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

INCOME TAX APPEAL NO.295 OF 2017

Principal Commissioner of Income-Tax-7 .... Appellant

versus

M/s Graviss Foods Pvt. Ltd. ... Respondent

…....

- Mr.Suresh Kumar, Advocate for Appellant.
- Mr.Jitendra Jain a/w Mr. Jas Sanghavi a/w Ms.Divyasha Mathur i/b. PDS Legal, Advocate for Respondent.

CORAM : AKIL KURESHI &
SARANG V. KOTWAL, JJ.
DATE : 05th APRIL, 2019.

P.C. :

1. This Appeal is filed by the revenue to challenge the judgment of Income Tax Appellate Tribunal. Following question is presented for our consideration;

"Whether on the facts and circumstance of the case and in law the Hon'ble Tribunal is correct in deleting the disallowance of Rs.1,87,16,047/- incurred by the assessee as preoperative expensive for "Mawa Project" a

new project unconnected with the existing business which was capital in nature and not deductable u/s 37(1) of the Act?

2. Brief facts are as under;

The Respondent-Assessee is a private limited company and is engaged in the business of manufacturing Ice-cream and other milk products. For the assessment year 2010-2011 the assessee had filed return of income which was taken in scrutiny by the Assessing Officer. He noticed that the assessee had incurred expenditure of 1.80 crores (rounded of) in process of setting up a factory for production of Mawa, which project the assessee was forced to abandon. The Assessing Officer was of the opinion that the expenditure was incurred for setting up of a new industry. The expenditure was a preoperative expenditure and could not have been claimed as revenue expenditure. This issue eventually reached the tribunal. The tribunal by the impugned judgment relied upon its earlier decision in case of assessee for the earlier assessment year and confirmed the view of CIT (Appeals) and dismissed the revenue's Appeal. Tribunal was of the opinion that there was interlacing of the accounts, management and control. The new product to be manufactured by the assessee, was in the same line of the business, in which the assessee was already engaged. The tribunal therefore held that the expenditure was incurred for expansion of the existing business and therefore allowable as a revenue expenditure.

3. Learned Counsel for the Revenue submitted that the assessee was previously engaged in the business of manufacturing ice-cream. Assessee desired to set up a new plant at a distant place for production of Mawa. This was therefore clear case of setting up of a new industry. The Tribunal has committed error in holding that the assessee had merely attempted to expand the existing industry.

4. Learned Counsel for the assessee opposed the appeal contending that the tribunal has correctly applied the legal parameters. In the present case, there was commonality of

accounts, management and control. The assessee was engaged in manufacturing of the ice-cream. The company had object of production of milk and milk products and ice-cream. Merely because the new unit was being set up at a place distant from the existing unit, would be of no consequence. Counsel relied on certain decisions, reference to which, would be made later.

5. The facts on record as culled out by the tribunal are that the assessee-company was set up with the objects to produce or caused to be produced by process, grate, pack, store and sell milk products and ice-cream. In furtherance of such objects, the assessee had already set up an ice-cream producing unit. Using same management, control and accounts, the assessee attempted to set up another unit for production of Mawa, which is also a milk product. Under such circumstances, tribunal correctly came to the conclusion that this is a case of expansion of existing business and not a case of setting up of new industry.

6. The Division Bench of this Court in case of ***Commissioner of Income Tax Vs. Tata Chemicals Ltd. reported in (2002) 256 ITR 395,*** in somewhat similar background had held and observed as under;

> *9. As far as question (b) read with question (h) is concerned, Mr. Desai took us through the order passed by the Assessing Officer as well as by the Commissioner of Income Tax (Appeals), Mumbai, and pointed out that both these authorities have come to the conclusion that this fertilizer unit will have to be treated as a separate unit and, therefore, the benefit Under section 36(l)(iii) cannot be extended to the respondent as far as any amount of interest paid in respect of capital borrowed for the business of the fertilizer unit is concerned. Now, when one sees the order of the Assessing Officer, he has given emphasis on the solitary fact that the two plants, one at Mithapur, and other at Babrala, are situated at two far off places and that the operation of both these plants is neither interdependent for technology nor for inputs. He has observed that the closure of plant at Mithapur would not in any manner adversely affect the operation of the fertilizer plant at Babrala.*

10. This order of the Assessing Officer has been mechanically confirmed by the Commissioner of Income Tax (Appeals), Mumbai. As against this, the Appellate Tribunal has culled out the propositions of law based on various judgments of the apex court as well as of various High Courts in para. 28 of its order. It has summarised propositions and determined the tests on the question of unity of business. They are as follows :

(i) The nature of the two lines of business is not relevant.

(ii) The fact that one business can be conveniently closed down without affecting the other business is a strong indication that both the businesses are distinct and separate. But no decisive inference can be drawn from the fact.

(iii) The decisive test is the unity of control which is indicated by interlacing, interdependence and interconnection between the businesses and the dovetailing of one into the other. Such interlacing, interdependence or inter- connection can be shown to exist by reason of a common management, common administration, common fund and a common place of business.

The above propositions are culled out from the following judgments of the apex court:

(1) Setabganj Sugar Mills Ltd. v. CIT[1961]41ITR272(SC);
(2) CIT v. Prithvi Insurance Co. Ltd. [1967]63ITR632(SC);
(3) Produce Exchange Corporation Ltd. v. CIT [1970]77ITR739(SC);
(4) Standard Refinery and Distillery Ltd. v. CIT [1971]79ITR589(SC);
(5) Hooghly Trust (Pvt.) Ltd. v. CIT [1969] 73ITR685(SC); and
(6) B. R. Ltd. v. V. P. Gupta, CIT [1978]113ITR647(SC).

The learned counsel appearing for the parties took us through the text of the various judgments referred to hereinabove and we are in complete agreement with the Tribunal that the above determined tests would be the correct approach to the questions with which we are concerned. The Tribunal while reaching to the conclusion has considered various factors such as administration of various units, flow of funds, unity of management, unity of the accounting set up as well as control coupled with *various such relevant factors. The Tribunal also found the administration and management of funds of two units is common. The Tribunal has also recorded findings of fact that there was a functional integrity between the two units. It is in these circumstances that the deduction under the particular section was held allowable.*

11. *The Tribunal has come to the conclusion that the decisive test is the unity of control which is indicated by interlacing, interdependence and interconnection between the businesses and dovetailing of one into the other. In the present case, it is quite clear that the amalgamation of the subsidiary was allowed by the High Court. Thereafter it is for the management of the company to manage its affairs and the benefit which would be available for the borrowings done for a unit would certainly be claimable by the company as such. Section 36(1)(iii) which permits the amount of interest paid in respect of capital borrowed for the purposes of the business will have to include the borrowing for a unit of the company which is what the fertilizer unit at Babrala is. Considering the fact that the finding is based on appreciation of evidence brought on record, we do not find that this question can be said to be a question of law warranting*

> *adjudication by this court. In view of what is observed hereinabove, the questions of law raised in at (b) and (h) do not arise for our consideration."*

7. The Supreme Court in case of ***Alembic Chemical Works Co. Ltd. Vs. Commissioner of Income-Tax, Gujarat, reported in [1989] 177 ITR 377,*** was considering a case where the assessee was engaged in the business of manufacturing antibiotic including the Penicillin. The assessee acquired know-how to produce higher yield and sub-culture of high-yielding strain of penicillin. Observing that there was no evidence to indicate that this was not in the line of existing manufacture of Penicillin, the Court held that the expenditure was revenue in nature.

8. In view of the above discussion, no question of law arises. Income Tax Appeal is dismissed.

(SARANG V. KOTWAL, J.) **(AKIL KURESHI, J.)**