
(2003) 10 RAJ CK 0035
In the Rajasthan High Court
Case No : IT Appeal No. 12 of 2002

Commissioner of Income Tax	Vs	APPELLANT
Udaipur Distillery Co. Ltd.		RESPONDENT

Date of Decision : 10-10-2003

Acts Referred:

Income Tax Act, 1961 — Section 32(1), 35(1), 43B

Citation : (2004) 186 CTR 34

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

Bench : Division Bench

Advocate : K.K. Bissa, for the Appellant; N.M. Ranka, R.K. Yadav, Mahendra Gargieya and K.N. Joshi, for the Respondent

Final Decision : Dismissed

Judgement

RAJESH BALIA, J.—This appeal is against the order of the Tribunal, Jaipur Bench, Jaipur relating to asst. yr. 1995-96. At the time of admission, following questions were framed as substantial questions of law arising for consideration of this appeal:

"(Q. 1) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in deleting the addition of Rs. 12,67,656 by holding that unpaid amount of bottling fee has, on furnishing of bank guarantee, to be treated as actual payment and accordingly the deduction in respect of the same cannot be denied u/s 43B of the IT Act, 1961 ?

(Q. 2) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in deleting the addition of Rs. 38,442 made by the AO on account of disallowance of research and development expenses not covered u/s 35(1)(iv) of the IT Act, by wrongly relying on the decision in ITA No. 1546/Jp/1995, dt. 30th March, 2001 ?

(Q. 3) Whether, on the facts and in the circumstances, the Tribunal is justified in allowing the 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 ?"

2. During the course of hearing, we were satisfied that the following question of law also arises in this appeal for consideration, which is closely connected with question No. 1 referred to above and was founded on the contentions raised before the Tribunal but was not decided and the issue was decided only on the alternative ground which is subject-matter of question No. 1. We have, therefore, deemed it just and proper to frame the following question of law in addition to the aforesaid questions for consideration in this appeal:

"(Q. 4) 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 ?" .

3. We may notice here that this question has been raised in number of appeals relating to the same assessee for different assessment years and the reasons for framing the aforesaid question has been set out in detail in the order passed on 26th Aug., 2003, in DB IT Appeal No. 8/2002 which related to asst. yr. 1988-89.

4. The question No. 1 and the newly framed question quoted above have been considered by us in the same set of facts relating to the same assessee in DB IT Appeal No. 8/2002 which was decided on 3rd Sept., 2003. It was found that the Tribunal was not right in holding the bank guarantee to be treated as actual payment to satisfy the condition of Section 43B before any deduction can be claimed in respect of any amount which is payable by way of tax, duty, cess or fee. The conclusion was recorded as under:

"Requirement of Section 43B of the Act is actual payment and not deemed payment as condition precedent for laying down the claim to the deduction in respect of any of the expenses incurred by the assessee during the relevant previous year specified in Section 43B. Furnishing bank guarantee cannot be equated with actual payment. Actual payment requires that money must flow from the assessee to the public exchequer as such as specified in Section 43B.

In our opinion, there cannot be two arguments on the requirements of Section 43B.

The Division Bench of this Court in the case of Commissioner of Income Tax Vs. Rajasthan Patrika Ltd., has said that by no stretch of imagination can it be said that furnishing of bank guarantee is actual payment of tax or duty in cash? A bank guarantee is only a guarantee for payment on some happening and that cannot be actual payment as required u/s 43B of the IT Act, 1961, for allowance as deduction in the computation of profits.

We are in agreement with the aforesaid ratio laid down in Rajasthan Patrika's

case (supra)."

5. On the newly framed question, the Court referred to a large number of decisions of the Supreme Court as well as of Calcutta High Court and considering the scheme of Rajasthan Excise Act, 1950 and Rules framed thereunder, it was held that bottling fee was charged from the respondent-assessee by the State Government for parting with its exclusive privilege to bottle liquor, whether as part of manufacturing process or for facilitating its sale, it does not alter its character as price charged by the State for parting with its exclusive privilege of bottling potable liquor as one of the manifestations to deal in potable liquor. Consequently, if the assessee maintains his books of account as per mercantile system, he is entitled to claim deduction of such expenses incurred by him by way of bottling fee for the accounting period when it becomes payable to the State Government as consideration. Such liability is allowable as expenditure in the year in which it is incurred notwithstanding the actual payment has been deferred to a future date. It was also held that "fee" in its technical sense means compulsory exaction by the State in respect of services performed by the State for the benefit of fee-payers. The expression fee under Rajasthan Excise Act and Rules has been used as price for consideration for use of privilege by the licensee which is in exclusive control of the State. The former falls within the domain of compulsory exaction of the State" in exercise of its taxation power. The latter falls in the realm of term of contract. Therefore, the bottling fee cannot be termed "fee" in its technical sense as a part of taxation. This takes it out from the realm of expression "fee" as used in Section 43B of the IT Act.

6. In view of this finding, the deduction claimed by the assessee in respect of liability to pay bottling fee for the accounting period relating to the assessment year in question is allowable expenditure and we affirm the finding of the Tribunal though for the reasons other than that which prevailed with the Tribunal, by following the decision in DB IT Appeal No. 8/2002, CIT v. Udaipur Distillery Co. Ltd., referred to above.

7. The question No. 3 relates to claim of the assessee for deduction on account of depreciation on the assets of research and development division of its business. The same was disallowed by the AO on the ground that during the accounting period relating to the assessment year in question, the business of fast food division of the assessee-company had been closed and the assets had not been used as such for the business of the assessee during the accounting period in question. However, the case of the assessee was that the fast food division was not the only business which was transacted by the assessee but the assessee was carrying on other business of manufacture and selling of potable liquor and the research and development division of its business was also engaged in R&D work for its remaining business and, therefore, it cannot said that the assets related to a closed business. The Tribunal has accepted this contention of the assessee.

8. This question has also been subject-matter of another appeal filed by Revenue

in the matter of same respondent-assessee, DB IT Appeal No. 78/2003 CIT v. Udaipur Distillery Co. Ltd., which related to asst, yr. 1992-93.

9. It was submitted by the assessee that R&D did not solely exist for fast food division of the company but also relates to the manufacture and sale of liquor. Research and development division was also rendering services for its liquor business and the liquor business has not been closed at any stage. Therefore, factual foundation on the basis of which AO disallowed the claim, did not exist. It was contended in the alternative that since amendment of Section 32 w.e.f., 1st April, 1988, the scheme of depreciation has undergone radical change vide Taxation Laws (Amendment & Miscellaneous Provisions) Act, 1986. "Block assets of business" has been succinctly defined u/s 2(11) of the Act of 1961. Thenceforth, under the scheme of depreciation, the claim of depreciation is allowed on block assets of business on the basis of same rate of depreciation. 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 nor the liquor business of the assessee was closed. Therefore, it also cannot be said that assets in question were not used in the business of assessee during the period of question.

10. The learned counsel for the Revenue, on the other hand had urged that u/s 32(1) an asset can be construed as part of block assets for computation of depreciation only if it has been put to use for the assessee's business during the relevant accounting period. If any asset has not been at all 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. The Tribunal has recorded the finding of fact in favour of assessee that the R&D division has neither been closed nor discarded as yet and the same is used for liquor business of the assessee.

In view of the aforesaid finding of the Tribunal, which is supported by material on record, it must be held that the R&D division was alive during the accounting period in question. It has not closed all its businesses and it was being used as part of its remaining business. Therefore, depreciation in respect of assets of R&D division ought to have been allowed as deduction as part of block assets of assessee.

11. In view of the aforesaid, following the decision rendered in DB IT Appeal No. 78/2003 relating to asst. yr. 1992-93, it must also be held that the Tribunal was justified in allowing the depreciation on research and development assets and it could not have been denied merely because one of the activities of the assessee's business namely, fast food division has been closed.

12. The question No. 2 referred to above is closely inter-linked with question No. 3 as it relates to the expenses incurred by way of payment of lease money paid for building used in research and development division of the assessee and which

has been denied by the AO on the like ground viz., closure of fast food business of the assessee. However, the reason which prevailed while affirming the order of the Tribunal in respect of allowing the deduction on account of depreciation on the assets of the research and development division of the assessee, applies equally to the claim made by the assessee in respect of lease amount paid for the building which was used by the assessee in its R&D division. Accordingly, it must also be held that the Tribunal was right in allowing deduction of Rs. 38,442 by upholding the contentions made by the assessee on account of lease expenses in respect of the R&D division building.

13. In view of the aforesaid finding, this appeal fails and is hereby dismissed with no costs.