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Present: Ms. Rashmi Chopra, Advocate with Mr. Chandramani Bhardwaj, Advocate for the appellant/Revenue.
Mr. Salil Kapur, Advocate for the respondent/assessee.

+ ITA 456/2009, ITA 888/2009 & 889/2009

(COMMON ORDERS)

These three appeals relating to the same assessee pertain to the assessment years, 1999-2000, 2003-04 and 2004-05. The issue involved relates to the allowability of expenditure incurred by the assessee in the assessment years 1995-96. The assessee had incurred the expenditure for establishing the business of manufacturing and sale of Beer and Cold Drinks in that year to the tune of ₹ 1,56,94,191/-. The assessee wanted this expenditure to be spread-over for a period of ten years as according to him, this expenditure need to be amortized for the aforesaid period. The assessee, therefore, claimed deduction of the entire expenditure in the same year i.e. the assessment years 1995-96 but claimed only 10% thereof as deduction in that year.

Assessment order was passed under Section 143 (3) of the Income-Tax Act (hereinafter referred to as the 'Act'). After going into the nature of the aforesaid expenditure and the Assessing Officer allowed the amortization of the expenditure in aforesaid manner in which the assessee wanted this expenditure to be claimed over a period of ten years. We have been shown the copy of the assessment

order passed by the Assessing Officer for the assessment year 1995-96. The perusal thereof shows that this issue was specifically deliberated upon by the Assessing Officer and after calling for the explanation of the assessee in this behalf, the Assessing Officer allowed the expenditure to the extent of 10% in that year which would imply that contention of the assessee that the expenditure is to be spread-over a period of ten years to be claimed in each succeeding assessment year at the rate of 10% was accepted. On this basis, in the assessment years 1996-97, 1997-98, 1998-99 and 2000-01, 2001-02 and 2002-03 i.e next six years, the assessee was allowed to claim the deduction at the rate of 10% of the aforesaid expenditure incurred in the assessment year 1995-96. However, when the regular assessment for the assessment years 2003-04 was carried out, the Assessing Officer, in that year took the view that there was no concept of deferred revenue expenditure and since it was pre-establishing expenditure, the same should have been claimed under Section 35 D of the Act. The Assessing Officer thus passed the assessment orders for the year 2003-04 as well as 2004-05 on that basis.

At the same time, notice under Section 147 read with section 148 of the Act was issued in respect of assessment years 1999-2000, 2000-01 and 2001-02 seeking to reopen the assessments in those years on the ground that expenditure was allowable under Section 35 D of the Act and by allowing the deduction at the rate of 10% in each year, the income had escaped assessment.

The assessee preferred appeals against the reassessment orders passed in respect of assessment year 1999-2000, 2000-01 and 2001-02. The assessee also preferred appeals against the regular assessment passed in respect of assessment years 2003-04 and 2004-05. The CIT (A) set aside the orders passed under Section 147 of the Act as well as the assessment orders made in respect of assessment years 2003-04 and 2004-05. It is in this back drop that the Department preferred appeals against all these years of CIT (A) and in respect of three assessment years i.e. assessment years 1999-2000, 2003-04 and 2004-05. Three appeals have been disposed of by a common order dated 18th July, 2008 against which these appeals are preferred by the Revenue under Section 260 A of the Act.

The aforesaid factual narration would clearly demonstrate that the ball was set in motion in the assessment year 1995-96 when the assessee was allowed to claim deduction at the rate of 10% of the total expenditure incurred by it for four years i.e. for the assessment years 1995-96 to 1998-99 the assessment have become final. Thus, 40% of the lump sum amount incurred in the first assessment year has been allowed as deduction at the rate of 10% in each of these years. That is the factual situation prevailing, up-setting the apple cart in the middle and challenging the course of action by treating these expenditure under Section 35 D of the Act would clearly be impermissible.

We may also note, with interest, that for the assessment years 2002-03 again deduction at the rate of 10% of the said expenditure has been allowed.

In these circumstances, apart from the fact that in the year 1995-96, the issue was gone into by the Assessing Officer by applying his mind, We are of the opinion that this course of action cannot be adopted for few assessment years, whereas assessment in respect of five assessment years has already become final. If this is allowed, it will lead to anomalous and absurd situation, inasmuch as, the same expenditure which was incurred in the year 1995-96 has been given one treatment, namely, the Department has allowed it to be spread over and give the benefit of deduction at the rate of 10% for five years and in respect of some expenditure incurred much earlier, for the remaining year, the department seeks to apply the provisions of Section 35 D of the Act. This is clearly impermissible.

On this ground alone, we are of the opinion that the order of the Tribunal cannot and should not be interfered. These appeals are accordingly dismissed. No costs.

A.K. SIKRI, J.

M.L. MEHTA, J.

JANUARY 11, 2011
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