* **HIGH COURT OF DELHI AT NEW DELHI**

Judgment Reserved on : 26th July, 2010
% Judgment Pronounced on: 20th September, 2010

\+ ITA 939/2010

COMMISSIONER OF INCOME TAX ..... Appellant
Through: Ms. Prem Lata Bansal, Advocate

versus

CAREER LAUNCHER (INDIA) LIMITED ..... Respondent
Through: None

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE MANMOHAN

1. Whether reporters of the local papers be allowed to see the judgment? No
2. To be referred to the Reporter or not? No
3. Whether the judgment should be reported in the Digest? No

DIPAK MISRA, CJ

The present appeal preferred under Section 260A of the Income Tax Act, 1961 (for brevity 'the Act') is directed against the order dated 26.6.2009 in ITA No. 1047(Del)2008 passed by the Income Tax Appellate Tribunal, Delhi Bench-B (for short 'the tribunal') pertaining to the assessment year 2004-2005.

2. Though the appellant-revenue has raised number of questions, yet Ms.Prem Lata Bansal, the learned counsel for the revenue, restricted to the following questions:

"(a) Whether ITAT was correct in law in allowing non-compete fee of Rs.5,40,000/- payable by the assessee to Shri Vijay Kalyan Jha and Shri Sujit as revenue expenditure?

(b) Whether ITAT was correct in law in treating the expenditure as revenue without examining its nature and character as per the agreement entered into by the assessee with the payees?

(c) Whether non-compete fee payable by the assessee was to ward off the competition so as to be treated as capital in nature?

(d) Whether ITAT was correct in law in allowing interest of Rs.22,07,188/- paid by the assessee to Noida Authority for purchase of land as revenue expenditure?

(e) Whether interest was to be capitalized by the assessee as the same was paid towards acquisition of the fixed asset?

(f) Whether ITAT was correct in law in allowing a sum of Rs.4,24,259/- being advances written off by the assessee, u/s 37(1) of the Act?

(g) Whether residuary provisions of Section 37(1) were applicable to write off of advances when it fell within the ambit of Section 36(1)(vii) of the Act but the deduction was not allowable due to non-fulfillment of Section 36(2) of the Act?

(h) Whether provisions of Section 36(1)(vii) and Section 37(1) are mutually exclusive or the same operates in different field?"

(i) Whether order passed by ITAT is perverse in law and on facts?

3. To appreciate whether the questions would give rise to any substantial question of law, it is requisite to refer to the facts in brief. In respect of the assessment year 2004-05, the assessee had paid a sum of Rs.5,40,000/- as non-compete fee to one Mr. Vijay Kalyan Jha for not entering into a similar business on 31.12.2005 and the said payment was claimed as a revenue

expenditure. When a query was made as to why the said expenditure should not be treated as a capital expenditure, it was contended by the assessee that the fee was actually paid in respect of the agreement of the company with recipient Mr. Vijay Kalyan Jha and that the said sum was a proportionate amount of 9 months during the relevant previous year. It was also urged that the period of non-compete fee being very short, the assessee company did not derive any enduring benefit and, therefore, the expenditure incurred was a revenue expenditure claimed as a deduction under Section 37(1) of the Act. The assessing officer scanned the agreement and came to hold that Mr. Vijay Kalyan Jha and one Mr. Sujit paid Rs.15,00,000/- over a period from 1.3.2003 to 30.11.2003; that of the total amount, 60% amounting to Rs.9,00,000/- was to be paid towards service rendered as faculty trainer, etc., whereas the balance 40% amounting to Rs.6,00,000/- was to be treated as consideration towards non-compete fee for their agreeing not to enter the same market till 31.12.2005 and the assessing officer opined that the claim of the assessee to treat the non-compete fee as a revenue expenditure could not be accepted and it was treated as a capital expenditure.

4. In appeal, the CIT(A) observed that the payment had been made to avoid rivalry in the business; that the same was an element of prior handling of the business and the impact of such expenditure could not be limited to the years. The said authority relied on the decisions of ***Chelpark Co. v. CIT***, 191 ITR 249 and ***CIT v. Coal Shipment Pvt. Ltd.***, 82 ITR 902(SC) to uphold the conclusion that the non-compete fee was a capital expenditure.

5. Being dissatisfied with the decision of the CIT(A), the assessee preferred an appeal before the tribunal and in appeal, it contended that the amount was paid to different persons under an agreement that they would not compete in the similar line of business as that of the assessee; that no asset was created out of the payment made to such prospective competitors; that the payment was necessitated for the smooth running of the assessee's business; that the decision in ***Coal Shipment Pvt. Ltd.*** (supra) had been erroneously applied that the payment had been made in the ordinary course of the assessee's business and no enduring benefit was derived out of such payment and that the assessing officer had allowed such expenditure as revenue expenditure for the earlier period and, hence, should have been treated as a revenue expenditure and not capital expenditure.

6. The revenue, in support of the order passed by the forums below, contended that each year is an independent year and the assessee cannot claim the benefit of allowance made in respect of the earlier years and that competition having been eliminated in the assessee's line of business for a certain period of time preventing destruction of the assessee's business and securing a goodwill for the assessee in its line of business, the profit making apparatus of the assessee's business had been improved, providing the benefit of enduring nature and, therefore, the expenditure has been rightly held to be capital expenditure rather than revenue expenditure.

7. The tribunal, as is evincible, perused the agreement entered into between the assessee and its payees. The agreement showed that both the

payees agreed not to enter MBA Education Preparation Market, [illegible] individually, jointly or in association with any other person in faculty, managerial or consulting capacity for the period of 3 years ending on 31.3.2005. From 1.1.2004 to 30.12.2004, Mr. Vijay Kalyan Jha was to deliver 400 hours of classes and was required to design and develop contact with the assessee. The payment of this was to be of Rs.3,20,000/-. The other payee Mr. Sujit was to be made available for 425 hours of classes for the period from 1.5.2004 to 30.9.2004 and was also required to design and develop contact for the assessee. The payment for the same was Rs.2,12,500/-. The payment was to be made in 10 equal installments as far as Mr. Vijay Kalyan Jha was concerned and in the case of Sujit's working with the assessee, the payment was to be made in 5 equal installments.

8. The tribunal referred to the said decisions and analyzed the clauses of the agreement and came to hold as follows:

> "In the present case, as seen above, the agreement is explicit inasmuch as Shri Vijay Kalyan Jha was to deliver 400 hours of classes and to design and develop contact for the assessee. The payment for this was Rs.3,20,000/-. Shri Sujit, the other payee, was to be available if he so desired for 425 hours of classes from 1.5.2004 to 30.9.2004 and he too was required to design and develop contact for the assessee. The payment for this was 2,12,500/-. The payment was to be made in 10 equal installments of Rs.32,000/- each to Shri Vijay Kalyan Jha, from 1.3.2004 to 1.12.2004. In case Shri Sujit worked out with the assessee in 2004, the payment was to be in 5 equal installments of Rs.42,500/- each, from 1.6.2004 to 1.10.2004. The period involved, therefore, was a short period of 12 months. So, the so called enduring benefit is not for enduring a benefit, in keeping with "Coal Shipment" (supra). Therefore, the payment

> needs to be allowed as a revenue expenditure. This payment is, therefore, allowed as a revenue expenditure."

9. On a perusal of the aforesaid analysis, it is perceptible that the tribunal has been guided by the two concepts, namely, the period of benefit and payment by installment. The question framed by the revenue has to be recast and read as follows:

> "Whether the tribunal is correct in allowing non-compete fee of Rs.5,40,000/- payable by the assessee to Mr. Vijay Kalyan Jha and Mr. Sujit as revenue expenditure solely on the basis of agreement period and the mode of payment?"

10. The next issue that arises for consideration is the disallowance of interest paid to Noida Authority amounting to Rs.22,07,188/-. The assessee had capitalized the said amount in his books of account. However, in the computation sheet filed, it was detected from the profits of the assessee company. The assessee had submitted that he had been allotted 20,000 square meters of institutional plot by the Greater Noida Authority and he paid the amount in two installments and interest was levied. The tribunal, as it appears, has opined that the assessee did not have an office or a training place of its own and the plot was acquired for the said purpose. In this backdrop, the tribunal has held that the expenditure is directly related to the carrying on or conduct of the assessee's business and, hence, is a revenue expenditure. In our considered opinion, prima facie there is a question of law arises which is as follows in this regard:

> "Whether ITAT was correct in law in allowing interest of Rs.22,07,188/- paid by the assessee to Noida Authority for purchase of land as revenue expenditure?"

11. The another aspect which falls for consideration is whether an advance of Rs.4,24,259/- which had been written off by the assessee deserves to be allowed. The tribunal took note of the fact that the assessing officer had asked the assessee to provide the details and the assessee submitted that the said advances written off had arisen during the course of the business of the company and are incidental to the business of the company. It has further been submitted that the assessee company could not recover these advances from the parties after doing the best possible efforts for recovery and, hence, they were written off. The CIT(A) had held that the advances were not in the nature of debts and the claim of the assessee did not fall under Section 36(1)(vii) read with Section 36(1)(ii) of the Act and disallowed the same. The tribunal has held as follows:

> "There is no denying the fact that the advances were made as a business exigency of the assessee. It has also not denied that despite efforts on behalf of the assessee, the recovery with regard thereto could not be effected. However, invoking of the provisions of Section 37(1) in this regard, is not called for. Page 48 of the APB shows details of the amounts written off. The amount of Rs.85,242/- was an amount paid to education. This represented licence fee booked as revenue and debited to the franchise. No business, however, generated by him. The amount was written off as the amount of Rs.47,576/- represents employee balances. In this period was not served by the employees who left the salary, that the same was debited and could not be recovered is necessitating write off. In these facts, the write off is held to be justified and is allowed as such."

12. In ***Travancore Tea Estates Co. Ltd. v. CIT*** [1998] 233 ITR 20[illegible] the Apex Court has held that the question whether a debt had become bad or the point of time when it became bad are pure questions of fact. In the case at hand, the tribunal has, on proper analysis and scrutiny of the materials, recorded a finding that it was bad debt and could not be recovered. In view of the aforesaid, we do not think any substantial question arises on that score.

13. In view of our aforesaid analysis, the present appeal is admitted on the following two substantial questions of law:

> "1. Whether the tribunal is correct in allowing non-compete fee of Rs.5,40,000/- payable by the assessee to Mr. Vijay Kalyan Jha and Mr. Sujit as revenue expenditure solely on the basis of agreement period and the mode of payment?"
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> 2. Whether ITAT was correct in law in allowing interest of Rs.22,07,188/- paid by the assessee to Noida Authority for purchase of land as revenue expenditure?"

Issue notice to the respondent limited to the aforesaid two substantial questions of law.

CHIEF JUSTICE

MANMOHAN, J

September 20, 2010
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