

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC

&

THE HONOURABLE SMT. JUSTICE P.V.ASHA

FRIDAY, THE 26TH DAY OF AUGUST 2016/4TH BHADRA, 1938

I.T.A.No.55 of 2010

AGAINST THE ORDER IN ITA 624/2007 of I.T.A.Tribunal, COCHIN BENCH
DATED 22-9-09

APPELLANT/RESPONDENT IN ITA:

S.GOPALAKRISHNAN, ARSHIK HERBAL REMEDIES
(INDIA), SREE VIHAR, TANK ROAD, VANCHIYOOR,
THIRUVANANTHAPURAM.

BY ADVS.SRI.ANIL D. NAIR
SMT.NIVEDITA A.KAMATH

RESPONDENT/APPELLANT IN ITA:

COMMISSIONER OF INCOME TAX,
THIRUVANANTHAPURAM.

R BY SRI.JOSE JOSEPH, SC, FOR INCOME TAX

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 26-08-2016,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S ANNEXURES

ANNEUXRE A: TRUE COPY OF THE ASSESSMENT ORDER FOR THE YEAR 2004-2005 DATED 29.12.2007 ISSUED TO THE APPELLANT.

ANNEXURE B: TRUE COPY OF THE ORDER OF THE COMMISSIONER OF INCOME TAX (APPEALS) I, THIRUVANANTHAPURAM DATED 22.2.2007 FOR THE YEAR 2004-2005.

ANNEXURE C: TRUE COPY OF THE GROUNDS OF APPEAL ALONG WITH THE STATEMENT OF FACTS FILED BY THE RESPONDENT BEFORE THE INCOME TAX APPELLATE TRIBUNAL, COCHIN BENCH, ERNAKULAM.

ANNEUXRE D: TRUE COPY OF THE ARGUMENT NOTE SUBMITTED BY THE APPELLANT BEFORE THE INCOME TAX APPELLATE TRIBUNAL, COCHIN BENCH, ERNAKULAM.

ANNEUXRE E: TRUE COPY OF THE ORDER OF THE INCOME TAX APPELLATE TRIBUNAL, COCHIN BENCH IN ITA NO.624/COCH/2007 DATED 22.9.2009 FOR THE YEAR 204-2005.

// TRUE COPY //

P.A TO JUDGE

ANTONY DOMINIC & P.V.ASHA, JJ.

I.T.ANo.55 of 2010

Dated this the 26th day of August, 2016

JUDGMENT

Antony Dominic, J.

This appeal is filed by the assessee impugning the order passed by the Income Tax Appellate Tribunal, Cochin Bench, in I.T.A.No.624/2007 pertaining to the assessment year 2004-2005.

2. On facts, it is relevant to state that for the assessment year 2004-2005, the assessee had returned loss of Rs.10,12,980/-. The Assessing Officer, after making additions and disallowances, determined the total income at Rs.50,49,560/-. The appeal filed by the assessee was allowed by the Commissioner of Income Tax (Appeals). The Revenue challenged the order of the 1st Appellate Authority before the Tribunal. The Tribunal passed the impugned order partly allowing the appeal of the Revenue. It is in these circumstances, the assessee has filed this appeal, framing the following questions of law for the consideration of this court:

- i) *In the facts and circumstances of the case, ought not the Tribunal had allowed the expenditure claimed on the use of cars and telephone bills ad allowable expenditure under Section 37(1) of the Act?*
- ii) *In the facts and circumstances of the case ought not the Tribunal had held that the salary paid to the wife is an allowable deduction as contemplated under Section 64(i)(ii) of the Act?*
- iii) *In the facts and circumstances of the case ought not the Tribunal had held that the research and development expenses incurred by the appellant for developing the new product namely “Anoop Anti-dandruff Cream” is an allowable deduction?*
- iv) *In the facts and circumstances of the case ought not the Tribunal had allowed the advertisement expenses incurred by the appellant as the same is revenue in nature.*

3. We heard the counsel for the appellant and the Senior Standing Counsel for the Revenue.

4. Although by order dated 29th March 2010, notice has been issued only on question Nos.3 and 4, having heard the submissions made at the Bar and on going through the orders impugned, we feel that the four questions of law framed in the appeal memorandum

deserve to be considered.

5. Insofar as the first question regarding the expenditure claimed on the use of cars and telephone bills are concerned, reading of Annexure A assessment order shows that the assessee, who is the manufacturer of 'Anoop Hair Oil', on the basis of a secret formula developed by the assessee himself had entrusted the marketing of the product to M/S Godrej. Assessee had a fleet of cars comprising of one Mercedes Benz van, four Mercedes Benz cars, one Maruti Wagon R and 2 Fiat Palio. In respect of these cars, he had incurred a total expenditure of Rs.22,15,189/-. The Assessing Officer disallowed 50% thereof and allowed only 50% as expended for business purposes. The disallowance was reduced to 5% by the 1st Appellate Authority and the Tribunal set aside the order of the 1st Appellate Authority and restored the order passed by the Assessing Officer.

6. Reading of the order passed by the Tribunal shows that it has endorsed the conclusion of the Assessing Officer that the 8 cars were maintained by the assessee as his personal fad. It was also found that the assessee has not maintained any log register or other materials to establish that all these 8 cars were used by the assessee exclusively for the purpose of carrying on his business.

7. Insofar as the telephone bills, the expenses of which were also claimed by the assessee are concerned, the Assessing Officer has disallowed 50%. The 1st Appellate Authority has reduced it to 5% and the Tribunal has restored the order of the Assessing Officer. On this issue also, the Tribunal has held that the findings in respect of the disallowance of the car expenditure equally applied. Here also, the Tribunal has found that the assessee has not maintained proper data base to verify whether all the phones were used for the purpose of his business. The aforesaid conclusions of the Tribunal regarding the cars and the telephone bills show that these are

factual conclusions and do not give rise to any question of law for the consideration of this court.

8. Next issue is concerning the disallowance of the salary paid to the assessee's wife. The findings of the Assessing Officer in paragraph 6 of the assessment order is that the assessee had paid an amount of Rs.81,000/- to his wife. This was sought to be justified by the assessee's Authorized Representative by contending that the assessee had imparted the secret formula of his medicines to her and hence the salary was paid. The Assessing Officer found that such payment of salary cannot be regarded as one covered by the proviso to Section 64(1)(ii) of the Income Tax Act and disallowed the same. However, this finding was vacated by the 1st Appellate Authority and the Tribunal has set aside the order of the 1st Appellate Authority and restored the order of the Assessing Officer.

9. The learned counsel appearing for the appellant challenged the finding of the Tribunal by relying on the provisions of Section 64(1) (ii) and the decision of the Andhra Pradesh High Court in Batta Kalyani v. Commissioner of Income Tax [154 ITR 59].

10. Section 64(1)(ii) provide that in computing the total income of any individual, there shall be included all such income as arises directly or indirectly to the spouse of such individual by way of salary, commission, fees or any other form of remuneration whether in cash or in kind from a concern in which such individual has a substantial interest. This provision is followed by a proviso which states that nothing in sub clause (ii) shall apply in relation to any income arising to the spouse where the spouse possesses technical or professional qualifications and the income is solely attributable to application of his or her technical or professional knowledge and experience.

11. Therefore, if the income earned by the wife of the assessee was on account of her technical or professional knowledge or experience, such income cannot be reckoned in computing the total income of the assessee. Reading of paragraph 6 of the assessment order shows that the very contention of the Authorized Representative of the assessee was “that the assessee had imparted secret formula of his medicine to her”. In other words, apart from imparting the secret formula to his wife, even the assessee did not have a case that the wife was earning her salary on account of her technical or professional knowledge or experience. In such a case, the payment made by the assessee to his wife would not qualify for the benefit of proviso to Section 64 (1)(ii).

12. Insofar as the judgment of the Andhra Pradesh High Court in Batta Kalyani v. Commissioner of Income Tax [154 ITR 59] is concerned, findings therein turned on the conclusion of the

Assessing Officer that the assessee's husband was employed to manage the business of his wife. Insofar as this case is concerned, there is no such finding and, therefore, this judgment is of no assistance to the assessee. In the light of the above, the second question of law has to be answered against the assessee and in favour of the revenue.

13. Insofar as the third question regarding the expenditure incurred for the Research and Development is concerned, reading of paragraph 7 of the assessment order shows the same was disallowed by the Assessing Officer on the finding that even according to the Authorized Representative of the assessee, the expenditure in question was incurred during the previous assessment year and that the assessee who is following the mercantile system of accounting could not have claimed it during the assessment year in question. It was this finding which was ultimately sustained by the Tribunal. Since the assessee is

admittedly following the mercantile system of accounting, the expenditure in question could have been claimed only in the year in which it was incurred. Therefore, the third question also has to be answered against the assessee and in favour of the Revenue.

14. The fourth question is regarding the advertisement expenses incurred by the assessee. Reading of the assessment order shows that during the assessment year in question, the assessee had incurred Rs.29,25,000/- as advertisement expenses. This was disallowed on the basis that it is a capital expenditure. While the 1st Appellate Authority allowed the appeal of the assessee, the Tribunal has sustained the finding of the Assessing Officer that the expenditure is in the nature of capital expenditure, relying on the judgment of the Calcutta High Court in the case of Indian Oxygen Ltd. V. CIT [164 ITR 466] and Gujarat High Court in the case of CIT v. Mc Graw Ravindra Laboratories (India) Ltd. [132 ITR 401].

15. Insofar as this finding of the Tribunal is concerned, the learned counsel for the assessee has placed reliance on the judgment of this court in Commissioner of Income Tax v. Aluminium Industries Ltd. [214 ITR 541] wherein Division Bench of this court had occasion to consider whether the advertisement charges incurred by a company is capital expenditure or revenue expenditure. That was a case where the assessee had incurred advertisement expenditure in connection with the inauguration of its 'relay' project. In that factual background, referring to several precedents on the subject it was held that if expenses are incurred for advertisements for the expansion of the business of the assessee, such expenditure are necessarily revenue expenditure.

16. Since the expenditure in question was incurred in connection with launching of the assessee's new product, respectfully following the dictum laid down by the decision of this court in *Aluminium Industries Ltd. (supra)*, we answer the 4th

question of law raised in favour of the assessee and against the Revenue.

17. Now, that this court has reversed the finding that advertisement expenditure is a capital expenditure and has held it to be a revenue expenditure, and the matter necessarily has to be remitted back to the Assessing Officer for examining the reasonableness of the same. Accordingly, answering the 4th question of law in favour of the assessee and against the Revenue, the matter is remitted to the Assessing Officer, who will determine the reasonableness of the revenue expenditure incurred by the assessee in this regard.

The appeal is disposed of accordingly.

SD/-
ANTONY DOMINIC
JUDGE

SD/-
P.V.ASHA
JUDGE