IN THE HIGH COURT OF KERALA AT ERNAKULAM

ITA.No. 1382 of 2009()

1. THE COMMISSIONER OF INCOME TAX,
... Petitioner

Vs

1. INTERNATIONAL CREATIVE FOODS (P) LTD.,
... Respondent

For Petitioner :SRI.JOSE JOSEPH, SC, FOR INCOME TAX

For Respondent :SRI.P.BALAKRISHNAN (E)

The Hon'ble MR. Justice C.N.RAMACHANDRAN NAIR
The Hon'ble MR. Justice K.SURENDRA MOHAN

Dated :01/10/2010

O R D E R

C .N. RAMACHANDRAN NAIR, &
K. SURENDRA MOHAN, JJ.

I. T. A. No. 1382 of 2009

Dated this the 1st day of October, 2010

JUDGMENT

Ramachandran Nair, J.

This is an appeal filed by the revenue under Section 260A of the Income Tax Act against the orders of the Tribunal on various questions raised in the appeal. We have heard senior counsel appearing for the revenue and Sri. P. Balakrishnan, counsel appearing for the respondent-assessee.

2. The first question raised pertains to assessee's claim for deduction of exchange rate fluctuation on the outstanding loan which is stated to be $ 25 lakhs. The assessing officer found that the loan remained outstanding and the exchange rate fluctuation is not actual liability but is only a provision which cannot be allowed. The contention of standing counsel is that the first appellate authority as well as the Tribunal allowed the claim by following Accounting Standards (AS) II issued by the Institute of Chartered Accountants of India. According to counsel for the revenue unless liability is accrued

the assessee cannot claim deduction. Counsel appearing for the assessee on the other hand contended that loan account maintained in the Balance Sheet is in Indian rupee and at the end of the previous year, foreign exchange fluctuation is added to the rupee liability which is claimed as deduction by the assessee. Even though we find force in the contention of assessee, there is nothing to indicate in the orders of any of the authorities below as to when the assessee availed the loan and for every year whether the assessee was claiming deduction whenever exchange rate fluctuation was adverse to them. If the practice adopted by the assessee is correct, then whenever exchange rate fluctuation goes to reduce the rupee liability of the loan, the same should be taken as income of the relevant year. We feel the matter requires reconsideration by the assessing officer after verifying the accounts for previous and subsequent years with regard to treatment of exchange rate fluctuation by the assessee. We therefore set aside the orders of the tribunal and that of the lower authorities and remand the matter to the assessing officer for fresh consideration after giving an opportunity to the assessee to produce accounts for previous and subsequent years and after verifying the assessment records of those years. If the

assessee has followed uniform practice of debiting and crediting the profit and loss account with variation in exchange rate fluctuation, then deduction should be allowed for this year, if the exchange rate fluctuation has caused increase in rupee liability of the loan account.

3. The next question raised pertains to assessee's claim of deduction of depreciation which was disallowed by the assessing officer for the reason that machinery itself is installed on 31.3.2002. It is seen that the first appellate authority as well as the Tribunal allowed the claim by following the decision of this Court in GEO TEC CORPORATION, 244 I.T.R. 452, wherein this Court has held that if machinery was kept ready for use, the assessee is entitled to claim depreciation. Senior counsel appearing for the revenue contended that the value of machinery itself is around Rs. 98 lakhs and there is nothing to indicate that the assessee has even kept the machinery ready for use even assuming that the same is sufficient for claiming depreciation. Counsel appearing for the assessee on the other hand submitted that none of the authorities below found that machinery was not kept ready for use, and so much so, going by the decision of this Court above referred, the assessee is rightly granted relief by the appellate authority.

We are unable to accept the contention of the assessee and we find that neither the CIT (Appeals) nor the Tribunal has considered relevant facts on this issue. In the first place, nobody has considered what the machinery is. The assessee obviously procured the machinery from manufacturer and machinery of this value will certainly involve installation with all integrated facilities, trial run and commissioning. Even assuming that keeping the machinery ready for use itself is sufficient for claiming depreciation, assessee has to establish that the machinery was brought to it's site and installation and commissioning were done which is possible only after trial run. Since none of the authorities has considered these matters, we allow the appeal on this issue and set aside the orders of the first appellate authority and that of the Tribunal and even assessment and remand the matter to the assessing officer to reconsider the same with documentary evidence about the transport, installation, trial run and commissioning of the machinery. If the machinery was not put to use in regular production, then the assessing officer will consider whether the judgment above referred will entitle the assessee for deduction based on findings of facts on the issues stated above.

4. The next ground pertains to assessee's entitlement for deduction of amounts paid to two consultants, one being Rs. 2,15,748/- and the other being Rs. 5 lakhs. After hearing both sides and after going through the Tribunal's order, we find no merit in this ground because assessee was carrying on business and the advice given by them was for the purpose of business and so much so, the Tribunal rightly held that expenditure is revenue in nature entitling the assessee for deduction. We therefore dismiss the appeal on this issue.

5. The next ground raised by the revenue pertains to disallowance of Rs. 13,27,234/- which is the expenses incurred by the assessee on behalf of Hindustan Lever Ltd. Senior counsel contended that expenditure was to be reimbursed by Hindustan Lever Ltd. and so much so it is not a real expenditure for the assessee. However, assessee's counsel contended that expenditure is a business expenditure and is allowable and there is nothing to indicate the Hindustan Lever ltd. has reimbursed though assessee may have a claim of reimbursement. We do not find any justification for the departmental appeal on this issue because if amount incurred by the assessee is reimbursed the same is assessable under Section 41(2) of the Act.

Consequently we dismiss the appeal on this issue.

6. The last issue raised by the revenue pertains to payment to foreign technicians of Rs. 1 46,160/- which was disallowed for the reason that tax was not deducted at source under Section 195(2) of the Act. The Tribunal reversed the disallowance made under Section 40(a) (i) of the Act for the reason that payments to non-resident Indians were not subject to tax. We find from the Tribunal's order that payment was made outside India for services rendered outside India and so much so, no TDS was called for. In view of this finding of the Tribunal, we do not find any ground to interfere with the order of the Tribunal on this issue. The appeal filed by the revenue on this issue is also dismissed.

In the result, Appeal is allowed to the extent indicated above remanding the first two issues referred above for fresh consideration by the assessing officer.

(C.N.RAMACHANDRAN NAIR)
Judge.

(K. SURENDRA MOHAN)
Judge.