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

\+ **{ITA No.966 OF 2009}**
&
{ITA No.836 OF 2010}

% *Judgment delivered on:25.1.2011*

(1) ITA No.966 OF 2009

THE COMMISSIONER OF INCOME TAX . . . APPELLANT
Through: Mr. Sanjeev Sabharwal, Sr. Standing Counsel.

VERSUS

AGRA BEVERAGES CORPORATION P. LTD. ….RESPONDENT
Through: Mr. Satyen Sethi, Advocate with Mr. A.T. Panda, Advocate

(2) ITA No.836 OF 2010

THE COMMISSIONER OF INCOME TAX . . . APPELLANT
Through : Mr. N.P. Sahni, Sr. Standing Counsel.

VERSUS

AGRA BEVERAGES CORPORATION P. LTD. ….RESPONDENT
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CORAM :-

HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M.L. MEHTA

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J. (oral)

1. Notice was issued in these appeals on proposed questions of law Nos. (1) and (2), which are of the following effect:

the Act solely on the ground that the expenditure benefited the assessee; in spite of the facts on record that the cooler were hired by the Pepsi from one M/s. 20th Century Finance Corporation Ltd. but there was no agreement between Pepsi and assessee for payment of hire charges?

(ii) Whether the claim of deduction under Section 37(1) of the Act by the assessee for the expenditure incurred in "advertisement and publicity" of the products of Pepsi, in spite of the fact that the assessee was merely a bottle and had no right in the goodwill and trademark of the Pepsi and since the said expenditure was benefiting to Pepsi and not to the assessee?"

2. Insofar as question of law No. (i) is concerned, the assessee is the franchisee of M/s. Pepsi Food (Pvt.) Ltd. (hereinafter referred to as 'Pepsi'). Under the Franchisee Agreement, the assessee was manufacturing Pepsi brand of soft drinks. Pepsi had entered into a Lease Agreement with M/s. 20th Century Finance Corporation Ltd. for lease of visi coolers. Pepsi was paying the hire charges to the said 20th Century Finance Corporation Ltd. These coolers were installed with the various franchisees including the assessee in the areas falling within the territory allocated to the assessee. For this purpose, Pepsi claimed and received from the assessee its share of hire charges amounting to ₹ 3,45,177. This amount was, thus, paid by the assessee to Pepsi reimbursing Pepsi the lease charges which Pepsi had paid to the 20th Century Finance Corporation Ltd. The assessee had claimed the same as business expenditure under Section 37 of the Income Tax Act (hereinafter referred to as 'the Act'), which was disallowed by the Assessing Officer (AO) as well as CIT (A). The ground of disallowance was that the assessee could not produce any agreement entered into between it and Pepsi in order to

the AO and CIT (A), *inter alia*, recording that it was not disputed th the coolers were in fact hired by the Pepsi and as per agreement with the 20th Century Finance Corporation Ltd., the coolers were installed in the premises of various distributors including at the premises of the assessee. It was also not in dispute that the amount of ₹ 3,45,177 in respect of coolers installed in the territory assigned to the assessee was in fact paid by the assessee to Pepsi. So much so, Pepsi had given a certificate to this effect confirming that the aforesaid charges were recovered by it from the assessee in respect of visi coolers.

3. In these circumstances, we are of the opinion that the Tribunal rightly allowed this claim as business expenditure which could not be denied merely on the ground that there was no written agreement between the Pepsi and the assessee for payment of the aforesaid amount. The amount is represented as hire charges for the coolers which were installed at the premises of the assessee and it would be clearly business expenditure.

4. Insofar as second question of law proposed by the Revenue is concerned, it relates to the expenditure incurred on advertisement and publicity. The assessee had incurred an expenditure of ₹91,99,946 on aforesaid account. It had furnished complete details of this expenditure to the AO and claim was supported by various bills which were produced by the AO. The AO was, however, of the view that the expenditure incurred was for advertisement and publicity of the product of Pepsi for which Pepsi gained and therefore, the entire expenditure should not be allowed. He, thus, disallowed

10% of the expenses. The CIT (A), however, increased tl disallowance from 10% to 50% giving following three reasons:

(a) The expenditure was exorbitantly high;

(b) There was no agreement between the assessee and the Pepsi for incurring such expenditure by the assessee or sharing such expenditure by the assessee.

(c) The expenditure benefitted the Pepsi and not the assessee.

5. The matter was taken up to the Tribunal against the aforesaid view held by the CIT (A). The Tribunal vide impugned judgment dated 7th December, 2007 held that since the assessee incurred the entire expenditure exclusively for business purposes, whole expenditure would be allowable as deduction under Section 37 (1) of the Act. Referring to the judgment of Supreme Court in the case of ***Sassoon J. Davis & Co. P. Ltd.*** Vs. ***CIT*** [1979] 118 ITR 261, the Tribunal opined that by advertising the product, the trademark and trade brand of Pepsi has been benefited and that would be of no consideration to deny the assessee deduction of the expenditure incurred by it.

6. Learned counsels appearing for the appellant have submitted that the agreement entered into between the assessee and the Pepsi clearly shows that it was Pepsi who was to remain owner of the trademark and an obligation was cast upon the assessee not to take any action which would prejudice or harm the trademark or Pepsi's ownership thereof in any way. It is also stated in the said agreement that the use of the trademark by the assessee enures to the benefit of Pepsi. It is also pointed out by the learned counsels that as per

in respect of any advertising and sales promotion which is incurred the trademark and trade name of Pepsi. The learned counsels also argued that the advertisement and publicity which was done by the assessee, nowhere mentions the name of the assessee and exclusively name of Pepsi appeared therein, i.e. its trademark and trade address etc. were exhibited. From this, it is sought to be argued that by specific agreement in writing the assessee agreed to give advantage to the Pepsi in respect of publicity and advertisement carried out by the assessee for Pepsi's product. In these circumstances, argued the learned counsels, the CIT (A) was justified in apportioning the expenditure and the principles laid down by the Supreme Court in the case of ***Sassoon*** (supra) would not be applicable. We are unable to accept the aforesaid submission of the learned counsel for the appellant. In ***Sassoon*** case (supra), the Supreme Court categorically held that when the expenditure incurred for promoting the business to earn profits merely because from the said expenditure some third party has benefited cannot be a reason to disallow the expenditure. Instead of analyzing that judgment in detail, our purpose would be served by referring to a Division Bench judgment of this court in ***CIT*** Vs. ***Dalmia Cement (B.) Ltd.*** [2002] 254 ITR 377, wherein the judgment of Supreme Court in ***Sassoon*** case (supra) and some other judgments are taken note of, analysed and the principles laid down therein are succinctly culled out. Examining and interpreting the provisions of Section 37 of the Act, the Court expressed that the true import of the expression "wholly or exclusively" appearing in Section 37 of the Act would not mean "necessarily". Ordinarily, it was for the assessee to decide whether

expenditure may be incurred voluntarily and without any necess and if it is incurred for promoting the business and to earn profits, the assessee can claim deduction under relevant provision even if there was no compelling necessity to incur such expenditure. The fact that somebody, other than the assessee is benefitted by the expenditure should not come in the way of an expenditure-being allowed by way of deduction under Section 37 of the Act, if it otherwise satisfies the tests laid down by law.

7. The Court went into the legislative history of Section 37 of the Act and pointed out that though in the Income-Tax Bill, 1961, in the original Section 37, as per the draft, the word “necessity” appeared was ultimately omitted and instead replaced by the word “ordinarily”. Thus, for allowing the expenditure incurred under Section 37 (1) of the Act, the conditions which are to be satisfied are:-

(a) there must be expenditure,
(b) such expenditure must not be the nature described in Section 30 to 36 of the Act,
(c) the expenditure must not be in the nature of capital expenditure or personal expenses of the assessee,
(d) The expenditure must have been laid out or exclusively for the purposes or profession.

8. It was clarified by the Division Bench that the word “wholly” refers to quantum of expenditure while the word “exclusively” refers to the motive, objective and purpose of the expenditure. The Court also explained that the term “commercial expediency” is not a term of art and it means anything that serves to promote commercial expediency and includes every means suitable to that end. While examining the issue of deductibility of such expenditure, the Court also laid down the role of the Assessing Officer therein. In no

expenditure" namely, whether the amount claimed as deduction w factually expanded or laid down or whether it was wholly or exclusively for the purpose of the business. The reasonableness of the expenditure could be gone into only for the purpose of determining whether, in fact, the amount was spent. When we apply the aforesaid test to the facts of this case, it becomes manifest that all the ingredients laid down in Section 37 (1) of the Act are satisfied. It is not in dispute that the expenditure is in fact incurred. The Assessing Officer or the CIT (A) did not question the amount incurred by the assessee on the advertisement. It is also not the case of the Revenue that the expenditure is of the nature described in Section 30 to 36 of the Act. The expenditure is not capital expenditure or personal expenditure of the assessee either. It is also clear that the entire quantum of expenditure was for the purpose of business and, therefore, it is wholly for the purpose of business. We are also of the opinion that the expenditure was exclusively incurred for the purpose of the business and promote the sales by the assessee. Therefore, it was incurred wholly or exclusively for the purposes of business.

9. The agreement entered into between the assessee and the Pepsi shows that the assessee was given a particular territory in Haryana, boundaries whereof are specifically defined in the agreement for the purposes of bottling, selling and distributing of the beverages. This entire territory within which the assessee was to operate, the assessee was not only supposed to bottle the beverages he was also given rights to sell and distribute the project of the Pepsi in the defined territory during the currency of the said agreement.

and publicize the product for maximizing its sale. The expenditu was thus incurred by the assessee for its own benefit. Clause 18 of the agreement authorized the assessee to undertake appropriate advertising and sales promotion activity for the beverage. If in the process, Pepsi or its trademark also benefited, that would not militate against the assessee as far as claiming the deduction under Section 37 of the Act is concerned, once all the characteristics of the said provision stood satisfied.

10. The judgment of this Court in ***Dalmia Cement*** (supra) has been approved by the Supreme Court in the case of ***S.A. Builders Ltd.*** *Vs.* ***CIT****,* [2008] 288 ITR 1 in the following words:-

> "Similarly, the view taken by the Bombay High Court in Phaltan Sugar Works Ltd. Vs. CIT [1995] 215 ITR 582 also does not appear to be correct.
>
> We agree with the view taken by the Delhi High Court in **CIT V. Dalmia Cement (B) Ltd. [2002] 254 ITR 377 that once it is established that there was nexus between the expenditure and the purpose of the business which need not necessarily be the business of the assessee e itself),**the Revenue cannot justifiably claim to put itself in the arm-chair of the businessman or in the position of the board of directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. No businessman can be compelled to maximize his profit. The income-tax authorities must put themselves in the shoes of the assessee and see how a prudent businessman would act. The authorities must not look at the matter from their own view point but that of a prudent businessman. As already stated above, we have to see the transfer of the borrowed funds to a sister concern from the point of view of commercial expediency and not from the point of view whether the amount was advanced for earning profits."

11. It is clear from the highlighted portion extracted above that the Apex Court went to the extent of observing that once such an

the assessee itself, that would not be of any consequence. We m also take note of another judgment of this Court in ***CIT*** Vs. ***Nestle India,*** 296 ITR 682. In this case the assessee had claimed deduction of ₹ 2 lacs under Section 37 (2) of the Act, the expenditure incurred was paid towards club member-ship fees but the Assessing Officer made a disallowance of ₹ 1 lakh i.e. 50% of the membership fee paid under Section 31 (2) of the Act. The view of the AO was accepted by the CIT (A) but the Tribunal allowed the entire expenditure. Dismissing the appeal of the Revenue, this Court observed that since the AO had allowed the deduction of 50% of ₹ 2 lacs under Section 37 (2) of the Act, it was clear that the AO himself accepted the fact that the expenditure incurred was for the business purpose, otherwise, the entire amount would have been disallowed by the Assessing Officer. On this premise, it was held that the assessee was entitled to entire deduction as claimed.

12. We thus, are of the opinion that the approach of the Tribunal is in consonance with law and does not call for any interference. These appeals are accordingly dismissed.

(A.K. SIKRI)
JUDGE

(M.L. MEHTA)
JUDGE

January 25, 2011
Skb