



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.08.2021

CORAM :

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

AND

THE HONOURABLE MR.JUSTICE SATHI KUMAR SUKUMARA KURUP

T.C.A.NOS.1087 TO 1089 AND 1119 OF 2015

The Commissioner of Income Tax,
Chennai.

...Appellant in all appeals

Vs

M/s.Citadel Aurobindo Bitotech Ltd.,
No.43, Main Road,
Velachery, Chennai - 600 042.
PAN: AABCC7824N

...Respondent in all appeals

T.C.A.Nos.1087 to 1089 of 2015: APPEALS under Section 260A of the Income Tax Act against the common order dated 08.04.2015 made in ITA.Nos.467, 468 & 469/Mds/2015 on the file of the Income Tax Appellate Tribunal, 'C' Bench, Chennai for the assessment years 2002-03, 2004-05 and 2005-06 respectively.

And against the O/o. Commissioner of Income Tax (Appeals)-1, 121, Mahatma Gandhi Road, Nungambakkam, Chennai-34, and made in ITA.No.173/07-08/A-1, ITA.No.210/07-08/A-1, ITA.No.174/07-08/A-1 dated 25.11.2014, and against the Assistant Commissioner of Income Tax, Company Circle-1(3), Chennai-34, and made in GIR.No.PAN.No.AABCC7824N, order dated 28.09.2007 respectively, for the assessment years 2005-06, 2004-05 & 2002-03.

T.C.A.No.1119 of 2015: APPEAL under Section 260A of the Income Tax Act against the order dated 26.06.2015 made in ITA.No.2761/Mds/2014 on the file of the Income Tax Appellate Tribunal, 'D' Bench, Chennai for the assessment year 2003-04.

And Against the O/o. Commissioner of Income Tax (Appeals)-1, 121, Mahatma Gandhi Road, Nungambakkam, Chennai-34, and made in ITA.No.41/06-07/A-1, dated 30.07.2014, and against the Assistant Commissioner of Income Tax, Company Circle-1(3) Chennai and made in GIR.No.PAN.No.AABCC7824N, dated 28.02.2006 for the assessment year 2003-2004.



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For Appellant
in all T.C.As : M/s.R.Hemalatha
Senior Standing Counsel
For Respondent
in all T.C.As : Mr.M.V.Swaroop

COMMON JUDGMENT
(Delivered by T.S.Sivagnanam,J)

T.C.A.Nos.1087 to 1089 of 2015 have been filed by the revenue under Section 260A of the Income Tax Act, 1961 ['the Act' for brevity] challenging the common order dated 08.04.2015 passed by the Income Tax Appellate Tribunal [hereinafter referred to as "the Tribunal"], 'C' Bench in ITA.Nos.467, 468 & 469/Mds/2015 for the assessment years 2002-03, 2004-05 and 2005-06 respectively.

T.C.A.No.1119 of 2015 has been filed by the revenue under Section 260A of the Income Tax Act, 1961 ['the Act' for brevity] challenging the order dated 26.06.2015 passed by the Income Tax Appellate Tribunal [hereinafter referred to as "the Tribunal"], 'D' Bench in ITA.No.2761/Mds/2014 for the assessment years 2003-04.

3.The following substantial questions of law arises for consideration in all the four appeals:

"1.Whether on the facts and circumstances of the case, the Tribunal was right in allowing depreciation on non compete fee at 25%?

2.Is not the finding of the Tribunal bad especially when non compete fee paid does not confer upon the assessee any right which could be used in the business as it only restrains the other person from carrying on his business in competition with the assessee's business?"

4.We have heard M/s.R.Hemalatha, learned senior standing counsel appearing for the appellant/revenue and Mr.M.V.Swaroop, learned counsel appearing for the respondent/assessee.

5.It is not in dispute that the substantial questions of law which have been framed for considered have been answered against the revenue and in favour of the assessee by the Division Bench of this Court in the case of Commissioner of Income Tax, ITU,



Chennai vs. Areva T & D India Ltd. [(2021) 434 ITR 604 (Mad)]. In the said decision, the second substantial question of law which fell for consideration are the questions of law in the instant case before us. The said question was answered against the revenue and in favour of the assessee in the following terms:

"14. In the decision in the case of Asianet Communications Ltd. Vs. CIT, Chennai [reported in (2018) 257 Taxman 473], a Division Bench of this Court, to which, one of us (TSSJ) was a party, had considered the same issue as to, where the non compete fee paid by the assessee was for the purpose of its business and it did not entail an enduring benefit to the assessee in its business, whether the payment of such fee was to be allowed as revenue expenditure. In this decision, the Court took note of the decision of the Delhi High Court in the case of Sharp Business System and it has been held as follows :

"36. So far as the decision in Sharp Business System (supra) is concerned, as pointed out earlier, in paragraph 5 of the judgment, it has referred to the decision of this Court in G.D.Naidu. The discussion is in paragraph 9 and the conclusion is in paragraph 10.

37. In paragraph 9 of the judgment, the Court has not discussed the decision of G.D.Naidu, though it has referred to it in paragraph 5 of the judgment. This is pointed out because, the Court has discussed the decision in Blaze & Central (P.) Ltd. (supra), which was distinguished in G.D.Naidu. We find that in paragraph 9 of the judgment, the Court after referring to Empire Jute Co. Ltd. (supra) and Alembic Chemical Works Co. Ltd. (supra), has pointed out that the single test, that is, whether the payment results in an enduring benefit cannot be conclusive in a decision as to whether an expenditure qualifies as one falling or in the capital field and that the decisions have emphasized the need to shift from a narrower field to a broader one, to ascertain the real nature of the advantage, which the taxpayer would derive.

38. Thus, the test to be applied following Empire Jute Co. Ltd. (supra) is to see as to whether it added to the capital of the assessee, whether a new asset was created and whether there was an addition or expansion of



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the profit making apparatus of the assessee and whether the assessee acquired source of profit or income when such investment was made. However, the Court in our respectful view, applied the test, which does not flow from the test laid down in Empire Jute Co. Ltd. (supra) by observing that the test is one of ascertaining whether from commercial angle and the advantage results in a capital field or it is the expenditure falls legitimately within the revenue field. Ultimately, the Court held that the arrangement for a period of 7 years is an enduring benefit. This in our respectful view, does not fulfil the test laid down by Empire Jute Co. Ltd. (supra) and in fact, the Court itself had pointed out that is not the conclusive test to determine whether expenditure is in capital field or revenue. Thus, for the above reasons, we are not in respectful agreement with the reasoning given by the Hon'ble Division Bench in Sharp Business System (supra).

39. It would be relevant to note that, in the case of Sharp Business System (supra), the Joint-venture company was incorporated in the assessment year 2001-02 and in the first year of business, with a view to warding off competition, it entered into agreement by paying a non-compete fee of Rs.73 Crores to L&T Ltd., of setting-up or undertaking or assisting in the setting-up or undertaking any business in India, of selling, marketing and trade of electronic office products for seven years and this amount was treated as deferred revenue expenditure in the assessee's books of accounts and written-off over corresponding period of seven years.

40. There is a marked difference in the factual position in Sharp Business System (supra) and the factual position in the case on hand where the assessee's business continues to remain the same, and this is also one more reason to hold that the decision in Sharp Business System (supra) is not applicable to the facts of the case apart from the reservation expressed by us above."

15. In the decision of this Court in the case of Asianet Communications Ltd., the Court distinguished the decision of the Delhi High Court in the case of Sharp Business System. We would



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hasten to add that the facts in the case of Sharp Business System were couched differently in the sense that a sum of Rs.73 Crores was paid to M/s.L & T Ltd., as consideration for the latter in setting-up or undertaking or assisting in the setting-up or undertaking any business in India, of selling, marketing and trade of electronic office products for seven years. The facts of the case of the assessee before us are entirely different. This aspect had been noted by the Tribunal in paragraph 11 of the impugned order. The Tribunal also took note of the fact that in the assessee's own case, the High Court of Delhi decided the issue in favour of the assessee."

6.Thus, following the above decision the tax case appeals are dismissed and the substantial questions of law are answered against the revenue. No costs.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

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To

1. The Income Tax Appellate Tribunal,
'C' Bench, Chennai.
2. The Income Tax Appellate Tribunal,
'D' Bench, Chennai.
3. The Commissioner of Income Tax (Appeals)-1,
121, Mahatma Gandhi Nagar,
Nungambakkam, Chennai-34.
4. The Assistant Commissioner of Income Tax,
Company Circle - I(3),
Chennai.

+2ccs to Mr.T.Ravikumar, Advocate, S.R.Nos.41561 & 41548

T.C.A.Nos.1087 to 1089 & 1119 of 2015

RR(CO)
PM/20/09/2021