2012:DHC:5739-DB

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

RESERVED ON: 23.07.2012
PRONOUNCED ON: 14.09.2012

\+   **ITA Nos.95 & 100/2011**

CIT ..... Appellant

Through: Mr. Sanjeev Sabharwal,
Sr. Standing Counsel.

versus

HINDUSTAN TIMES ..... Respondent

Through: Mr. Ajay Vohra with Ms. Kavita
Jha and Mr. Somnath Shukla, Advocates.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT

% The present common judgment arises out of an order of the Income Tax Appellate Tribunal (ITAT) dated 04.09.2009 in ITA 2158/Del/2003 and ITA 827/Del/2006. These two pertain to the Assessment Years 1999-00 and 2000-01.

2. The following questions of law arise for consideration:

i. Did the Tribunal err in law in upholding the deduction towards provision for salary, Provident Fund etc not actually paid during the assessment year under consideration?

ii. Did the Tribunal err in holding that the sum of ₹ 43,01,632/-, paid by the assessee as its share of the joint venture to insurance business, towards business capital and drafting expenses was deductible in its hands, as expenditure?

iii. Did the Tribunal fall into error in holding that the sum of ₹ 5,76,975/-, paid to IMRB for market research on life insurance business in India, was a deductible expenditure?

3. The brief facts necessary to decide the case are that the assessee is engaged in the business of printing and publishing of newspapers, periodicals and also production of video cassettes. For the Assessment Year, 2001-02, it filed a return declaring loss of ₹ 27,41,56,666/-. During this year, it claimed business expense to the tune of ₹ 38,01,632/- and another amount of ₹ 5,75,000/-. This was on account of reimbursement towards its share of joint venture company set-up for the purpose of life insurance business and towards its share for branding and re-branding of joint venture agreement. Likewise, for the Assessment Year 1999-00, the assessee claimed a deduction in the sum of ₹ 5,76,975/-, which had been paid to M/s. IMRB for conducting market research on its propose insurance project. It is a fact that the proposed insurance business was never launched and the commercial or business activity in fact never undertaken by the

respondent assessee. Apart from these, for the Assessment Year 2000-01, an amount of ₹ 60,03,453/- had been claimed as payable to the assessee's staff and employees, under various heads on account of provision made for Monesana Wage Board Award. The Assessing Officer (AO), in respect of all these as well as in respect of other matters disallowed the claim. The assessee could not succeed in the appeal to the Commissioner of Income Tax. The appellate Commissioner, by the two orders, rejected these claims in respect of expenses payable as contribution to the assessee towards the proposed joint venture and the branding/re-branding of joint venture fee, observing as follows:

> *"5. Reimbursement expenses in Joint Venture for Insurance business and other expenses.*
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> *A sum of Rs.38,01,632/- represents reimbursement of expenses to a Joint Venture company set for the life Insurance business. A further sum of Rs.5,75, 000/- is on account of drafting and redrafting of Joint Venture agreement etc. making a total of Rs.43,76,632/- This expenses is not revenue nature and clearly is of capital in nature. This view India further support from the decision of various High Courts, as discussed below*
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> *In the case of Kanoria Chemicals & Industries Ltd., Vs. CIT (1995) 78 Taxman 455 (Cal), it was decided that an abortive capital expenditure is not different from any other capital expenditure. The Delhi High Court itself had taken me view mat me expenditure on an abandoned project would be capital expenditure in State Trading Corporation of India Ltd., Vs. CIT (1974) 94 ITR 496 (Delhi). Subsequently the Delhi High Court in Triveni Engineering Works Ltd. Vs. CIT (1998) 232 ITR 639 232*

ITR (Del) has held that an expenditure in the nature of capital expenditure cannot be treated as revenue expenditure only because the purpose for which the expenses was incurred could not be fulfilled. It was so held by the Delhi High Court that where the issue related to me claim for expenditure for getting a project report for a project which did not take off, it is the nature of the expenditure that is relevant and not whether the expenditure ultimately resulted in enduring benefit as long as it was an expenditure intended for acquiring such benefit.

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5.3 In the Written arguments, the Ld. Counsel for the appellant strongly objected to the treatment of expenditure as capital expenditure, it was stated that t6he appellant company has brand name "Hindustan Times" which is well known both nationally and internationally. It was stated that the company decided to explore the market of banking and insurance business due to its wide brand recognition and depth market penetration at base level. The relevant clause in Memorandum of Association of the appellant company was also filed. It was stated that in order to expand business, the appellant entered into a joint venture with CGU, one of the leading insurance company in Europe. It was stated that in the relevant assessment year, the appellant reimbursed Rs.43,76,632/- to HTCGU Ltd. as appellant's share of expenses and for drafting of a joint venture agreement. It was stated that the project could not go in line and was abandoned. It was stated that the aforesaid activity of insurance undertaken by the appellant was in consonance with the object of the appellant and was only expansion of the same business carried on by the appellant, it was stated that expenditure incurred for making feasibility studies for identifying projects that may be taken up advantageously even though later on project was

abandoned were allowable expenditure. Reliance in this regard was placed on the decision of Hon'ble Andhra Pradesh High Court in the case of CIT Vs. Coromandal Fertilizers 247 ITR 417. Reliance was also placed on the following decisions :-

i) Enpro India Ltd. Vs. DCIT Taxman 132 (Delhi)
ii) DCIT Vs. Assam Asbetos Ltd. 263 ITR 357 (Guhati)
iii) Sayaji Industries Ltd. Vs. DCIT 100 Taxman 110 (MAG)

5.4 It was also stated that the decisions relied upon by the A.O. are not applicable to the appellant's case. It was, however, admitted that in A.Y. 1999 – 2000-01, Ld. CIT (A) has treated the expenditure on the aforesaid project as capital in nature.

5.5 I have considered the reasoning given by the AO and the submissions made by the Ld. Counsel. The issue in question is clearly covered by the decisions of Hon'ble Delhi High Court in the case of State Trading Corpn. of India Ltd. (Supra) and Triveni Engineering Works Ltd., (supra). My Ld Predecessor as also in Appeal No. 80/02-03 for A.Y 1999-2000 vide order dated 20.02.2003 has treated the expenses as that of capital in nature. The detailed reasoning has been given by me Ld. Predecessor while deciding the issue. The same is the position for A.Y. 2000-01 wherein the disallowance has been confirmed in Appeal No. 86/03-04 vide order dated 27.07.2004. Since the facts are identical, the disallowance of Rs.38,01,632/- and Rs. 5,75,000/- is confirmed.

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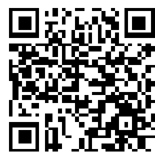
4. Similarly, in respect of the sum of ₹ 5,76,975/- towards market research report, it was held that:

"20. The next point of appeal relates to disallowance of Rs.5,76,975/- paid to M/s. IMRB for conducting a market research on Life Insurance business in India. The appellant company has argued that H.T. is a activity company and is engaged in various activities such as printing and publishing of Newspaper, distributing and broadcasting T.V. Firms, video magazines, Insurance etc., The objects of the appellant company include undertaking of insurance business. The appellant has cited the Supreme Court in Setabganj Sugar Mills Ltd., Vs. CIT 41 ITR 272 wherein the Court held that in determining whether there was any inter-connection, any interlacing, any inter-dependence, any unity, embracing the ventures, and whether the different ventures were so interlaced and so dovetailed into each other as to make them into the same business.

21. The appellant company has based his contention on the argument resting on 'unity of control', that is to say that even though the business any involve a diversity, there is a unifying factor which is the unity of control.

22. Having considered the arguments of the appellant and the case law cited, I am of the view that the moot question is not whether the appellant company was authorized by its 'objects clause' in the Memorandum and Articles of Association in undertake business of insurance or there was unity of control or otherwise unifying factor. The most question relate to capital or revenue nature of the expense. The main reference point would be, whether the expenditure resulted in an asset of an enduring nature. To my mind, the expenditure is of capital nature. The conclusion is also based on the ratio in CIT Vs. Shri Digvijay Cement Co. Ltd., (1986) 159 ITR 253 where the Gujarat High Court held that expenditure incurred in obtaining a feasibility report for setting up a ship yard, where the report was found not favourable for materializing, was held to be capital in nature. The same High Court re-confirmed the principle in Saurashtra



> *Cement Chemicals Indst. Ltd. Vs. CIT (1992) 196 ITR 237 (Gujarat) wherein it was held that expenditure incurred in obtaining a techno economic feasibility report and the consultation fee paid for a Soda Ash Plant, was held to be a capital expense."*

5. So far as the claim towards wage arrears liability to the extent of ₹ 60,03,453/- was concerned, the Commissioner held that since the assessee itself accepted that it could pay arrears in three installments, the provisions of Section 43B were attracted.

6. The assessee's appeals were allowed by the ITAT. It was held that the proposed insurance business expenditure amounted to expenditure in respect of an existing business. The Tribunal relied upon the judgment reported as *CIT v. Tata Chemicals* 256 ITR 395; *Produce Exchange Corporation Ltd. v. Commissioner of Income-tax* 77 ITR 739; *Jay Engineering Works Ltd. v. CIT* 212 CTR 562 and *CIT v. Monnet Industries Limited* 221 CTR (Del) 266. The Tribunal, therefore, held that the total amount of ₹ 43,78,607/- (₹ 38,01,632- business expenditure and ₹ 5,76,975/-) paid by the assessee as its share of the joint venture towards proposed insurance business could be properly allowed as deduction. Likewise, as regards the sum of ₹ 5,76,975/- incurred towards market research report fee, the Tribunal followed its reasoning with regard to expenditure towards existing business and also relied upon the judgment of this Court in *CIT v. Relaxo Footwears Limited* 293 ITR 231. Similarly, so far as the liability to make payments towards arrears and liability arising out of the Provident Fund, ESI arrears etc were concerned, the Tribunal held that the liability accrued in the Assessment year under consideration

since the award had been made in that year even though the mode and manner of payment was deferred; in other words, the liability accrued in the Assessment Year in question. The assessee had relied upon the decision of the Andhra Pradesh High Court in *S. Subba Rao & Co. v. Union of India* 173 ITR 708. Following that and the Special Bench ruling of the Tribunal in *Dy. CIT v. Glaxo Smith Kline Consumer Healthcare Ltd.* ITD 107 343 (Chd), it was held that the entire amount of ₹ 60 lakhs could be allowed.

7. The Revenue, in the present appeal relies upon the decision of this Court in *Triveni Engineering Works v. Commissioner of Income Tax* 232 ITR 639, arguing that expenditure towards a proposed business, the purposes for which was never fulfilled, can never be allowed. It was submitted that an abortive capital expenditure did not in any manner radically differ from any manner of capital expenditure. Even though the test of "interlacing" enunciated by the Supreme Court might *prima facie* be satisfied, in that, there might be unity of control and management and commonality of personnel, yet, if, in fact, the line of business proposed is entirely different from the existing one, and more importantly, if the proposed business never starts, the expenditure is capital in nature and liable to tax. Learned counsel submitted that the commissioning and receipt of a project report does not in any manner stand on a different footing and has to be likewise taxed as capital expenditure.

8. Learned counsel for the Revenue argued that the impugned judgment of the Tribunal to the extent it granted benefit of deduction for the sum of ₹ 6.03 Lakhs is contrary to the true meaning and

intendment of Section 43B which mandates that expenditure that is otherwise deductible would not be permitted if it falls within the accepted category and would be deductible only on actual payment. Learned counsel emphasized upon the imperative nature of the provision highlighting the non-obstante clause.

9. Learned counsel for the assessee contended that several judgments of the Supreme Court entitled *CIT v. Prithvi Insurance Company Ltd.* (1967) 63 ITR 632; *Hooghly Trust Pvt. Ltd. v. CIT* (1969) 73 ITR 685; *Produce Exchange Corporation Ltd. v. CIT* (1970) 77 ITR 739; *B.R. Ltd. v. V.P. Gupta* (1978) 113 ITR 647 as well as the judgment of this Court in *Monnet (supra)* and *CIT v. Modi Industries Limited* (1993) 200 ITR 341 have held that if there is common management, common business organization and administration, common fund and common place of business, the conclusion to be drawn is that for the two commercial activities, there is interconnection, interlacing and interdependence which would result in justifiable inference that both constitute same business. It was submitted that the ratio in those judgments are squarely applicable to the facts of this case because insurance business is entirely dependent on the funding by the assessee and utilization of its resources, such as its personnel as well as common place of business.

10. Having regard to these facts, there could have been only one conclusion that the expenses let-out for the proposed commercial activity were part of the existing business of the assessee. Learned counsel also submitted that so far as the expenditure towards payment of fee for conducting market research and survey is concerned, the

issue stands covered by the ruling of this Court in *CIT v. Priya Village Roadshows Ltd.* 332 ITR 594 and the judgment of the Punjab and Haryana High Court in CIT v. *Vardhman Spinning and General Mills* 176 Taxman 157 and judgments of the Gauhati High Court and the Andhra Pradesh High Courts. These amounts are clearly deductible as the feasibility study conducted by the assessee was for the same and existing business.

11. On the question of expenditure paid towards wage arrears, learned counsel emphasized that Section 43B cannot apply where statutory liability is incurred during the accounting year but payable on either due to operation of law or on account of arrangements not within the volition of the assessee. Relying on the ruling of the Andhra Pradesh high Court in *S. Subba Rao (supra),* it was argued that they attract Section 43B when not only the liability to pay tax is incurred in accounting year but when the amount also, in fact, is statutorily payable in the same year.

Questions No. 1 and 2

12. These questions are taken up together, since the discussion of law and its application is based on common principles. The question whether expenditure by an assessee concerns an "existing" business has engaged the attention of the Supreme Court on several occasions. The earliest decision on this issue was *Setabganj Sugar Mills Ltd. v. CIT,* [1961] 41 ITR 272. The law declared in that judgment was later applied in successive rulings (Ref. *CIT v. Prithvi Insurance Co. Ltd.,* [1967] 63 ITR 632*; Produce Exchange Corporation Ltd. v. CIT,* [1970] 77 ITR 739; *Standard Refinery and Distillery Ltd. v. CIT,*

[1971] 79 ITR 589; *Hooghly Trust (Pvt.) Ltd. v. CIT,* [1969] 73 ITR 685 and *Veecumsees v. CIT,* [1996] 220 ITR 185 (SC)). In *B. R. Ltd vs V. P. Gupta, C.I.T., Bombay,* AIR 1978 SC 1320, after discussing the principles settled in the previous judgments, the Court held that the applicable test – wherever the issue arises, would be to see if the two commercial activities are "interlinked" or "interlaced":

> *"A common management, a common business Organisation, a common administration, a common fund and a common place of business show in the instant case the interlacing and inter-dependence of the businesses carried on by the appellant.*
>
> *In support of his conclusion that the two businesses are different, the Commissioner relies on the circumstances that "there is a distinct and marked difference in the nature of goods dealt with" by the appellant and, "the procedure involved in the import of articles from foreign countries and the export of articles manufactured in India to different foreign countries is entirely different". These circumstances are not by themselves sufficient to establish that the business of import which the appellant was doing is not the same business as that of export. The decisive test, as held by this Court in Produce Exchange Corporation, (Supra) is unity of control and not the nature of the two lines of business. The Commissioner also fell into the error of supposing that, apart from the fact that the two activities must form an integral part of the entire business, the "main consideration which has to prevail is" whether, "notwithstanding the fact that the assessee may close one activity, it does not interfere in carrying on of the other activity". The fact that one business cannot conveniently be carried on after the closure of the other may furnish a strong indication that the two businesses constitute the same business. But the decision of this Court in Prithvi Insurance Co., (63 ITR 632.) shows that no decisive inference can be drawn from the fact that after the closure of one business, another may or may not conveniently be carried on.."*

Therefore, to be part of an existing business, the assessee has to satisfy that the business proposed, or undertaken involves common elements, such as unified administration and management, resource sharing, personnel sharing and common funding. If these are satisfied, the quest ends, and the business activity being looked into (to consider if it is new) would be deemed as part of the existing business.

13. In this case, the existing business of the assessee was in newspapers and publication. It examined the feasibility of starting life insurance business. There are no details as to whether that business could have involved the same personnel, or there were other commonalities, besides common funding. The commercial activities are different; the laws applicable are also different. An amendment to the law enabled foreign investment opportunity to the extent of 26% in any given domestic company (by an overseas company) in the insurance sector. This amendment was made in 2000 to the Insurance Act, 1938. The assessee apparently entered into a joint venture with some other concern. Its share of expenses to set up that joint venture, and the share of expenses for feasibility report, was held to be deductible, as it constituted part of an existing business.

14. There can be no dispute about the fact that the issue or question of whether a commercial activity or business is part of an existing business is essentially one of fact. The record reveals no document showing that the new activity was even permitted at the relevant time; if so, whether the assessee had obtained any license in this regard. Further, there could not be any assumption that there would be a common place of business, or that common staff and personnel would

be used. Indeed, the business was not even that of the assessee; it was a joint venture; the identity of the other partner is unknown. Having regard to these, the question of interconnection had to be seen in the light of the facts as they presented themselves in this case. In view of these, the mere circumstance that common funding of the (proposed) business existed, and there was a management which conceived the start of the new business activity, did not make the proposed joint venture business an "existing business" for the expenditure to qualify as revenue expenditure. For these reasons, the rulings relied upon by the assessee are distinguishable. The same reasoning would apply for feasibility study report fee. The decision in *Priya Village Road Show,* in this Court's opinion, is distinguishable. In that case, the existing business was sought to be expanded, and the market survey commissioned by the assessee was to get consumer feedback about its brand strength and performance. In this case, however, the market survey appears to be of a different kind. These expenses, in the court's opinion (joint venture share reimbursement, joint venture agreement drafting fee, market survey report fees) are pre-start up expenses in respect of an aborted activity, which would fall within the proscribed category spelt out in *Challapalli Sugars Ltd. V Commissioner of Income-tax* (1975) 98 ITR 167 (SC).

Question No. 3

15. As far as this question goes, the ITAT allowed the all the heads of expenditure. The argument of the revenue here is that commitments or liabilities arising out of the Wage award were not "payable" and their being shown as accrued liabilities had to be seen in the context of

the fact that the employer assessee had to pay these arrears in three installments. Therefore, the bar under Section 43B was attracted. For the sake of convenience, that provision is set out below:

> *"43B. CERTAIN DEDUCTIONSTO BE ONLY ON ACTUAL PAYMENT*
> *Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of -*
> *(a) Any sum payable by the assessee by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force,*
> *(b) Any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees,*
> *(c) Any sum referred to in clause (ii) of sub-section (1) of section 36,*
> *(d) Any sum payable by the assessee as interest on any loan or borrowing from any public financial institution or a state financial corporation or a state industrial investment corporation, in accordance with the terms and conditions of the agreement governing such loan or borrowing.*
> *(e) Any sum payable by the assessee as interest on any term loan from a scheduled bank in accordance with the terms and conditions of the agreement governing such loan, shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in section 28 of that previous year in which sum is actually paid by him.*
> *Provided that nothing contained in this section shall apply in relation to any sum referred to in clause (a) or clause (c) or clause (d) or clause (e) which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return:*

Provided further that no deduction shall, in respect of any sum referred to in clause (b), be allowed unless such sum has actually been paid in cash or by issue of a cheque or draft or by any other mode on or before the due date as defined in the Explanation below clause (va) of sub-section (1) of section 36 and where such payment has been made otherwise than in cash, the sum has been realised within fifteen days from the due date.
Explanation [1] : For the removal of doubts, it is hereby declared that where a deduction in respect of any sum referred to in clause (a) or clause (b) of this section is allowed in computing the income referred to in section 28 of the previous year (being a previous year relevant to the assessment year commencing on the 1st day of April, 1983 or any earlier assessment year) in which the liability to pay such sum was incurred by the assessee, the assessee shall not be entitled to any deduction under this section in respect of such sum in computing the income of the previous year in which the sum is actually paid by him.

Explanation 2 : For the purposes of clause (a), as in force at all material times, "any sum payable" means a sum for which the assessee incurred liability in the previous year even though such sum might not have been payable within that year under the relevant law.
Explanation 3 : For the removal of doubts, it is hereby declared that where a deduction in respect of any sum referred to in clause (c) or clause (d) of this section is allowed in computing the income referred to in section 28 of the previous year (being a previous year relevant to the assessment year commencing on the 1st day of April, 1988, or any earlier assessment year) in which the liability to pay such sum was incurred by the assessee, the assessee shall not be entitled to any deduction under this section in respect of such sum in computing the income of the previous year in which the sum is actually paid by him.

Explanation 3A : For the removal of doubts, it is hereby declared that where a deduction in respect of any sum referred

to in clause (e) of this section is allowed in computing the income referred to in section 28 of the previous year (being a previous year relevant to the assessment year commencing on the 1st day of April, 1996, or any earlier assessment year) in which the liability to pay such sum was incurred by the assessee, the assessee shall not be entitled to any deduction under this section in respect of such sum in computing the income of the previous year in which the sum is actually paid by him.

Explanation 4 : For the purposes of this section, - (a) "Public financial institution" shall have the meaning assigned to it in section 4A of the Companies Act, 1956 (1 of 1956);

(aa) "Scheduled bank" shall have the meaning assigned to it in clause (ii) of the Explanation to clause (viia) of sub-section (1) of section 36;

(b) "State financial corporation" means a financial corporation established under section 3 or section 3A or an institution notified under section 46 of the State Financial Corporations Act, 1951 (63 of 1951);

(c) "State industrial investment corporation" means a Government company within the meaning of section 617 of the Companies Act, 1956 (1 of 1956), engaged in the business of providing long-term finance for industrial projects and approved by the Central Government under clause (viii) of sub-section (1) of section 36."

It would be evident that the provision is an exception to what is "otherwise" deductible in the case of an assessee. Parliamentary intention, in enacting this provision was to preclude assesses from claiming as payable, on mercantile or accrual basis, certain specified categories of liabilities. In such cases, unless payments are actually

made, no deduction is admissible. A careful analysis of the main provision would reveal that the nature of expenses, i.e. arrears of salary and other benefits payable to employees, is not covered by Section 43-B at all. Such liabilities are not contributions to provident fund, superannuation or any other fund or plan which the employer is obliged to extend to its employees to fulfill its statutory or contractual obligations. The character of the amounts in this case is pure and simple arrears of wages, which were directed to be paid as a result of wage revision exercise mandated by an award. There is no doubt that the liability arose during the year covered by the Assessment Year. However, the award itself required payment in installments. It is not as if the assessee voluntarily deposited the amounts, when they were not payable, or claimed it when no such liabilities existed as a matter of fact. Having regard to these facts, the Court is of opinion that the Tribunal was justified in holding that the liabilities arising out of the Monesana Wage Board award were justifiably deductible as expenditure, and not covered by Section 43-B. As regards the other part of its order, the Tribunal itself did not grant relief in respect of contributions to Provident funds, and allowed only such portions as were actually paid. No other ground urged by the assessee was accepted. Therefore, the Court sees no reason to interfere with the order of the ITAT on this aspect.

16. For the above reasons, the first two questions are answered in favour of the Appellant/revenue, and against the assessee; the findings of the Tribunal in respect of the third question framed, are upheld. The

appeal is partly allowed, to the extent it covers the first two questions; the amounts arising as a result shall be added back to the income of the assessee and brought to tax. The appeals are partly allowed in the above terms.

S. RAVINDRA BHAT
(JUDGE)

R.V. EASWAR
(JUDGE)

SEPTEMBER 14, 2012