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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **Date of Decision: 30.09.2019**

\+ ITA 519/2019

M/S JBM INDUSTRIES LTD ..... Appellant

Through: Mr. R. Santhanam with Mr. Arujun Prasad Sinha, Advs.

versus

COMMISSIONER OF INCOME TAX NEW DELHI..... Respondent

Through: Ms. Adeeba Mujahid for Mr. Ajit Sharma, Advs.

\+ ITA 520/2019

M/S JBM INDUSTRIES LTD ..... Appellant

Through: Mr. R. Santhanam with Mr. Arujun Prasad Sinha, Advs.

versus

COMMISSIONER OF INCOME TAX NEW DELHI ..... Respondent

Through: Ms. Adeeba Mujahid for Mr. Ajit Sharma, Advs

\+ ITA 524/2019

M/S JBM INDUSTRIES LTD ..... Appellant

Through: Mr. R. Santhanam with Mr. Arujun Prasad Sinha, Advs.

versus

COMMISSIONER OF INCOME TAX NEW DELHI ..... Respondent

Through: Ms. Adeeba Mujahid for Mr. Ajit Sharma, Advs

\+ ITA 525/2019

M/S JBM INDUSTRIES LTD ..... Appellant

Through: Mr. R. Santhanam with Mr. Arujun Prasad Sinha, Advs.

versus

COMMISSIONER OF INCOME TAX NEW DELHI ..... Respondent

Through: Ms. Adeeba Mujahid for Mr. Ajit Sharma, Advs

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE SANJEEV NARULA

VIPIN SANGHI, J. (ORAL)

1. The aforenoted appeals are directed against the composite order dated 20.12.2018 passed by the Income Tax Appellate Tribunal in ITA Nos. 5811-5814/Del/2011 in respect of assessment years from 2001-02 to 2004-05. In all these appeals, common questions of law are sought to be urged with respect to disallowance under Section 37 of the Income Tax Act. Since issues involved in all the appeals are common, the same are being decided by a common judgment.

2. The Tribunal has dismissed the appeals preferred by the appellant and upheld the disallowance of expenditure claimed by the appellant incurred towards the educational expenses in respect of Ms. Esha Arya, who happens to be the daughter of one of the Directors of the assessee company.

3. In the assessment year 2001-02, the appellant claimed expenditure of Rs. 29, 72,710/- on account of educational expenses of Ms. Esha Arya. The said expenditure was disallowed on the ground that it was personal in nature. On appeal, the learned CIT (A) dismissed the same. Similar expenditure was claimed in subsequent years i.e. 2002-03, 2003-04 and 2004-05 and they were also disallowed and additions of Rs. 16, 62,227/-, Rs. 21, 51,045/- and Rs. 3, 27,837/- were made by the Assessing Officer in the said years.

4. The assessee preferred appeals against the said orders, which too were dismissed. In respect of all the four assessment years i.e. 2001-02 to 2004-05, the assessee preferred appeals before the Tribunal. Vide a consolidated order dated 27.02.2009, the Tribunal restored to the file of the Assessing Officer, the issue of disallowance of educational expenses incurred by the assesee, on behalf of Ms. Esha Arya, daughter of one of the Directors.

5. The assessee was permitted to produce evidence in relation to the said expenditure. The Assessing Officer granted sufficient opportunities to the assessee and, thereafter, passed assessment orders sustaining the disallowance mainly on the ground that the assessee did not produce the original application form of Ms. Esha Arya for admission to the Boston University, USA. The Assessing Officer also noted that the assessee did not have any scheme for training of the employees, particularly for imparting

higher education. Further appeal before the CIT (A) met the same fate and the CIT (A) upheld the disallowance of the expenditure claimed by the appellant. The Tribunal, in the impugned order has extracted the findings returned by the CIT (A). Since the same are pertinent, we reproduce the same as hereunder:

> *"6.2 I have carefully considered the submissions made on behalf of the appellant, the findings of the Assessing Officer and the facts on record. I have also perused the judgments relied upon by learned counsel of the assessee. I have also perused the directions given by the Hon'ble ITAT; New Delhi which were very specific.* ***The appellant was given clear directions by the ITAT to furnish all the facts starting from making the application of admission till making the last payment. However, it is found that no evidence regarding application of admission could be produced by the assessee before the A.O. and also before the undersigned as per the directions of the ITAT*** *It is also pertinent to point out that the appellant had not been able to furnish a copy of the application to the Educational Institution before ITAT as well.* ***The evidences regarding payment of foreign exchange were produced but I am of the considered view that the same are not sufficient to prove the commercial expediency of the expenditure.***
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> ***6.3 It is difficult to comprehend that not even the print-out of the online application for admission is available with the appellant. It cannot be disputed that the process for admission of Miss Esha Arya at Boston University in USA for education must have started much earlier. She had to appear at GMAT for admission in Business Management and the GMAT scores obtained by her would have been considered by the University before offering admission to her. The letter of admission would have also been issued by Boston University. At the time of interview for visa, some evidence in support of her admission in Boston University would have also been produced by Miss Esha Arya before the USA embassy***

authorities. However, the appellant company has not been able to produce/adduce any direct or circumstantial evidence in order to prove that as to when she got the admission in Boston University.

6.4 It is also observed that the assessee has not adopted any procedure for selection of the employees for higher education in Foreign University. ***Miss Esha Arya was sent for the higher education not on the basis of requirement of the company or her ability but only because of her relationship with the one of the directors of the company. The decisive test in a situation like this is to ask a question whether an assessee will incur expenditure of the type being claimed in case of appellant as business expenditure in case of any employee. If this test is applied, it would be clear that huge expenditure on foreign education is incurred because she is daughter of the Director of the appellant company and such expenditure has no business connection.*** *It is thus apparent that only consideration for incurring huge expenditure on Miss Esha Arya is because she being the daughter of one of the directors of the appellant-company. Thus, the only logical conclusion which could be drawn on these facts of the case is that there is no nexus between education expenses incurred abroad for Miss Esha Arya and the business of the appellant-company. In any case, such expenditure on facts cannot be said to be laid out or expbiTdeTwholly and exclusively for the purpose of business. In view of the foregoing discussion and for the reasons given by the AO,* ***I am of the considered view that the expenditure on education of Miss Esha Arya is in nature of personal expenditure of the Director of the appellant company, which cannot be stated to be laid out or expended wholly and exclusively for the purposes of business of the appellant company.*** *As such, these expenses cannot be considered as allowable expenses under section 37(1) of the Act. Therefore, disallowance made by the AO on account of the educational expenses incurred by the appellant on behalf of Ms Esha Arya, is hereby upheld. As a result, Ground of appeal No. 4 for the*

assessment years 2001-02, 2002-03, 2003-04 & 2004-05 is dismissed." (sic)

(emphasis supplied)

6. Before the Tribunal, the assessee produced the paper book containing 224 pages to justify its claim of deductable expenses. The Tribunal has not found merit in the appeal and dismissed the same. The discussion found in the impugned order reads as follows:

"12. We have heard the rival submissions and perused the relevant material on record including the paper book submitted by the assessee. In the instant appeals, the common issue involved is whether the expenses on education of Ms Esha Arya, (who, happened to be daughter of one of the directors of the assessee company) at the Boston University, which included college fee, boarding, travelling from India and back and other incidental expenses, have been incurred wholly and exclusively for the purpose of the business and allowable under section 37(1) of the Act or not. The assessee is before us in second round of proceedings. ***In first round, the Tribunal, questioned the assessee about the fact whether at the time of making application for admission to the MBA program, the company had sponsored Ms. Esha Arya or she had applied independently. The assessee was not able to furnish a copy of application for admission to the Boston University. In view of failure to substantiate the fact of a sponsoring by the assessee company, the Tribunal restored the matter to the file of the AO directing the assessee to file all evidences starting from the making of the application till making the last payment, for determining whether the expenditure was incurred by the directors of the company out of love and affection towards their daughter or it was an expenditure incurred in the course of the business of the assessee.***

13. As far as requirement of the filing of the application form, the Assessing Officer has noted that no original application was

filed by the assessee before him. The Ld. CIT(A) has also noted that no copy of application for admission was filed by the assessee before him. He has also noted that no other evidence have been filed related to documents submitted during visa interview before the USA Embassy Authorities. ***Thus, it is evident that the assessee has not complied with the direction of the Tribunal issued at the time of remanding the matter back to the Assessing Officer. Before us also, only information sheet/medical & physical history of the student has been filed and copy of admission form has not been filed.***

14. We find that the assessee has accepted the decision of the Tribunal in first round of proceedings and no appeal has been filed against the said direction of the Tribunal. In such circumstances, not complying with the direction of the Tribunal, itself is sufficient to dismiss the appeal of the assessee.

15. In addition to the above, the documents filed in relation to the remitting of foreign exchange through M/s Thomas Cook private limited, nowhere demonstrate that payments were made as part of the sponsoring agency for furtherance of the business interest of the assessee company. We also find that the assessee has failed to justify its claim of appointment of Ms Esha Arya as a whole time director of the company, barely at the age of 18 years without any relevant educational qualification or experience.

16. We also note that in assessment year 2003-04, the Assessing Officer has disallowed the salary of Rs.33,337/- paid by the assessee to Ms. Esha arya observing as under:

> *"7.In respect of assessment year 2003-04, the appellant has also raised Grounds of appeal No.5 which relates to the disallowance of the salary to the extent of Rs.33,337/- paid by the appellant to Ms. Esha Arya. This matter was also restored to the file of the AO for fresh adjudication after ascertaining whether any service was rendered by*

her to the assessee company in this year for during her vocation period. In this regard, the copy of the extracts of the minutes of the meeting of the Board of Directors dated 06.05.2002 was furnished before the A.O. as well as before the undersigned. The above-quoted letter dated 06.05.2002 does not indicate anything about the expenses in question and its justification from the point of commercial expediency. In order to claim a deduction on account of expenditure for purposes of business the onus lies on the assessee to prove that the expenditure was incurred for the purposes of business and was not of a capital nature. If it is to be allowed, the onus is on the assessee to prove the amount of expenditure which can be allowed. In order that an expenditure should qualify for deduction as contemplated by section 37(1), one of the requirements of the provision is that the expenditure must have been laid out wholly and exclusively for the purpose of the business. It cannot be disputed that before an assessee can become entitled to an allowance under that provision, he must satisfy the Department of the purpose for which the amount is spent. It is true that the taxing authorities are not entitled to go into the reasonableness of the expenses, but they are certainly entitled to be satisfied as to the commercial necessity of expending that amount. The question will always be as to the nature of the relation between the expenditure and the business, whether the benefit is remote or near, prospective or immediate, imaginary or real and so forth. The capacity in which the assessee spends will also be relevant. In the instant case, the assessee did not furnish any material to the Assessing Officer to arrive at the conclusion favoring the assessee. The A.O. therefore, exercised his judgment and

discretion which cannot be said to be arbitrary or unreasonable. As a result, the addition of Rs. 33,337/- on account of salary paid by the appellant to Ms Esha Arya is confirmed and ground No.5 is dismissed."

17. We find that the assessee has not taken any ground of appeal against the above finding of the Ld. CIT(A), and, thus, the fact that no services were rendered by her even during vocation period, become final.

18. We find that in the case of RAS information technology (p) Ltd., the Hon'ble High Court in para 6 of the decision has noted that during the course of pursuing his postgraduate course at USA, the son of the director of the company updated about the latest trends and developments in the field of consultancy and was also sending key input in the form of articles, research papers etc to enable the company to keep itself updated of the technical know-how and knowledge. Whereas, in the instant case before us, even the claim of services during the vocation period has not been found to be true. Thus, the ratio of the above decision cannot be applied over the facts of the instant case. In the case of Mallige Medical Centre Private Limited (supra), the daughter of the managing director acquired degree in medicine and she was already employed with company as full-time employee. In the instant case, the daughter of the director barely attained the age of 18 years and completed schooling. Thus, facts of the instant case are distinguishable from the facts of the cases relied upon by the assessee."

(emphasis supplied)

7. The submission of Mr. Santhanam, learned counsel for the appellant, is that the Tribunal heard the submissions on 18.12.2018 and pronounced the impugned order on 20.12.2018 without considering the compilation of

documents submitted by the appellant. He further submits that all the conditions of Section 37 of the Income Tax Act were satisfied inasmuch as, the nature of the expenditure was not capital in nature; it was not personal expenses of the assessee company; it was expended wholly and exclusively for the purpose of business of the company.

8. He submits that merely because Ms. Esha Arya was the daughter of one of the Directors of the company, the expenses could not be disallowed. He further submits that before proceeding for the course, Ms. Esha Arya was inducted as a Director and employee of the company and she even entered into a bond with the company – undertaking to serve the company upon her return. He further submits that, as a matter of fact, after her return, she did serve the company and changed the fortunes of the company. The education obtained by Ms. Esha Arya was pertinent and relevant to the business of the company since she had gone abroad to obtain the degree of M.B.A from Boston University, USA.

9. In support of his submission, Mr. Santhanam has placed reliance on the decision of this Court in ***Kostub Investment Ltd. v. Commissioner of Income Tax***, (2014) 365 ITR 436 (Delhi). In this case, an employee of the company, who had already served for about a year, had been sent to obtain higher education. This Court distinguished ***Kostub Investment Ltd.*** (supra) from ***Natco Exports Pvt. Ltd. v. CIT***, (2012) 345 ITR 188 (Delhi), and held in favour of the assessee that the said expenditure was allowable.

10. Per contra, learned counsel for the respondent, firstly, submits that no question of law arises for consideration since the entire dispute is completely

factual. She submits that there are concurrent findings of fact returned by the Assessing Officer, CIT (A) and the Tribunal after examining the materials produced by the appellant. The onus to justify the deduction of the expenditure incurred by the appellant was entirely upon the appellant, and the appellant had failed to discharge the same. She submits that an issue of appreciation of evidence does not raise a question of law, particularly when concurrent findings of facts have been returned and no perversity is pointed out in the finding concurrently returned by the authorities and the tribunal. She points out that the two Directors of the company, who participated in the Board Meeting which resolved to send Ms. Esha Arya to Boston University to undertake the MBA Course were her parents, and none else. She also points out that the nature of the bond executed by Ms. Esha Arya is also questionable inasmuch as, she was only required to serve the company, upon her return, for a period of one year, failing which she was subjected to penalty of Rs. 50,000/-, which too could be waived.

11. She points out that the expenditure incurred by the appellant company on the foreign education of Ms. Esha Arya was to the tune of Rs. 70 lakhs (approx.), spread over a period of four years. She also points out that the assessee company was running into losses when it purportedly resolved to send Ms. Esha Arya for her higher education to Boston University for the MBA course.

12. We have gone through the facts of the case and have also examined the judgments cited by the Appellant as well as the Revenue. The assessee has claimed expenditure in respect of educational expenses incurred by the

assessee for overseas education of Ms. Esha Arya, daughter of one of the directors of the assessee company. The expenses were disallowed concurrently by all the authorities- the A.O, CIT (A) as well as the Income Tax Appellate Tribunal.

13. Section 37 of the Act postulates that expenditure which is wholly and exclusively incurred for the purpose of business can be allowed as a deduction in taxable business income. The onus is on the assessee to show and establish that the aforesaid twin conditions are satisfied. Personal expenses cannot be claimed as a deduction under Section 37 of the Act.

14. The question as to whether, in a given case, the expenditure claimed is allowable or not has to be examined in the context of the facts and circumstances of the case, which would entail analysis of the business activities of the assessee and its general policy to incur such expenses for the purpose of the business wholly and exclusively; the nature of education, training, etc. would need examination. It would also need examination whether the expense saddled on the assessee is, in fact, a personal expense of the owner/partner/Director of the assessee who may be controlling the affairs of the assessee, and is sought to be passed off as an allowable expenditure, only to reduce the tax liability of the assessee and that of the owner/partner/share holder-Director of the assessee. All these factors are necessarily required to be examined so as to ascertain if there is a nexus between the expenditure claimed and the business of the assessee, whether it was wholly and exclusively expended for the purpose of business of the assessee. This requires the assessee to produce reliable evidence before the

Assessing Officer. The evaluation of the claim of expenditure has to be considered on the basis of the material on record, and there cannot be any straight jacket formula for such determination. Each case would turn on its own facts, and the decision would vest on the fact whether the assessee has discharged the burden of showing that the expenditure was wholly and exclusively for the purpose of the business of the assessee under Section 37(1), to include the conclusion that the expenditure, which is of personal nature, is not claimed as business expenditure. In the present case, the assessee has failed to produce material and documents to support that the expenditure was incurred for the purpose of the business of the assessee. The findings of the AO, affirmed in the successive appeals are all factual. The assessee has not been able to show as to how the findings are perverse or contrary to the evidence and material on record.

15. It is also to be noted that the Appellant is a Company engaged in the business of manufacturing of Sheet Metal components and LPG Cylinders. It has claimed that it incurred expenses for education of the newly inducted Director- 18 year old daughter of at least one of the existing Directors, for pursuing MBA programme in USA. The Board of Directors comprised of Sh. S.K. Arya and Smt. Neelam Arya (Husband & Wife) and Ms. Esha Arya (their daughter) was inducted in the business as a Director at the start of the previous year in respect of assessment year 2001-2002, when she was barely 18 years of age.

16. In ***Kostub Investment Ltd*** (supra), the crucial factor that prevailed upon the Court is noticeable in the following words, *"But that it has chosen*

to fund the higher education of one of its Director's sons in a field intimately connected with its business is a crucial factor that the Court cannot ignore." The assessee in that case was in the business of investments and securities and it claimed expenditure on account of education and training under the head 'Education and Training Expenses' relating to higher education of one of the sons of its Director for pursuing the Course of MBA. This is not the situation in the present case. Masters of Business Administration is a course which is general in nature and is not any specialized training or degree in relation to the business activity of the assessee.

17. There is yet another fact which distinguishes the present case from ***Kostub Investment Ltd*** (supra) and renders it inapplicable. In the said case, the person whose education was sought to be funded was already on the Board of Directors of the assessee's Company and he was working for a salary. Since, the Company was in need of a Manager who could study the methods of investment market, the Board of Directors took a conscious decision to send the son of one of its Directors to pursue the course and to incur the expenditure for his study and training.

18. In the present case, Ms. Esha Arya, the daughter of one of the Directors was barely 18 years of age without any relevant education, qualification or experience when she was inducted as a whole time Director of the Company. The agreement with the company wherein she undertook to remain in the employment of the assessee company for a period of not less than one year from the date of completion of higher education/training was executed on 20.03.2000, the date when she was inducted as the Director of

the Company. The terms of the said agreement also defy logic. It is highly improbable that a Company which would incur expenditure to the tune of Rs. 70 lacs approximate on overseas education, agreed to have Ms. Esha Arya make a commitment to work for the Company only for a period of one year and, in the event she were to leave the Company before the expiry of the said period, she was required to pay only Rs. 50,000/- as default money, which too could also be waived off at the discretion of the Director of the assessee. When these contradictions were pointed out, the Assessee produced the supplemental agreement dated 01.11.2000 wherein she agreed to serve the Company for not less than two years and in the event of default, reimburse 50% of the expenditure incurred on higher education. These facts cannot be ignored and one can easily infer that the expenses were not incurred wholly and exclusively for the business of the Company. Significantly, when the learned ITAT restored the matter to the file of the AO, in the first round of a challenge, the assessee, despite opportunity failed to produce the evidence that would justify the expenditure, as noted in the impugned order. The assessee could not produce any evidence to show that the assessee company had sponsored the application of Ms. Esha Arya from the beginning. The Assessing Officer thus concluded that there was no nexus between the higher education expense of Ms. Esha Arya and the business of the assessee and accordingly disallowed the entire sum holding that it was not an expenditure incurred wholly and exclusively for the purpose of business. While it may also be true that it is for the assessee to decide as to who should be employed, and what should be the terms of the Contract, however, it is for the Income Tax Officer to determine whether

there is indeed a nexus between the expense and the business of the Company and for that, the enquiry conducted by him cannot be faulted with. The present case is similar to ***Natco Exports Pvt. Ltd.*** (supra). The distinction sought to be drawn by Mr. Santhanam on the ground that in the present case Ms. Esha Arya had executed a bond with the assessee Company is rejected because the bond is itself farcical and that is not the only relevant factor. In ***Natco Exports Pvt. Ltd.*** (supra), this Court observed:-

> *"5. The aforesaid findings are findings of fact and have been upheld by the Tribunal. We may also note that in the present case Ruchika Grover had not executed any bond that she would work for the appellant company after she completes the course and on failure shall return the money spent. The findings of the Tribunal clearly show that Ruchika Grover, who had completed her graduation in the year 2005 and immediately thereafter applied for further studies in University of Nottingham in United Kingdom. It is a case where she continued with her studies. The said application for undertaking the studies abroad was made even prior to her completing the course. The alleged board resolution has rightly not been relied upon as it was not relied and filed before the Assessing Officer. Considering the facts and circumstances of the case, the aforesaid expenditure, it has been held, cannot be regarded as wholly and exclusively incurred for the purpose of business. The findings are findings of fact. The findings are not perverse."*

19. The cumulative impact of all the events and circumstances noted in the impugned order, has led the Income Tax Authorities to hold that the deduction could not have been allowed. The reasons for disallowance are germane and relevant and cannot be ignored. Apparently, this was an attempt on the part of the assessee to avoid tax liability.

20. For the foregoing reasons, the Court is of the opinion that the concurrent findings of fact arrived at by all the lower Appellate Authorities do not call for any interference and no question of law arises for consideration.

21. Accordingly, all the present appeals are dismissed.

VIPIN SANGHI, J

SANJEEV NARULA, J

SEPTEMBER 30, 2019