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**(2006) 05 P&H CK 0150**  
**In the Punjab And Haryana At Chandigarh**  
**Case No : IT Appeal No. 383 of 2004**

Commissioner of Income Tax

APPELLANT

Vs

JCT Electronics Ltd.

RESPONDENT

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**Date of Decision :** 18-05-2006

**Acts Referred:**

Income Tax Act, 1961 — Section 35AB, 37

**Citation :** (2006) 203 CTR 315 : (2008) 301 ITR 290

**Hon'ble Judges :** Rajesh Bindal, J; Adarsh Kumar Goel, J

**Bench :** Division Bench

**Advocate :** Yogesh Putney, for the Appellant; P.C. Jain, for the Respondent

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## Judgement

1. This is an appeal by the Revenue against the order passed by the Tribunal, Chandigarh B Bench in ITA No. 244/Chd/2000 dt. 29th March, 2004 raising the following substantial questions of law:

(i) Whether in law the royalty and cess of royalty paid as a percentage of net selling price of licensed product is a capital expenditure not allowable as a deduction u/s 37 of the IT Act.

(ii) Whether the Hon'ble Tribunal was right in law in allowing deduction u/s 35AB even after observing that the conditions for claim of said deductions were not fulfilled.

2. We have heard Shri Yogesh Putney, advocate for the Revenue and Shri P.C. Jain, advocate for the respondent and with their consent, the appeals are disposed of finally.

3. The brief facts as stated in the memo of appeal are that the assessee filed return of income on 30th Nov., 1995 declaring its income at Rs. 30,43,17,955. At the time of filing the return, the assessee claimed deduction to the tune of Rs. 1,76,93,000 paid on account of royalty and cess of royalty to M/s Hitachi Ltd. Another deduction of Rs. 59,02,295 being 1/6th of Rs. 3,54,13,775 was claimed u/

s 35AB of the Act, on account of payment made to M/s Teba Ltd. for acquiring their services connected with dismantling, packing and transporting of the plant purchased by the assessee in Finland and installation of the same in India.

4. The claim of the petitioner with regard to the above two issues was rejected by the AO while framing the assessment. However, in appeal both the claims were accepted by CIT(A) vide order dt. 1st Dec, 1999. Revenue's further appeal against the order of CIT(A) was rejected by the Tribunal. As far as issue No. 1 is concerned, the Tribunal relied upon the order passed by the Tribunal in the case of Swaraj Engines. The order passed by the Tribunal in case of Swaraj Engines is under consideration before this Court in IT Appeal No. 99 of 2002 which has also been disposed of by a separate order of today reported as CIT v. Swaraj Engines Ltd. (2006) 203 CTR 310-Ed.

5. For the reasons recorded in IT Appeal No. 99 of 2002 decided today, first substantial question is answered against the Revenue and in favour of the assessee.

6. As far as the second question is concerned, the AO, on examination of the terms and conditions of the agreement entered into between the assessee and M/s Teba Ltd. came to the conclusion that the payment to M/s Teba Ltd. by the assessee under the agreement was not lump sum consideration and, thus, the basic pre-requisites for application for Section 35AB of the Act was not fulfilled. However, the CIT(A) in appeal against that order accepted the claim of the assessee. In the appeal filed by the Revenue against the order of CIT(A) before Tribunal, the Tribunal came to a definite finding that the payments made by the assessee were not on acquiring any know-how as the same were paid towards services rendered by the personnel of M/s Teba for dismantling the plant at Finland and refurnishing of the same in India. After observing this, the Tribunal recorded following findings in para 14 of its order:

... We, therefore, after observing the facts and circumstances of the case, are of the considered view that though the assessee does not fulfil all the relevant criteria to enable itself to claim the deduction u/s 35AB but still observing the fact that the same amount once capitalized and debited to the cost of machinery of the assessee, the assessee-company will enjoy more depreciation than deduction claimed by it u/s 35AB....

7. Counsel for the Revenue submits that once the Tribunal had come to a definite finding that the claim of the assessee is not covered u/s 35AB of the Act, the same should have been rejected and in case the assessee is found to be entitled to any other deduction under any other provisions of the Act it was at liberty to get the same. But, merely for the reason that the claim in other section would amount to same figure or even more than that, the claim under the Section 35AB of the Act, which is not admissible, cannot possibly be allowed.

8. We are completely in agreement with the argument raised by the counsel for the Revenue. Once a definite finding had been recorded by the Tribunal that the

claim of the assessee is not covered u/s 35AB of the Act there was no valid reason for the Tribunal to have accepted the claim for any other reason. The claim of the assessee was not that because it is entitled to the benefit similar or greater in extent as compared to what is availed of u/s 35AB of the Act under some other provision so the deduction already permitted by the CIT(A) should be allowed to remain as such. By filing the return the assessee had claimed such deduction u/s 35AB of the Act which clearly has been found by the Tribunal to be not admissible under that provision. That being so, in our opinion, the findings of the Tribunal are not in conformity with the spirit of law; hence we set aside the same and hold that the assessee was not entitled to claim deduction u/s 35AB of the Act on account of payments made to M/s Teba Ltd. So question No. 2 is answered in favour of the Revenue and against the assessee.

9. Faced with this situation, the counsel for the assessee, relying upon judgment of Hon"ble the Supreme Court in Commissioner of Income Tax, Hyderabad Vs. Warner Hindustan Ltd., raised the plea that in case this expenditure is not treated as covered u/s 35AB of the Act, the assessee would be entitled to claim depreciation on the same, the same having been capitalized by the assessee. We are not expressing any opinion on this issue as the same does not arise for our consideration in the present appeal keeping in view of substantial question of law raised by Revenue. However, in case the assessee is entitled to any other relief under any of the provisions of the Act in terms of the judgment of CIT v. Warner Hindustan Ltd. (supra) it is at liberty to claim the same before the authorities as per the Act and the Rules.