

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

ITA No.585 of 2006 (O&M)

Date of decision: 18.04.2023

M/s Kwalitiy Cafe & Restaurant (P) Ltd.

...Appellant

Vs.

Commissioner of Income Tax and another

...Respondents

**CORAM: HON'BLE MS. JUSTICE RITU BAHRI
HON'BLE MRS. JUSTICE MANISHA BATRA**

Present: Mr. Akshay Bhan, Senior Advocate,
with Mr. Shantanu Bansal, Advocate,
for the appellant.

Ms. Gauri Neo Rampal, Senior Standing Counsel,
for the respondent.

Ritu Bahri, J. (oral)

The instant appeal under Section 260A of the Income Tax Act, 1961, has been filed against the order dated 07.04.2006 (Annexure A-3) passed by the Income Tax Appellate Tribunal, Chandigarh, whereby appeal filed by the revenue-respondent against the order dated 22.03.2000 passed by the Commissioner of Income Tax (Appeals), Chandigarh, has been partly accepted.

Brief facts of the case are that the appellant's family, which hailed from that part of India, which is now in Pakistan, was carrying on the business of manufacture of ice-cream for the past many generations. It was a large family and at the time of partition, various branches of the family migrated to India and settled in different parts of India like Shimla,

Chandigarh, Delhi, Lucknow, Calcutta, Bombay etc., where every one was carrying on his own business of manufacturing ice-cream and running of restaurants. The Chandigarh branch of the family started manufacturing ice-cream under the brand name “Kwality” and the ice-cream was being sold in the following territories:-

<u>Towns</u>	<u>Cities</u>
Himachal Pradesh	Parwanoo
Haryana	Hissar, Fatehabad, Panchkula, Sirsa, Shahbad, Pipli, Kurukshetra, Kaithal, Pinjore, Karnal (Haryana Tourist Complex only), Yamunanagar
Punjab	Rahpura, Patiala, Sangrur, Gobindgarh, Kurali, Ropar, Nangal, Mohali (SAS Nagar).
U.P.	Saharanpur

On account of differences that arose between Lambas at Chandigarh (the assessee) and Shri P.L. Lamba Group of Delhi, the latter opened a factory at Ludhiana in 1968 and started manufacturing ice-cream with the ostensible purpose of selling the ice-cream in the areas of the assessee group. Probably, the Lambas of Delhi wanted to wrest the business from the assessee group at Chandigarh. A writ was filed in the Himachal Pradesh High Court seeking a restraint on the assessee group’s production facilities of ice-cream. However, vide order dated 26.05.1981, the High Court refused to grant temporary injunction against the assessee by observing that both the families have independent identities and were running business independently. Later on, an out of Court settlement between the parties was effected, on the basis of which, an agreement was executed on 29.07.1982 between S/Shri Peshori Lal Lamba, Sunil Lamba and the assessee group through Shri Swatantar Kumar Lamba, Mrs. Swaraj Vatui Lamba, Mrs.

Rewa Lamba and Mrs. Rupa Lamba. By virtue of the said agreement, it was

agreed by the parties that each group shall operate in their distinct areas and shall submit the registered user's documents along with all other necessary documents to the Registrar of Trade Marks for being registered in the Register of Trade Marks. The assessee group was assigned three trade marks for exclusive use in the specified areas. As per clause 11, the agreement was to subsist so long the Trade Marks remain subsisting on the register of Trade Marks. In other words, the agreement was impliedly to be in perpetuity. There was no dispute between the parties till the year 1994. In the year 1994, the assessee had read in the newspaper that M/s Hindustan Lever Ltd. was negotiating with a group of their Delhi relatives for purchasing the 'Kwality' brand name. On the basis of the said information, the assessee had faxed a letter to the Managing Director of M/s Hindustan Lever Ltd. informing that it had exclusive right on the 'Kwality' brand name within the territories mentioned elsewhere in this order. M/s Hindustan Lever Ltd. had been informed not to enter into any agreement with any party by bypassing the assessee and in case the rights of the assessee were jeopardized, proper legal action would be taken. The opinion of M/s Remfry and Sagar, Attorneys-at-laws, was obtained by the assessee. In the mean time, Shri P.L. Lamba Group of Delhi had entered into a Strategic Alliance Agreement with Brooke Bond Lipton India Ltd. (a subsidiary of Hindustan Leverl Ltd.) on 14.10.1994. As per the said agreement, Shri P.L. Lamba Group of Delhi undertook the task of buying the rights of Brooke Bond Lipton India Ltd. to manufacture ice-cream and the brand name from the following parties:-

- (i) Jayanti Food Processing (P) Ltd., Kota
- (ii) Kwality Ice-cream Company (P) Ltd., Jaipur
- (iii) Rake Foods Industries, Jammu
- (iv) Hukson Foods India (P) Ltd., Varanasi, U.P.

Later on, the assessee entered into an agreement (MOU) with Shri P.L. Lamba Group of Delhi on 31.05.1995 for; (i) Relinquishment of Trade Mark user right and interest; and (ii) Termination of ice-cream manufacturing facilities under the brand name 'Kwality'. As per the said agreement, the assessee could not use the trade mark 'Kwality' w.e.f. 01.06.1995 and had to stop manufacturing operation of the ice-cream. At the time of signing of the said agreement, a sum of Rs.10 Lakhs was paid to the assessee vide cheque dated 31.05.1995. Further, a sum of Rs.35 Lakhs was paid to the assessee vide demand draft dated 07.07.1995. The balance amount of Rs.10 Lakhs was also paid to the assessee on 19.08.1995. As per MOU dated 31.05.1995, final agreement was to be entered into between the parties. On the basis of negotiations and discussions with the representatives of Brooke Bond Lipton India Ltd. and other concerned parties, the agreement entered on 31.05.1995 was considered to be hurried agreement and formal agreement was decided to be executed clearly defining the rights of the parties. Several drafts were exchanged and after prolonged negotiations, a formal agreement was entered into on 17.02.1997. As per the said agreement, the assessee was to close the business of manufacturing ice-cream under the trade mark 'Kwality'. However, the assessee was allowed to use the brand name 'Kwality' in respect of the hotel business without the star-burst logo without any hindrance from the parties to the agreement. While filing the return of income for the year under appeal, on 29.11.1996, the assessee had offered Rs.10 Lakhs as long term capital gains for surrender of goodwill of 'Kwality' trade mark and Rs.45 Lakhs towards termination of ice-cream manufacturing under the brand name of 'Kwality' treated as capital receipt not liable to tax. The Assessing Officer was of the view that

the agreement dated 17.02.1997 had been executed by the parties in order to avoid tax and that the said agreement was executed much after the filing of the return merely to give colour to tax avoidance planning. The Assessing Officer has referred to the comparative sale figures of the assessee for the assessment years 1995-96 to 1997-98, which are reproduced as under:-

Financial year	Sales of KICC* (Rs. in lakhs)	Total Sales including KICC (Rs. in lakhs)
1995-96	137.19	217.73
1996-97	174.87	252.94
1997-98	187.98	279.90

* under negative covenant

It was further observed that the assessee was in no way disadvantaged in its profits making structure after the operation of the agreement and there was no loss of any enduring asset which could be treated as a capital loss. The assessee had received the payment of Rs.55 lakhs from Shri P.L. Lamba Group of Delhi and not from M/s Brooke Bond India Ltd. and that the assessee had decided on its own to offer Rs.10 lakhs as capital gain on account of sale of goodwill and that there was no basis for the bifurcation. Amount of Rs.55 Lakhs received by the assessee was not for any negative covenants but a revenue receipt for determination of the agreement with Shri P.L. Lamba Group of Delhi. Finally, this amount of Rs.55 lakhs was assessed as a revenue receipt.

On appeal before the Commissioner of Income Tax (Appeals), this issue was decided in favour of the assessee. It was held that the appellant-assessee had lost the right to manufacture ice-cream and other products in the 'Kwality' brand name and had been debarred in perpetuity to manufacture ice-cream in any other name. Since the assessee had lost the source itself, the receipt of Rs.55 lakhs was taken as a capital receipt. With

respect to Rs.10 lakhs, it was held that the assessee had himself apportioned

the said amount on account of goodwill, which was liable to tax under the head “capital gains”. The balance amount of Rs.45 lakhs had been held to have been received for the assignment/sale of income earning apparatus and for non-competition and therefore, a capital receipt was not liable to tax.

Aggrieved by the order of Commissioner of Income Tax (Appeals), the revenue filed an appeal before the Tribunal.

The Tribunal, after going through the facts of the case, returned a finding that there was no dispute about the receipt of Rs.55 Lakhs. The dispute relates to the nature of the said receipt. The Tribunal examined the agreement dated 14.10.1994 executed between P.L. Lamba Group of Delhi and Brooke Bond Lipton India Ltd. (unit of H.L.L.). By virtue of this agreement, P.L. Lamba Group of Delhi had undertaken to procure franchisees marketing assets including rights to vendor licences/vending licences and municipal trade licences for a gross consideration of Rs.2 crores payable on acquisition of such asets. Clause 2 of the said agreement provides list of parties from whom the release of trade mark licences and transfer of marketing and distribution of assets in favour of Brooke Bond Lipton India Ltd was to be acquired. The said list is reproduced as under:-

<u>Amount Payable</u>	<u>Rs. Lakhs</u>		
<u>Franchisees</u>	<u>Trade Mark</u>	<u>Assets/Rights</u>	<u>Total</u>
Jayanthi Food Processing (P) Limited, Kota	10	25	35
Kwality Ice-cream Company (P) Ltd., Jaipur	25	65	90
Raks Foods Industries Jammu	20	35	55
Hukson Foods India (P) Ltd. Varanasi-UP	5	15	20
	60	140	200

In the above said list, name of the present assessee i.e. M/s Kwality Cafe & Restaurant (P) Ltd. was not mentioned. As per Schedule-3, name of the assessee is also included as a party “under dispute.” There were negotiations between the assessee and P.L. Lamba Group of Delhi and on the basis of mutual understanding between the parties, a memorandum of understanding (MOU) was recorded in writing on 31.05.1995. Consequent upon the said MOU, the assessee agreed to desist from making any claim, right or interest in the trade mark ‘Kwality’ w.e.f. 31.05.1995. The assessee also agreed to terminate w.e.f. 01.06.1995 all activities direct or indirect relating to manufacturing operations of ice-cream, lollies and other allied ice-cream products under the mark ‘Kwality’. P.L. Lamba Group of Delhi had agreed to pay a sum of Rs.55 lakhs to the assessee in consideration of giving up the claim in respect of trade marks as well as for stopping the manufacturing of ice-cream under the mark of ‘Kwality’ w.e.f. 01.06.1995. A sum of Rs.10 lakhs was paid to the assessee at the time of signing of the memorandum of understanding. It was clearly mentioned that a formal deed for relinquishment of trade mark user rights and interest and termination of ice-cream manufacturing operation, under the brand name ‘Kwality’ would be executed by the parties. Subsequently, an agreement dated 17.02.1997 was executed between the assessee, P.L. Lamba Group of Delhi, M/s Digital Securities Pvt. Limited and Brooke Bond Lipton India Ltd. By virtue of this agreement, not only the contents of the memorandum of understanding between P.L. Lamba Group of Delhi and the assessee have been reiterated, the assessee had been specifically allowed to use the name of ‘Kwality’ without using the star-burst for six existing restaurants and future establishments of hotel/restaurant business which were in pipeline at various stations at that

time. The Assessing Officer had recorded a finding that a sum of Rs.55 Lakhs received by the assessee is from P.L. Lamba Group of Delhi and not from Brooke Bond Lipton India Ltd. or M/s Digital Securities Pvt. Ltd. He further recorded a finding that the agreement between the assessee, P.L. Lamba Group of Delhi, M/s Digital Securities Pvt. Ltd., Bombay and Brooke Bond Lipton India Ltd., Calcutta was a device to give colour to the transaction for the purpose of tax avoidance. The payment was agreed to be paid to the assessee by P.L. Lamba Group of Delhi by virtue of memorandum of understanding dated 31.05.1995 and this memorandum was made basis to complete further transactions with M/s Digital Securities Pvt. Ltd and Brooke Bond Lipton India Ltd. Thereafter, the Tribunal came to a conclusion that the assessee had accepted payment of Rs.55 lakhs as per agreement and the formal agreement executed on 17.02.1997 was not merely the affirmation of the memorandum of understanding, but it also incorporated several aspects, such as the permission to the assessee to continue the user name of 'Kwality' in respect of its restaurants/hotel business. The only object was to secure the interest of the assessee to use the name 'Kwality' for its restaurant/hotel business without any hindrance. Hence, the following questions of facts were finalized by the Tribunal:-

- “(i) That the assessee had relinquished trade mark user rights and interest and had also agreed the termination of ice-cream manufacturing facilities under the brand name 'Kwality' w.e.f. 01.06.1995 in consideration of Rs.55 lakhs in favour of P.L. Lamba Group of Delhi.
- (ii) That the payment of Rs.55 lakhs was received by the assessee from P.L. Lamba Group of Delhi and not from Brooke Bond Lipton India Ltd. That in turn, P.L. Lamba Group of Delhi may have received the payments from Brooke Bond Lipton India Ltd./Digital Securities Pvt. Ltd. But since P.L. Lamba Group of Delhi was bound to make the payment to the assessee, it cannot be said that the payment to the

assessee was made by Brooke Bond Lipton India Ltd. or Digital Securities Pvt. Ltd.

(iii) That the agreement dated 17.02.1997 was necessitated by business consideration and not necessarily as a tax avoidance device.”

Thereafter, issue before the Tribunal was to consider the tax liability with respect to the amount of Rs.55 lakhs received by the assessee. While deciding this issue, the Tribunal has referred to a number of judgments i.e. **CIT vs. Rai Bahadur Jairam Valji**, (1959) 35 ITR 148 (SC), **Kettlewell Bullen and Co. Ltd. vs. CIT**, (1964) 53 ITR 261 (SC), **Divecha (P.H.) vs. CIT**, (1963) 48 ITR 222 (SC) and **Obero Hotel Pvt. Ltd. vs. CIT**, (1999) 236 ITR 903 (SC). As per opinion of the Tribunal, receipt of consideration for transfer of goodwill/trade marks and trade names is a **capital receipt and not a revenue receipt**.

Thereafter, the Tribunal proceeded to examine the issue of value of the goodwill, which had been transferred by the assessee. This value could have been evaluated by well accepted methods of determination. However, no exercise was made by the revenue authorities in that regard, so as to avoid multiplicity of litigation. The Tribunal proceeded to decide this issue by resorting to reasonable estimation. It was observed that a bifurcation in respect of four concerns between the trade mark and other rights was indicated in the agreement as reproduced in the order. Taking the ratio of 30%, the Tribunal was of the view that it would be just and reasonable to apportion Rs.15 lakhs out of the total consideration of Rs.55 lakhs towards the goodwill/trade name/trade marks and the remaining amount on account of surrender of right to manufacture ice-cream and other allied products under the brand name ‘Kwality.’ A direction was given to the

Assessing Officer to complete the amount assessable to tax. The appeal of

the revenue was partly allowed. This order is under challenge in the present appeal.

The only short point for consideration in the present appeal is, whether the Tribunal was right in bifurcating the amount of Rs.15 lakhs instead of Rs.10 lakhs for goodwill/trade name/trade marks, out of total amount of Rs.55 lakhs.

The Tribunal has observed that the revenue authorities did not take any exercise for determining the value of goodwill of the assessee at the time of surrender. The assessee has not given any basis for valuation of its goodwill for manufacture of ice-cream at Rs.10,00,000/-. The Tribunal, instead of remanding the matter to the Assessing Officer for re-determination of value of goodwill, proceeded to decide this issue at its own level to avoid multiplicity of litigation. In the case of Kwality Ice-cream Company (P) Ltd., Jaipur, the Tribunal has rightly come to a conclusion that ratio of all goodwill works out to 30%. In this backdrop, out of Rs.55 Lakhs, Rs.15 Lakhs were taken towards goodwill/trade marks and the remaining amount on account of surrender of right to manufacture ice-cream and other allied products under the brand name 'Kwality.'

The above said observation of the Tribunal is based on correct appreciation of facts, especially by referring to bifurcation in the case of Raks Foods Industries, Jammu, where a sum of Rs.20 Lakhs was bifurcated towards trade mark and Rs.35 Lakhs as Assets/Rights. In the case of Hukson Foods India (P) Ltd., Varanasi (UP), Rs.5 Lakhs were bifurcated towards trade mark and Rs.15 Lakhs as Assets/Rights. Similarly, in the case of Kwality Ice-cream Company (P) Ltd., Jaipur, bifurcation of Rs.25 Lakhs was towards trade mark and Rs.65 Lakhs as Assets/Rights.

After going through the impugned judgments, no ground is made out to interfere in the impugned judgment/order, as the same has been passed by appreciating the facts in the right perspective. No substantial question of law arises for consideration.

Resultantly, finding no merits, present appeal is dismissed.

(RITU BAHRI)
JUDGE

(MANISHA BATRA)
JUDGE

18.04.2023
ajp

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No