

(2003) 09 RAJ CK 0038
In the Rajasthan High Court
Case No : IT Appeal No. 78 of 2003

Commissioner of Income Tax

APPELLANT

Vs

Udaipur Distillery Co. Ltd.

RESPONDENT

Date of Decision : 24-09-2003

Acts Referred:

Income Tax Act, 1961 — Section 260A, 32, 32(1), 43B

Citation : (2004) 186 CTR 29 : (2004) 268 ITR 446 : (2004) 135 TAXMAN 487

Hon'ble Judges : Sunil Kumar Garg, J;Rajesh Balia, J

Bench : Division Bench

Advocate : K.K. Bissa, for the Appellant; N.M. Ranka, Rajkumar, K.N. Joshi and Rajesh Joshi, for the Respondent

Final Decision : Dismissed

Judgement

1. We have heard the learned counsel for the parties.

2. In this appeal against the judgment of Tribunal, Jodhpur Bench, Jodhpur dt. 30th March, 2001 (reported as Dy. CIT v. Udaipur Distillery Co. Ltd. (2002) 74 TTJ (Jd) 193 following two questions were framed as substantial questions of law involved in the appeal vide order dt. 15th Feb., 2002 :

(1) Whether, on the facts, and in the circumstances of the case, the Tribunal was justified in holding that the unpaid amount of bottling fee has, on furnishing of the bank guarantee, to be treated as actual payment and accordingly, allowing the deduction in respect of the same u/s 43B of the Act, even though the sum has not been actually paid before the due date of filing the return u/s 139(1) of the Act.

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in allowing depreciation on research and development assets which related to the closed business of fast food division/unit of the assessee-company and as such not used during the previous year."

3. The question No. 1 dwells on the claim of assessee-respondent for deduction of amount of bottling fee payable under the Rajasthan Excise Act, 1950, and relevant Rules framed thereunder, liability for which was incurred during the accounting period relevant to asst. yr, 1992-93, claim was made on the basis of accounts maintained on mercantile system.

4. During the course of hearing, it transpired that the claim of deduction on account of liability incurred for paying bottling fee during accounting period relevant to the asst yr. 1992-93, which is subject-matter of this appeal, has been sought to be denied on the ground that it being a fee, unless it is actually paid, when it is payable, deduction in respect thereof cannot be allowed during the relevant assessment year, when the liability was outstanding. For this purpose, the AO drew support from the provisions of Section 43B of the Act of 1961, as it existed w.e.f. 1st April, 1989.

5. Two-fold contentions were raised in support of claim of deduction before the Tribunal on behalf of assessee : firstly that bottling fee is not a fee in its technical sense as an impost and part of taxation scheme, but is a consideration receivable by the State for parting with its exclusive privilege to deal in potable liquor in all its manifestations and the same does not fall within the purview of Section 43B. Such liability which is of revenue in nature is allowable as deduction when such liability is incurred irrespective of its payment on due date. Alternatively, it was also urged, that since the assessee was required to furnish bank guarantee, in a pending litigation wherein the validity of liability was under challenge, the bank guarantee must be deemed to be actual payment so as to satisfy the condition of Section 43B.

6. But the Tribunal has decided the issue in favour of assessee on the latter contention and the first contention of the assessee has not been answered notwithstanding it was raised before the Tribunal. Under such circumstances, the assessee urged before us that even if the question No. 1 is decided against him, he is entitled to relief on second contention raised by him.

7. The second contention raised by him also raises substantial question of law which goes to the root of the controversy and arises out of the Tribunal's order. The assessee is entitled to seek sustaining of Tribunal's order on the alternative ground which was urged before the Tribunal but was not decided by it.

8. In the facts and circumstances of the case we are satisfied that following substantial question of law also arises in this appeal for consideration and it is required to be decided for deciding the appeal on merits on the contentions raised by the parties before the Tribunal as well as before us :

"(1A) Whether, in the facts and circumstances of the case, bottling fees chargeable from the assessee under the Rules framed under the Rajasthan Excise Act, 1950, and interest chargeable on late payment of bottling fees, amounts to tax, duty, cess or fees within the meaning of Section 43B of IT Act, 1961, so as to attract the said provisions while considering allowability of

deduction of such expenses."

9. In D.B. IT Appeal No. 8/2002--CIT v. Udaipur Distillery Co. Ltd. the respondent in this case also, in which same issues were raised in respect of asst. yr. 1988-89. This Court vide its judgment dt. 3rd Sept., 2003, has answered the question No. 1 holding that furnishing of bank guarantee cannot be treated equivalent to actual payment. Therefore, if the bottling fee is to be considered as "fee" in its technical sense, requirement of Section 43B are not fulfilled.

10. However, on newly framed question this Court has decided that looking to the nature of charges and provision of levy of taxation scheme under Article 265 after considering number of decisions of Hon'ble Supreme Court bottling fee is not a fee in its technical sense as part of taxation, but is a consideration for parting with exclusive privilege of State to deal in potable liquor. Therefore, question No. 3 has been decided in favour of assessee and claim of assessee to deduction was found to be not falling within, the ambit of Section 43B of the IT Act. It has to be considered as allowable revenue expenditure, if the accounts are maintained on mercantile basis, in the year when such liability has arisen.

11. The question No. 2 refers to allowance of assessee's claim to depreciation in respect of assessee's research and development assets relating to assessee's business.

12. The AO has disallowed the claim amounting to Rs. 28,617 by holding that the fast food division of the assessee at Delhi and Mumbai through three restaurants, two at Delhi and one at Mumbai, has been closed since the asst. yr. 1988-89 and, therefore, assessee's claim to depreciation pertaining to research and development assets cannot be allowed in view of provisions of Section 32 which require that the assets on which depreciation is claimed must be used in a live business during the accounting period relevant to the assessment" year in question. However, the assessee has raised two-fold contentions for sustaining his claim. Firstly, it is submitted that R&D assets did not relate solely to the fast food division of the company but also relates to the manufacture and sale of liquor. R & D division was also rendering services for its liquor business and the liquor business has not been closed at any stage. Therefore, the factual foundation on the basis of which AO has disallowed the claim did not exist.

13. Secondly, it was contended that since amendment of Section 32 w.e.f. 1st April, 1988, scheme of depreciation has gone radical change vide" Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986. Block assets of business has been succinctly defined u/s 2(11) of the Act of 1961. Now under the scheme of depreciation the claim of depreciation is allowed on block assets. It cannot be denied that assets for R&D division of the assessee's business forms part of block assets for accounting period relevant to the assessment year in question. R&D division of the assessee-company as such was not closed. Therefore, it also cannot be said that assets in question were not used in the business of assessee, Therefore, the assessee is entitled to deduction on account of depreciation on

assets of R&D division as part of block assets.

14. The learned counsel for the Revenue, on the other hand urged that Section 32(1) provides that before an asset can be construed as part of block assets for computation of depreciation it must be an asset which has been put to use for the purpose of assessee's business during the relevant accounting period. If an asset has not at all been used for the purpose of assessee's business during the relevant accounting period, it also cannot form part of block assets on which percentage depreciation has to be given while computing the total taxable income.

15. Apparently, the aforesaid question raises a substantial question as to the interpretation of Section 32 as amended by the Act of 1986 and was in force during the relevant assessment year.

16. However, we are of the opinion that in view of the findings of fact recorded by the learned Tribunal in this regard, this question really does not arise for consideration to affect the final decision. Apparently, as per facts not in dispute, the R&D division, of which the assets were formed part, was not closed albeit it was confined in its activities to the other business of the assessee than fast food. Once this is found the assets relating to R&D cannot be excluded because part of the assessee's business is closed to which also the R&D division might be rendering its services. It may not have been used for the business relating to the fast food division. It is not the requirement of Section 32 that the depreciation claim in respect of any asset has to be allowed if it continues to be used for all the purpose which was being used earlier. In view of the findings of fact recorded in favour of the assessee that the R&D division was alive and all business of the assessee were not closed, depreciation ought to have been allowed as deduction as part of block assets of R&D division. There is no other ground to disallow that claim. We accordingly hold that the Tribunal was right in allowing the depreciation on R&D division on assessee.

17. As a result of above discussion, this appeal fails and is hereby dismissed.

18. No order as to costs.