

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ITA No. 426 of 2010 (O&M)

Date of Decision: 8.9.2015

Commissioner of Income-tax, Jalandhar

....Appellant.

Versus

M/s Max India Ltd.

...Respondent.

1. Whether the Reporters of the local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not? Yes
3. Whether the judgment should be reported in the Digest?

**CORAM:- HON'BLE MR. JUSTICE AJAY KUMAR MITTAL.
HON'BLE MR. JUSTICE RAMENDRA JAIN.**

PRESENT: Mr. Vivek Sethi, Advocate for the appellant.

Mr. Ajay Vohra, Senior Advocate with
Mr. Gaurav Jain, Advocate and
Mr. Vishal Gupta, Advocate for the respondent.

AJAY KUMAR MITTAL, J.

1. This appeal has been filed by the revenue under Section 260A of the Income Tax Act, 1961 (in short "the Act") against the order dated 1.1.2010 (Annexure A-3) passed by the Income Tax Appellate Tribunal, Amritsar Bench, Amritsar (hereinafter referred to as "the Tribunal") in ITA No. 373(ASR)/2002 for the assessment year 1999-2000, claiming the following substantial questions of law:-

- I. Whether on the facts and circumstances of the case, the ITAT was right in law in allowing the expenses for setting off new business and fee

paid of Rs.6,70,78,483/- treating it as revenue in nature?

- II. Whether on the facts and circumstances of the case the ITAT was right in law in directing that depreciation should be worked out with reference to the WDV computed as a result of order passed u/s 250(6) of the I.T. Act for the A.Y. 1998-99?

2. A few facts necessary for disposal of the present appeal as mentioned therein are that the assessee filed its return of income on 14.12.1999 for the assessment year 1999-2000 declaring the income at ₹ 9,08,42,893/- under Section 115J of the Act. The said return was processed under Section 143(1)(a) of the Act and the case was taken up for scrutiny. Notices under Section 143(2)/142(1) along with questionnaire was issued. The Assessing Officer vide order dated 28.3.2002 (Annexure A-1) made assessment under Section 143(3) of the Act at the total income of ₹ 9,05,56,273/- after setting of brought forward losses of ₹ 16,97,76,240/-. The Assessing Officer made disallowance of ₹ 6,70,78,483/- on account of expenses for setting off new business and fee paid and ₹ 3,09,25,659/- on account of excess depreciation allowance. Feeling aggrieved, the assessee filed an appeal before the Commissioner of Income Tax (Appeals), Ludhiana [hereinafter referred to as "the CIT(A)"]. The CIT(A), Ludhiana vide order dated 16.8.2002 (Annexure A-2) allowed the appeal and deleted the additions made by the Assessing Officer. Being dissatisfied, the revenue filed the appeal before the Tribunal, who vide order dated 1.1.2010 (Annexure A-3)

dismissed the said appeal. Hence, the present appeal by the revenue.

3. After hearing learned counsel for the parties, we do not find any merit in the appeal.

4. The following issues emerge for our consideration in this appeal:-

- (i) Whether the different business/ventures carried on by the assessee including healthcare business constituted one business or separate businesses?
- (ii) Whether the expenditure of ₹ 6,70,78,483/- was revenue or capital in nature?
- (iii) Whether the admissible depreciation had to be worked out with reference to the written down value computed as a result of order passed under Section 250(6) of the Act for the assessment year 1998-99?

5. Examining issue (i) above, it would be advantageous to notice the legal position first. The Apex Court in **CIT v. Prithvi Insurance Co. Limited (1967) 63 ITR 632**, considering whether the business of life insurance and the business of general insurance could be regarded as same business, had observed as under:-

“A fairly adequate test for determining whether the two constitute the same business is furnished by What Rowlatt, J. said in *Scales v. George Thompson & Co. Ltd*:

“Was there any inter-connection, any interlacing, any

inter-dependency, any unity at all embracing those two business?”

“That inter-connection, interlacing, inter-dependence and unity are furnished in this case by the existence of common management, common business Organization, common administration, common fund and a common place of business.”

6. The principle of law enunciated in **Prithvi Insurance Co. Limited's case (supra)** was reiterated by the Supreme Court in **Produce Exchange Corporation Limited v. CIT (1970) 77 ITR 739** by holding that while determining two or more lines of businesses of the assessee to be same “business” or “different businesses”, regard has to be made to that there is common management of the main business and other lines of businesses, unity of trading organization, common employees, common administration, a common fund and a common place of business. It was further held that for evaluating the “same business”, the test of unity of control and not the nature of business is to be applied. Another judgment of the Supreme Court in the case of **Veecumsees v. CIT (1996) 220 ITR 185** had expressed similar view.

7. Applying the test in the present case, the CIT(A) after appreciating the evidence produced on record had observed that various businesses carried on by the assessee including healthcare do constitute the same business of the assessee. The relevant observations read thus:-

“I have considered the rival submissions in the matter.

On merits, I find that the appellant has been able to

ordain well that the various businesses carried on by it (including Healthcare) do constitute the same business of the appellant. I accordingly hold that the various businesses carried on by the appellant including Healthcare business, constitute one business only, and not separate businesses.”

8. The Tribunal on appeal had affirmed the said findings. Learned counsel for the revenue was unable to demonstrate with reference to any material that the conclusion of the CIT(A) and the Tribunal was erroneous, perverse or based on misreading of evidence on record which may warrant interference by this Court. Thus, it is concluded that the businesses carried on by the assessee including healthcare business would fall within the ambit of being the same business of the assessee.

9. Next we proceed to consider whether the expenditure of ₹ 6,70,78,483/- was revenue or capital in nature. In order to effectively resolve the said controversy, it would be essential to have the bifurcation of ₹ 6,70,78,483/- which is as under:-

“Salaries and Wages	52,60,075.00
Rent	1,21,182.00
Travelling and Conveyance	65,18,063.02
Communication	9,81,000.00
Business Promotion	9,68,569.11
Legal & Professional	5,15,24,383.00
(including fee paid to Mckinsey & Co.)	
Advertisement	60,602.00
Miscellaneous/other expenses	<u>16,44,609.39</u>
	<u>6,70,78,483/-</u>

10. There was no serious dispute with regard to expenses incurred by the assessee like salaries and wages, rent, travelling and conveyance, communication, business promotion advertisement and miscellaneous/other expenses, that these were revenue in nature. However, the amount of ₹ 6,70,78,483/- claimed as business expenditure by the assessee included professional fees of ₹ 4,46,44,800/- paid to Mckinsey & Co. Learned counsel for the revenue urged that this payment was capital in nature and was not admissible as revenue expenditure. The CIT(A) had held that in so far as genuineness of this payment is concerned, there was no controversy that it was actually paid to Mckinsey & Co. After appreciating the material, it was further recorded that this expenditure was revenue in nature. The Tribunal had affirmed the said findings with the following observations:-

“12. Keeping in view the aforesaid discussion by the learned first appellate authority in the impugned order, we are of the considered opinion that the expenditure in dispute incurred by the assessee as revenue in nature and allowable as deduction because the assessee has incurred the aforesaid expenses on different businesses owned by the assessee including health care business which constituted one business only. As regards the payment made to McKinsey & Company the expenditure incurred was commensurate with the services rendered specially as it happened to be a world renowned firm. The learned first appellate authority has rightly held that the

observations of the A.O. that agreement had been entered by the MTVL with McKinsey & Company and not the assessee was incorrect as MTVL is a subsidiary company and was not carrying on any business activities. The bill was raised by McKinsey & Co. in the name of the assessee. The payment was made by the assessee only. After going through the aforesaid judgment cited by the learned counsel for the assessee as well as the learned CIT(A), we are of the considered opinion that no interference is called for in the well reasoned order passed by the learned first appellate authority on this issue involving ground No.1. Therefore, this ground raised by the Revenue is dismissed.”

11. Nothing could be demonstrated by learned counsel for the revenue that the aforesaid conclusion was unsustainable in law which would persuade this Court to interfere with the said findings. Therefore, the same are hereby affirmed.

12. In all fairness, the judgments relied upon by the learned counsel for the revenue in **Commissioner of Income Tax v. OCL India Limited, ITA No. 1037 of 2009**, decided on 29.11.2010 by the Delhi High Court, **Commissioner of Income Tax v. Flour and Food Ltd. ((1988) 170 ITR 469 (MP)**, **The Commissioner of Income Tax v. Zenith Steel Pipes and Industries Ltd. (2009) 315 ITR 95 (Bom)** and **Larsen & Toubro Ltd. v. Commissioner of Income Tax ITR No. 67 of 1989** decided on 15.6.2012 also by the Bombay High Court may be

examined. Suffice it to notice that on perusal of these judgments, we find that they were either based on finding of fact recorded therein that the business undertaken by the assessee was initiation of a new business and not expansion of business which was already carried on by the assessee or were based on individual fact situation involved therein. Thus, no benefit can be derived by the revenue from the aforesaid enunciations.

13. Looking from another perspective, we find that the present case relates to the assessment year 1999-2000 where the allowability of the expenditure is not in dispute but the issue is whether it has to be allowed in one year as revenue expenditure or by spreading over by way of depreciation or amortisation over the years after capitalising it. At present, the number of years that have gone by from the initial year has been more than about fifteen years. Learned counsel for the revenue has not been able to demonstrate that there had been any change in the rate of taxation during these years. Thus, even if the substantial portion of the expenditure had been capitalised and depreciation or amortisation allowed under the Act, at the prevalent rate admissible under the Act and the Income Tax Rules, 1962, the entire amount would have been allowed as deduction on account of depreciation or amortisation by now and the case would be revenue neutral. Therefore, in such circumstances as well, we do not find any justification in interfering with the order of the Tribunal. Accordingly question No. I is answered against the revenue.

14. Now advertent to question No. II, the CIT(A) while passing the order under Section 250(6) of the Act for the assessment year 1998-99 in the case of the assessee had deleted certain disallowance

made by the assessing officer on account of depreciation resulting in higher Written Down Value (WDV) as on 1.4.98. The CIT(A) on that basis had directed the assessing officer to allow depreciation for the current assessment year, i.e., 1999-2000 by taking the effect of the revised WDV. The revenue had assailed the order of the CIT(A) in the case of the assessee for the assessment year 1998-99 which was affirmed by the tribunal in '**Deputy Commissioner of Income Tax Vs. Max India Ltd., (2007) 112 TTJ (ASR) 726**'. Since the order of CIT(A) in the case of the assessee for the assessment year 1998-99 had resulted in higher WDV of the asset, and the said order was affirmed by the tribunal in appeal, the depreciation for the assessment year 1999-2000 had thus been rightly directed to be worked out with reference to the WDV computed as a result of order passed under Section 250(6) of the Act for the assessment year 1998-99. No error could be pointed out in the approach adopted by the CIT(A) as well as the Tribunal for taking the higher WDV of the asset of the assessee for the assessment year 1999-2000. Accordingly, question No.II is also answered against the revenue.

15. In view of the above, finding no merit in the instant appeal, the same is hereby dismissed.

(AJAY KUMAR MITTAL)
JUDGE

September 8, 2015
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(RAMENDRA JAIN)
JUDGE