
(2007) 09 UK CK 0012
In the Uttarakhand High Court

Commissioner of Income Tax

APPELLANT

Vs

Pride Foramer S.A.

RESPONDENT

Date of Decision : 24-09-2007

Acts Referred:

Income Tax Act, 1961 — Section 260A, 71

Citation : (2008) 214 CTR 77

Hon'ble Judges : P.C. Verma, J;M.M. Ghildiyal, J

Bench : Division Bench

Judgement

1. Both these appeals u/s 260A of the IT Act, 1961 have been preferred by the Revenue against the consolidated judgment dt. 8th March, 2006 of the Income Tax Appellate Tribunal, Delhi Bench "C", New Delhi (for short, the Tribunal) passed in ITA Nos. 3056/Del/2003 and 3057/Del/2003 pertaining to asst. yrs. 1996-97 and 1999-2000, whereby the Tribunal has allowed the appeal of the assessee.

Since these appeals are based on common set of facts involving -common question of law, they are being decided by one and common judgment. We will refer to the facts in IT Appeal No. 91 of 2006 for brevity.

2. Brief facts of the case are that the assessee is a non-resident company, who procured business with the ONGC by entering into a contract with ONGC for drilling operation at offshore Bombay. Business of that contract was to be completed by the end of 1993. In other words, the period of contract for the business was from 1983-84 to 1992-93. Thereafter the assessee continued to make efforts for business under a fresh contract. Fresh contract was granted to the assessee by the ONGC on 22nd Jan, 1999 and thereafter the assessee started business. The office of the assessee company though alleged to be here was being operated from France. The assessee filed return showing nil income for the asst. yr. 1996-97. After perusal of the return filed by the assessee, it was found by the AO that the return reflected income of Rs. 1,69,57,395 as receipts on account of interest received on Income Tax refunds to the assessee from the

IT Department. Against these receipts, the assessee claimed following expenses:

Head Expenses claimed Administrative charges Rs. 2,40,000 Audit fee Rs. 10,000
Depreciation on furniture & fixture Rs. 788

3. The AO rejected the claim of the assessee on the ground that in the "V asst. yr. 1996-97 (i.e. financial year 1995-96), the assessee did not carry on any business and was out of business. Therefore, the set off claimed by the assessee u/s 71 was not allowable.

4. Against the aforesaid order of the AO, the assessee went in appeal before CIT(A), which was rejected and order of the AO was upheld by the CIT(A).

5. Aggrieved by the order of the CIT(A), the assessee filed appeal before the Tribunal bearing ITA No. 3056/Del/2003 for the asst. yr. 1996-97. The Tribunal vide its order dt. 8th March, 2006 held that the AO has rightly taxed the income by way of interest on the refunds under the head "Income from other sources" but allowed the appeal on the ground that the unabsorbed expenses would constitute business loss and such loss shall be available for set off u/s 71 of the Act. For this reasoning, the Tribunal relied on the judgment of Tribunal between the assessee and the Revenue passed in ITA No. 1442/Del/2001 for the asst. yr. 1997-98. The said judgment has been brought on the record by the assessee with its counter-affidavit. Therefore, the Tribunal in its judgment for the asst. yr. 1997-98 relying on Universal Plast Limited Etc. Vs. Commissioner of Income Tax, Calcutta, and judgment of Bombay High Court in case of Hindustan Chemical Works Ltd. Vs. Commissioner of Income Tax, Bombay City-I, , has called out the ratio that it was observed by the Hon"ble Supreme Court that an important enquiry to be made in such cases was whether the business had ceased with no intention to resume or was it temporary cessation only for whatever reason. This enquiry can be made from the facts and surrounding circumstances of each case. The Bombay High Court further went on drawing a distinction between "lull in business" and "going out of business" and has held that a temporary discontinuance of business may, in certain circumstances, give rise to an inference that a business is going through a lean period of transition and it could be revived if proper circumstances arise. On the strength of the ratios of the judgment quoted above, the Tribunal has held that from 1993 to 1998, the business of the assessee was in lull and could not be said that the assessee had gone out of business and accordingly allowed the appeal of the assessee. The Tribunal has observed as a fact that the assessee company was making efforts to get the business resumed by bidding in September, 1996 through the tender process.

6. The Tribunal having rejected the contentions of the Department in this regard, the Revenue has come up in appeal before us.

7. we have heard learned Counsel for the parties and perused the record.

The following question, to be answered by this Court, arises before us:

Whether in the facts and circumstances of the case, the business of the assessee was lull in business or assessee had gone out of business after 1993 upto 21st Jan., 1999?

8. The learned standing counsel for the Revenue, the Asstt. Solicitor General submitted that from the facts it is clear that the assessee had discontinued business in India in view of the own admission of the assessee that it had no PE in India as recorded by the Tribunal in para 6 of its judgment. The Tribunal has also observed that the assessee did not establish nor had any existing PE in India. According to Asstt. Solicitor General, this fact itself proves that the assessee had gone out of the business. It was vehemently submitted that the assessee had got refund of Income Tax rebates in the asst. yr. 1996-97 which was allowable to the assessee from the period 1983-84 to 1992-93. During that period, the assessee had business operations with the ONGC in terms of contract till 1993. The business of the assessee came to an end after the expiry of the contract which expired in 1993. Therefore, time is the essence of contract. The contract which ended in 1993 was a time bound contract. During the period prescribed in the said contract, the assessee was entitled to carry on the business only, not beyond that. Therefore, the assessee went out of the business after the expiry of the period.

9. On the other hand, learned Counsel for the assessee submitted that the assessee was making effort and had applied for the tender in September, 1996 and, therefore, he incurred the expenses in getting the business contract which was executed on 22nd Jan., 1999. After the execution of the said contract, the assessee started his business. For getting the said contract the assessee continuously made efforts and was successful in getting the contract. Therefore, the set off can be claimed u/s 71 for the expenses incurred by the assessee during this period.

10. We have considered the rival contentions put forth by learned Counsel for the parties.

11. No doubt that earlier business of the assessee was from 1983 to 1993. The contract was of 10 years and the assessee which is a nonresident company came to India for carrying on the business in terms of the contract and had paid the taxes during the relevant assessment years in the aforesaid period i.e. from 1983 to 1993 and out of those returns the assessee got refund of Rs. 1,69,57,395 in the asst. yr. 1996-97. Therefore, the AO has rightly concluded that it was an income under the head of "Income from other sources" as affirmed by the CIT(A). But the Tribunal did not apply the ratio of the apex Court as well as the judgment of the Bombay High Court in the facts and circumstances of the case. The facts are very clear that the contract of operation during the period 1983 to 1993 came to an end and the assessee started a fresh business after the grant of another contract on 22nd Jan., 1999. Thus, the expenditure incurred by the assessee while making the effort to get the contract is expenditure totally personal in nature of the company. It is not a business expenditure at all. Thus,

the claim of set off based on business loss u/s 71 is not sustainable. Accordingly the judgment of the Tribunal to this extent is set aside. The question is answered in favour of Revenue and against the assessee.

12. In view of our foregoing discussion, Appeal No. 91 of 2006 is allowed and Appeal No. 98 of 2006 pertaining to asst. yr. 1999-2000 is remanded back to the AO who will decide the claim of set off by the assessee during the period from when the assessee has started business under the contract dt. 22nd Jan., 1999. The issue of inter-head expenses as contemplated u/s 71 will also be decided after hearing both the parties.