IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 978 OF 2014

The Commissioner of Income Tax-8, Room No. 214, Aayakar Bhavan, M. K. Road, Mumbai – 400 020	}	Appellant
versus		
M/s. Parle Soft Drinks (Bangalore Pvt. Limited) (since amalgamated with Bisleri International Limited), Western Express Highway, Andheri (East), Mumbai – 400 099 PAN – AAACP4620J	}	Respondent

WITH
INCOME TAX APPEAL NO. 1765 OF 2014

Commissioner of Income Tax, Central – II, R. No. 414, 4th floor, Aayakar Bhavan, M. K. Road, Mumbai – 400 020	}	Appellant
versus		
M/s. Parle Bottling Pvt. Ltd. Western Express Highway, A-9, Andheri (E), Mumbai 400 099, PAN – AAACP8417H	}	Respondent

Mr. Arvind Pinto for the appellant in ITXA/978/2014.

Mr. A. R. Malhotra with Mr. N. A. Kazi for the appellant in ITXA/1765/2014.

Mr. J. D. Mistri-Senior Advocate with Mr.Hiten Chande i/b. M/s. PDS Legal for the respondent in ITXA/978/2014.

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Mr. Firoze Andhyarujina-Senior Advocate
with Mr. Sameer Dalal for the respondent
in ITXA/1765/2014.

**CORAM :- S. C. DHARMADHIKARI &
PRAKASH. D. NAIK, JJ.**

**Reserved on 25th September, 2017
Pronounced on 17th November, 2017**

JUDGMENT :- (Per S. C. Dharmadhikari, J.)

1. The Revenue has filed Income Tax Appeal No. 978 of 2014 challenging the order dated 20th September, 2013 of the Income Tax Appellate Tribunal, Bench at Mumbai. The assessment year is 1998-99.

2. The facts in brief are that the respondent assessee is a private company and during the relevant assessment year, it had shown income from the hire charges of vehicles and interest. During scrutiny of the return for assessment year 1998-99, the Assessing Officer noted that the company had received a sum of Rs.16.05 crores as compensation of a settlement for loss of its bottling rights with Coca Cola Company, USA. The company claimed the amount to be a capital receipt not liable to tax and was declared in the accounts as a capital reserve after deducting Rs.10 lakhs for professional fees paid.

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3. The Assessing Officer, on scrutinising the agreement dated 18th September, 1993, noted that the payment was made for settlement of dispute between the Coca Cola Company, UAS and the respondent assessee. Accordingly, the amount partakes the character of income in terms of section 2(24) of the Act and to be taxed as income from other sources. As an alternate argument canvassed by the assessee that the amount was received as surrender of the right of first refusal for giving up the rights of setting up a bottling plant, the Assessing Officer noted that this right was assigned to Limca Flavours and Fragrances Ltd. (LFFL) and the respondent assessee was not in a position to show how it had acquired the rights. That is how the assessee's alternate argument was also rejected.

4. The aggrieved assessee went in appeal before the Commissioner and complained that the assessment order dated 13th March, 2013 be set aside. The Commissioner held that the receipt was taxable as capital gains since section 55(2)(a) coveres such a situation as that of the respondent assessee. However, he held that the right of first refusal dated back to the 31st March, 1994, the date when the subsidiary company was formed for developing this new line of business or profit and hence the said receipt was taxable as long term capital gain.

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Since the receipt was held to be long term capital gain, it was not to be added to book profits as stipulated under section 115JA of the Act. This order was passed on 14th June, 2001 and the assessee, aggrieved by it, preferred a further appeal to the Tribunal. That was against part of the order of the Commissioner of Income Tax (Appeals). The Revenue also filed an appeal aggrieved by the other part of the order of the Commissioner of Income Tax (Appeals). The assessee filed cross objections. All these were heard together and the impugned order has been passed.

5. The Tribunal held that as per the master agreement, there was a clear indication regarding the formation of Bangalore subsidiary and this subsidiary would be given the bottling rights. The Tribunal held that the respondent company was entitled to receive compensation for breach of the right of first refusal from Coca Cola Company. Thus, the Tribunal concluded that the assessee has lost the source of its business or trading activity. The compensation received was a capital receipt, that was not taxable. It is this order of the Tribunal which is challenged in this appeal.

6. Mr. Arvind Pinto appearing in support of this appeal would submit that the questions of law and formulated at pages 6 and 7 of the paper book deserve admission of this appeal.

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7. Income Tax Appeal No. 1765 of 2014 is for the assessment year 1998-99. The assessee is the same.

8. The facts are that the Parle Group of Companies was engaged in the business of manufacturing, bottling and distribution of soft drinks and beverages under several popular brands, namely, Thums-Up, Limca, Gold Spot, Mazaa, Citra etc. The assessee had filed a return of income on 30th November, 1998 showing loss of Rs.2,16,70,502/- under normal provisions of the Act and book profit under section 115JA was shown at Rs.4,76,290/-.

9. The Assessing Officer observed, during the assessment, that the assessee had received a sum of Rs.16,05,60,000/- from Coco Cola Company of USA (TCCC), which was claimed to be exempt from tax on account of it being a capital receipt. This compensation was claimed to have been received as compensation related to the right of first refusal for bottling rights in the city of Pune. A reference was made to the master agreement with Coca Cola Company of September, 1993 for transfer of intellectual property rights in the nature of trademarks, knowhow, franchisee rights etc. in respect of various brands of beverages/soft drinks owned by the Parle Group. After the transfer of trademark, as per the master agreement, wherein

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the Parle Group of Companies along with Mr. Ramesh Chauhan and Mr. Prakash Chauhan is the seller and TCCC is the buyer along with Coco Cola South Asia Honding (Inc.) as the confirming party, bottling of soft drink was to be continued by Mr. Ramesh Chauhan and Mr. Prakash Chauhan through Parle Bottling Company having bottling rights in Pune while LFFL known as Aqua Bisleri, having bottling rights in the territory of Bangalore. In the said agreement itself, a draft of right of first refusal regarding bottling rights was also elaborated. However, later on, TCCC took strategic policy decision to set up its own bottling plant at Bangalore. This led to breach of obligation by TCCC in respect of the right of first refusal given to M/s. Parle Group in the master agreement and led to dispute between M/s. Parle Group and TCCC. This dispute was ultimately settled with TCCC agreeing to pay US$4.5 million which in terms of Indian Rupees was Rs.16,05,82,500/-. The Assessing Officer disallowed Rs.16,05,82,500/- on protective basis and also made addition of Rs.42,33,833/- on account of 100% depreciation on bottles. The assessment under section 143(3) was completed on 30th March, 2001 assessing the total income at Rs.14,87,82,130/-. The Assessing Officer computed book profit under section 115JA of the Act at Rs.4,86,44,290/-.

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10. As against this order and being aggrieved by it, an appeal was preferred to the Commissioner of Income Tax (Appeals). He passed an order on 29th November, 2012 holding that the sale proceeds relate to capital assets and hence, the same is to be reduced from the block assets.

11. The Revenue did not accept this order of the Commissioner and preferred an appeal to the Tribunal. The Tribunal held that the compensation received by the assessee is the capital receipt and since there was no transfer for extinguishment of any rights, there is no question of capital gain and accordingly, the Tribunal dismissed the Revenue's appeal.

12. Mr. Malhotra appearing for the Revenue in this appeal would submit that all the four questions proposed at pages 6 and 7 of the paper book are substantial questions of law. He would submit that the Tribunal failed to appreciate the relevant provisions of the Income Tax Act, 1961 in their right perspective. Mr. Malhotra would submit that the Tribunal was aware that this respondent had obtained benefits and which could not be be held to be revenue receipts. Further, the Tribunal erred in ignoring the reasoning of the Assessing Officer that up to the assessment year 1995-96, the assessee had claimed the purchases of bottles and crates as revenue expenses as the value was less than

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Rs.5,000/- though the expenses were incurred for capital assets and therefore, the amounts received against such assets will be revenue receipts.

13. The appellant-Revenue has pointed out, according to Mr.Malhotra, these bottles and crates sold during the year were admittedly worn out over the period of time and the assessee was not able to furnish the details of sale of bottles on which 100% depreciation had been allowed and therefore, such assets purchased prior to 1st April, 1995, on which 100% depreciation had been claimed and allowed, were logically sold first vis-a-vis such assets purchased on or after 1st April, 1995 on which 50% depreciation had been allowed. Thus, Mr. Malhotra urges that the compensation of Rs. 16,05,60,000/- should have been treated as income. Secondly, he has adopted the arguments of the Revenue in Income Tax Appeal No. 978 of 2014. Thirdly, he has addressed us on the two other questions proposed as question nos. 6.3 and 6.4 at page 7 of the paper book.

14. Mr. Malhotra relied upon a judgment of the Hon'ble Supreme Court in the case of *Commissioner of Income Tax vs. Shantilal (P.) Ltd.*[1].

1 **(1983) 144 ITR 57**

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15. Mr. Mistri and Mr. Andhyarujina learned senior counsel appearing for the respondent would submit that there is no merit in both the appeals. They would submit that the Tribunal, in Appeal No. 978 of 2014, had before it the undisputed facts. The compensation amount can be treated as capital receipt or revenue receipt. In other words, is it non-taxable or taxable. They would submit that the Hon'ble Supreme Court has in the judgment in the case of *Kettlewell Bullen and Co. Ltd. vs. Commissioner of Income Tax, Calcutta*[2] already settled the tests. These tests emerge from a decision of the Hon'ble Supreme Court in the case of *Commissioner of Income Tax, Hyderabad-Decan vs. Vazir Sultan and Sons*[3]. The Tribunal, while being guided by these tests and applying them to the facts and circumstances of this case, concluded that the receipt of compensation amount must be considered in the backdrop of the master agreement. Under the master agreement, the right of first refusal was vested with LFFL to carry out the bottling activities in the territory of Bangalore. There was a clear indication that there would be formation of Bangalore subsidiary and there would be an investment agreement also between the parties for this purpose. The necessary guidelines as to how the subsidiary would be formed, various assignments of the bottling rights only to such a newly

2 **(1964) LIII ITR 261 (SC)**
3 **(1959) XXXVI ITR 175 (SC)**

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formed company and to be held and formed by Parle Group and later on the Coca Cola Company will join in after subscribing 30% of the shares, are the provisions or guidelines in the master agreement itself. It was to this subsidiary company that the bottling rights were to be given in the territory of Bangalore. This subsidiary company was formed as Parle Soft Drinks Pvt. Ltd. Thus, the assessee company was formed only for carrying out bottling activities in the territory of Bangalore. There was, thus, no dispute that the assessee was entitled to receive the compensation amount on the breach of this agreement from Coca Cola Company. Thus, even though the right of first refusal was with LFFL, but it was always agreed upon by the parties that the same should be for the newly formed subsidiary at Bangalore. That Bangalore subsidiary is the assessee company only. Once these bottling activities were to be carried out for the Coca Cola Company and the Bangalore territory that the assessee was formed. It was not necessary that the assessee should have installed entire plant and machinery for carrying on such business. The right of first refusal itself stated a substantial right and foundation on which the assessee could have built its bottling business. If such right would have been assigned to the assessee, it would have been the source of assessee's income and profit making apparatus. The assessee has also submitted its business

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plans and various modes for carrying out the bottling business to the Coca Cola Company. There is no dispute that the Coca Cola Company has breached the agreement and particularly the right of first refusal by not assigning the rights. It was on account of breach of this agreement that the compensation amount was settled between the parties. The fundamental right for starting the bottling business was taken away as a result of breach of the right of first refusal by the Coca Cola Company. That is the reason why the Coca Cola Company paid this amount to the assessee and not to LFFL.

16. To our mind, therefore, all the tests that were evolved by the Hon'ble Supreme Court in the decisions noted above, have been applied and to arrive at the correct conclusion. We do not think that the view of the Tribunal is any way erroneous or illegal. Thus, it is not vitiated by any error of law apparent on the face of the record of perversity.

17. Mr. Mistry was also right in relying upon the Judgment of the Hon'ble Supreme Court in the case of Oberoi Hotel Pvt. Ltd. vs. Commissioner of Income Tax[4]. The Hon'ble Supreme Court, in this decision, referred to its earlier decision in the case of *Kettlewell Bullen and Co. Ltd.* (supra) and held as under:-

4 (1999) 236 ITR 903

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"…..

The question whether the receipt is capital or revenue is to be determined by drawing a conclusion of law ultimately from the facts of the particular case and it is not possible to lay down any single test as infallible or any single criterion as decisive. This court in the case of *Karam Chand Thapar and Bros. P. Ltd. v. CIT [1971] 80 ITR 167,* discussed and held that in *CIT v. Chari and Chari Ltd. [1965] 57 ITR 400 (SC)*, it was held that ordinarily compensation for loss of an office or agency is regarded as a capital receipt, but this rule is subject to an exception that payment received even for termination of an agency agreement would be revenue and not capital in a case where the agency was one of many which the assessee held and its termination did not impair the profit-making structure of the assessee, but was within the framework of the business, it being a necessary incident of the business that existing agencies may be terminated and fresh agencies may be taken. Thereafter the court held that it was difficult to lay down a precise principle of universal application but various workable rules have been evolved for guidance.

….."

18. Thus, the matter has to be approached from a factual view point.

19. Even in the case of Parle Bottling Private Limited, where the Assessing Officer has treated the receipt to be taxed as long term capital gains on protective basis and the learned Commissioner of Income Tax (Appeals) has treated the same receipt to be taxed as casual and non-recurring taxable income under section 10(3) of the Act, the argument was that the assessee received this sum of Rs.16,05,60,000/- as compensation from the Coca Cola Company for breach of the right of first refusal

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agreement with regard to bottling rights of Pune territory. The Assessing Officer, according to the assessee, solely relied upon the observations and findings in the assessment order dated 30th March, 2001 in the case of Aqua Bisslery Limited, wherein, the receipt was taxed under the head "long term capital gains". Once the factual basis was laid before the Commissioner (Appeals) and it was found that the same was identical to the case of Parle Soft Drinks Private Limited except for the fact that in the present case, the assessee was in the bottling business for Parle Group of Companies, there was a right of first refusal and the assessee was to carry on the business of bottling for the Coca Cola Company. A detailed business plan was submitted. However, the Coca Cola Company, without any specific reason, rejected the business plan. Thus, there was a breach of the right of first appeal, there was after negotiation received compensation in the above sum, which was shown as non-taxable capital receipt. The argument was identical that the Coca Cola Company has deprived the assessee of all potential right and that was to set up a bottling plant for Pune territory. There was a breach of contract giving rise to a claim for damages and same was paid on account of failure to honour the commitment. That is capital in nature. That source of income, by way of setting up of a bottling plant at Pune territory was lost forever. Hence, relying upon the judgment in the case of *Oberoi*

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Hotel Pvt. Ltd. (supra), the argument that such a receipt cannot be taxed as revenue receipt or casual income, was accepted. The Tribunal, in para 25 of the order under appeal noted the arguments of the Revenue and particularly the summary of the same. Thereafter, the Tribunal dealt with the main dispute and as above.

20. We do not, therefore, think that a different view on facts could have been taken in the case of Parle Bottling Private Limited.

21. The additional point raised by Mr. Malhotra with regard to the depreciation has also been answered properly. We do not see any merit in the argument of the Revenue on the point that the net compensation amount received by the assessee from the Coca Cola company is a long term capital gain and therefore added to book profit computed under section 115JA of the Income Tax Act, 1961. The Tribunal, in dealing with this argument in para 48 has held that the amount received by the assessee is not a capital gain, but a capital receipt, which is not taxable. Hence, the ground becomes purely academic.

22. The common findings of the Tribunal and endorsed by us thus take care of the Revenue's Appeal No. 978 of 2014.

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23. In Appeal No. 1765 of 2014, the two additional questions on the point of depreciation, namely, questions 6.3 and 6.4 also cannot be termed as substantial questions of law. The Tribunal had before it a challenge to the direction of the Commissioner of Income Tax (Appeals) to treat the sale of consideration of bottles and crates as part of the block of assets. The Assessing Officer shown the sale of bottles amounting to Rs. 84,67,666/- from the block of assets comprising bottles on which depreciation @ 50% is admissible. He also noted that up to the assessment year 1995-96, the assessee has claimed depreciation @ 100% on bottles and crates as the cost was less than Rs.5,000/-. He directed the assessee to furnish details of these bottles on which 100% depreciation has been claimed in the previous year. The assessee replied that no separate registers have been maintained for the bottles and also accepted that the bottles on which 100% depreciation has been claimed cannot be distinguished from the bottles on which depreciation of 50% has been claimed in the year under consideration. There was a reply given to the show cause notice by the assessee and the assessee's contentions were rejected by the assessing officer on the ground that up to the assessment year 1995-96, the assessee has claimed expenditure on the purchase of bottles and crates as revenue expenditure being the value less than Rs.5,000/- and in the assessment year in

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question, namely, 1998-99, the assessee has failed to prove whether these bottles and crates sold were purchased after 31st March, 1995. Accordingly, the Assessing Officer allowed the depreciation on the block of assets comprising of bottles and crates of Rs.42,38,833/- and the balance was added. On these facts and findings of the Assessing Officer, the Tribunal proceeded to then note the conclusions of the Commissioner of Income Tax (Appeals) deleting the addition. Thus, the conclusions are reproduced in para 80 of the order under appeal. The Tribunal concluded that the Commissioner of Income Tax (Appeals) was right that sale proceeds on a capital assets cannot be held to be a revenue receipt and after the sale, the block of assets have been reduced and accordingly whatever is there in the block of assets, deprecation has to be allowed in accordance with the provisions of law. Thus, the finding of fact recorded by the Commissioner of Income Tax (Appeals) has been endorsed and confirmed by the Tribunal.

24. We do not think that this finding of fact is perverse or vitiated by an error of law apparent on the face of the record.

25. Consequently, we find that none of the questions in both the appeals can be termed as substantial questions of law. Some of the questions are proposed by the revenue though the Tribunal

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has found that these were purely academic and do not survive after the principal or primary issue is answered in favour of the assessee.

26. We, therefore, proceed to dismiss both these appeals, but without any order as to costs.

27. We do not see how any reliance can be placed by the Revenue on the judgment of the Hon'ble Supreme Court in the case of *Commissioner of Income Tax vs. Shantilal (P.) Ltd.* (supra). Mr. Malhotra would pick up a stray sentence from the Hon'ble Supreme Court judgment and urge that the award of damages or breach of a contract is not a same thing as a party to the contract accepting satisfaction of the contract otherwise than in accordance with the original terms thereof. We do not think how this observation or conclusion can be relied upon for what happened in the case of *Shantilal* (P.) Ltd. (supra) was that the assessee company contracted to sell certain commodity to a party. It was unable to effect delivery due to a sharp rise in the price of the commodity. This dispute, which arose due to non-fulfillment of the contract was referred to arbitration and was settled by an award with the result that the assessee was obliged to pay compensation by way of damages to the other party. It is claimed that the deduction of the amount so paid as business loss

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was disallowed by the Income Tax Officer on the ground that the transaction was a speculative transaction as defined in section 43(5) of the Income Tax Act, 1961. The appellate Commissioner, however, allowed this claim of the assessee on the ground that the impugned payment represented a settlement of damages on breach of the contract, which was distinct from the settlement of a contract. The Tribunal dismissed the departmental appeal against this order. Hence, the reference.

28. The Hon'ble Supreme Court, on noticing the rival contentions, came to the conclusion that the award of damages for breach of contract is not the same thing as a party to the contract accepting satisfaction of the contract otherwise than in accordance with the original terms thereof. Thus, this is not a speculative transaction. A speculative transaction has been defined. The contract before the Hon'ble Supreme Court was questioned. The Hon'ble Supreme Court held that award of damages or breach of contract did not bring the transaction within the definition of "speculative transaction" set-forth in clause (5) of section 43. It is that matter which was highlighted by the Revenue. The Tribunal found it to be not speculative transaction. There was a breach of the contract. It is not, therefore, proper to read this one sentence in isolation. Preceding

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that sentence, the Hon'ble Supreme Court has made some pertinent observations. Even the later observations would clearly clinch the matter. What the award before the Hon'ble Supreme Court settled was the claim of damages. The dispute between the parties in relation to such claim is settled by the award. The contract cannot be said to be settled and that is settled, according to the Hon'ble Supreme Court, by either performance or the other requirements stipulated in law. It is in these circumstances that the Tribunal held that the transaction cannot be described as a speculative transaction within the meaning of clause (5) of section 43, where, there is a breach of contract and on a dispute between the parties, damages are by compensation by an arbitration award. We must not lose focus of this essential controversy dealt with and only pick one sentence, as desired by Mr. Malhotra, and apply it to the facts and circumstances to the present case. The reliance on this decision is, therefore, clearly misplaced.

(PRAKASH.D.NAIK, J.) **(S.C.DHARMADHIKARI, J.)**

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