefore, are not considered.

6. Coming to the question no.(a), the same pertains to the Revenue's objection to a technical know-how expenditure incurred by the assessee being treated as a revenue expenditure. The record would suggest that the assessee had incurred the expenditure for acquiring technical advice, assistance and information for running the business and to produce more products and to run business more efficiently. Before the Assessing Officer, the assessee had produced the separate terms of agreement for providing such know-how, showing that the same would be valid for a period of 5 years from the date of commencement of the regular production. The assessee had relied

upon the decisions of this Court in case of *CIT Vs. Tata Engineering and Locomotive Co. Pvt. Ltd. 123, ITR 538* and in case of *CIT Vs. Service Station Equipment Pvt. Ltd. 132 ITR 130*, besides others. The Assessing Officer did not dispute the applicability of the ratio of said decisions. He however recorded that such decisions were rendered prior to the amendment in Section 32 of the Income Tax Act, 1961 by virtue of Finance Act, 1998, which provides that such technical know-how in the nature of intangible asset would be eligible for depreciation. Counsel for the assessee had placed reliance on the judgment of the Supreme Court in case of *Alembic Chemicals Works Ltd. Vs. CIT, 177 ITR 377* before us in this context.

7. Upon hearing Counsel for the parties, we find that the Commissioner of Income Tax (Appeals) [CIT(A)] has correctly appreciated the legal position. As noted, the Assessing Officer also did not seriously dispute that the expenditure was in the nature of revenue expenditure. The only objection of the Assessing Officer was that by virtue of the amendment in Section 32, this position would no longer be valid. We notice that by virtue of such amendment in sub-section (1) of Section 32, the legislature recognized and granted depreciation at the prescribed date on know-how, patents, copyrights, trade marks,

licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998. Thus, sub clause (ii) of sub-section (1) of Section 32 merely grants depreciation on the listed intangible assets, in absence of which, the assessee would not be entitled to such depreciation. This provision however, cannot be pressed in service to examine whether certain expenditure for acquisition of know-how or similar intangible asset is revenue or capital expenditure. It would depend on the nature of expenditure. If it is a capital expenditure, it will be eligible for depreciation in terms of Section 32(1) of the Act. If it is revenue expenditure and expended wholly or exclusively for the purpose of the business, in any case, the assessee would be entitled to deduction thereof. Question (a) is therefore not entertained.

8. Question (b) concerns the Assessing Officer's attempt to tax the income in the hands of the assessee in relation to the assessee's units situated at USA and UK. The CIT(A) and the Tribunal referred to the earlier orders in the case of this very assessee and the Double Taxation Avoidance Agreement between the respective countries to come to the conclusion that such income was not taxable in the hands of the assessee in India. We notice that such an issue was carried by the

Revenue before the High Court in earlier years in Tax Appeal Nos. 475 of 2014 and 1102 of 2014. In both years, the Revenue's ground was rejected. We may refer to one such order passed by this Court on 27.09.2016 in Income Tax Appeal No. 475 of 2014. The Court dealt with following question raised by the Revenue, which reads as under :-

“1. Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in holding that profit of the assessee branch in USA viz. Birla Consultancy Software Services is not taxable in India without examining the facts of the case and without appreciating the fact as per Article 24(2) of the DTAA only deduction in respect of taxes on income paid in USA should be allowed as deduction from the tax payable in India, and therefore this decision of the Tribunal is perverse on facts?”

9. The Court in this context opined as under :-

“3. Re. Question (1) :

(a) The impugned order of the Tribunal dismissed the Revenue's appeal on the above issue by following its order in the case of the same Respondent Assessee for Assessment Years 1996-97 and 1997-98.

(b) On specifically being asked, Mr. Suresh Kumar, learned Counsel appearing for the Revenue, states that nothing is available on record to indicate any challenge by the Revenue to the order of the Tribunal for Assessment Years 1996-97 and 1997-98 before any higher forum. It therefore follows that the orders of the Tribunal on the above issue for the Assessment Years 1996-97 and 1997-98, have been accepted by the Revenue. Therefore, the Revenue can have no grievance with the impugned order of the Tribunal as it merely follows its earlier orders which have been accepted. Further, no distinguishing features in the present Assessment Year from

that existing in the Assessment Years 1996-97 and 1997-98 have been brought to our notice which would justify our taking a different view on this issue for the subject Assessment Year.

(c) In the above view, question (1) as proposed by the Revenue does not give rise to any substantial question of law. Thus, not entertained.”

10. Similar situation obtained in Income Tax Appeal No.1102 of 2014 which pertains to the assessee and concerns the Assessment Year 2000-01. This Court, therefore, repeatedly held that the Revenue had accepted the position which arose in the earlier assessment years. Without pointing out any distinction in the facts, it was not open for the Revenue to pick a certain year for carrying the challenge further before the High Court.

11. Learned Counsel for the Revenue however relied on the decision of the Supreme Court in case of CIT Vs. M/s. Modipon Ltd. in which it was observed as under :-

“8. We have considered the submissions made on behalf of the parties. Notwithstanding the acceptance by the Revenue of the practice adopted by the assessee-Modipon Ltd. in all the assessment years except for the one under dispute as enumerated above and the absence of any challenge to the decisions of the Delhi and the Punjab & Haryana High Courts, the present challenge would still be entertainable so long as it disclose a substantial question of law or an issue impacting public interest or the same has the potential of recurrence in future. The Revenue cannot be shut out from the present proceedings merely because of its acceptance of the practice of

accounting adopted by the assessee or its acceptance of the decision of the two High Courts in question. An adjudication of the question(s) arising cannot be refused merely on the above basis. We will, therefore, have to proceed to answer the merits of the challenge made by the Revenue in the present appeals.”

12. In the present case, however, the facts are that the earlier decisions of the CIT(A) and the Tribunal were rendered against this very assessee under substantially similar if not identical circumstances. Some of these decisions were accepted by the Revenue without challenge. It is not the case of the Revenue that on account of low tax effect or some such other reasons, the matter was not carried further in those years. In two earlier years i.e. for Assessment Years 1999-2000 and 2000-01, the Revenue filed the appeals before the High Court. The High Court turned down the appeals mainly on the ground that no distinguishing feature was presented and no reasons were cited for carrying selective matters in appeal. Under the circumstances, we do not find that such issue could be considered, in the present year.

13. In the result, the tax appeal is dismissed.

(M.S. SANKLECHA, J.)

(AKIL KURESHI, J.)