www.taxguru.in

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES " B ", MUMBAI

BEFORE SHRI G.E. VEERABHADRAPPA, HON'BLE PRESIDENT AND SHRI AMIT SHUKLA, JUDICIAL MEMBER

ITA No.4511 /Mum/2011

Assessment Year: 2006-2007

M/s Brightest Circle Jewellery Pvt. Ltd. Popular House, Plot No.119, Road No.19, MIDC, Andheri (East), Mumbai-400 093. PAN NO.AACCB4270E	Vs.	**ACIT 8 (3) (OSD), Mumbai.**
Appellant		Respondent

Appellant by	:	Mrs.Aarti Vissamji
Respondent by	:	Mr. Pravin Varma
Date of hearing	:	11th April 2012
Date of pronouncement	:	11th May 2012

O R D E R

PER AMIT SHUKLA (J.M.) :

This appeal has been preferred by the assessee against order dated 20-1-2010, passed by CIT(A)-16, Mumbai for the quantum of assessment passed under Section 143(3) for the assessment year 2006-2007.

2. The solitary grievance of the assessee herein this appeal is against enhancement and disallowance of ₹.3,8962,423/- made on account of sales promotion expenses by the CIT(A), treating it to be as capital expenditure as against disallowance of 20% made by the Assessing Officer at ₹.58,44,364/-.

www.taxguru.in

3. The factual matrix of the case is that the assessee-company is engaged in the business of licensing, manufacturing, distribution and selling of diamonds under the brand “Nakshatra”. In the course of scrutiny proceedings, the Assessing Officer noted that the assessee has claimed sales promotion expenses of ₹.3,89,62,423/-, which was towards the payment to ‘Diamond Trading Company Limited’ (in short ‘DTC’) for its share on promotion of mark “Nakshatra”. From the perusal of the copy of the invoice raised by the DTC for sum $57300 & $160000, he took note of the remark appearing in the invoice that it is a reimbursement of share contribution by the assessee on the actual marketing campaign expenditure incurred during the period for promotion of the mark “Nakshatra”. In response to the query raised by the Assessing Officer as to why these expenses be not disallowed, it was submitted that the assessee company has entered into an agreement dated 8-11-2005 with the DTC and ‘D’Beers Centenary AG’ (in short ‘DBC AG’), a Swiss based company which has licensed the mark of “Nakshatra” to DTC Ltd., London, who in turn has sub-licensed the mark to the assessee company. The DTC has devised and deployed a marketing campaign to grow consumer demand for diamond jewellery in India by promoting the mark “Nakshatra”. The assessee’s contention was that as per the agreement, the assessee company is using the mark “Nakshatra” for creating awareness in the

www.taxguru.in

market for highly standardised certified diamond jewellery to increase its sales.

3.1 The Assessing Officer partly admitted the explanation of the assessee that the expenses incurred from the marketing campaign is of revenue in nature, however, the payments made for use of brand "Nakshatra" is for use of license also which is capital in nature. Therefore, he earmarked 20% of the expenditure i.e. ₹.77,92,485/- towards payment for use of mark "Nakshatra" as capital expenditure. Being an intangible asset, he allowed depreciation @ 25% (i.e. ₹.19,48,141/-) on this capital expenses and worked out the disallowance at ₹.58,44,364/-.

4. Aggrieved by the aforesaid disallowance and the view taken by the Assessing Officer, the assessee in the first appeal before the CIT(A), contended that the expenses have been incurred for creating awareness about branded jewellery in India and to make potential buyers aware about a availability of such branded jewellery. Therefore, the expenses incurred is for sales promotion only which is wholly and exclusively for the purpose of business. It was further submitted that these expenses have not brought into existence any asset of enduring nature but a legitimate business expenditure intimately connected with the business of the assessee and, therefore, these expenses do not accrued to the assessee in the capital filed but only in the revenue

www.taxguru.in

field. In support of its contentions, reliance was placed on the following judgments before the CIT(A) :-

i) Empire Jute Company Ltd. Vs. CIT (17 CTR 113);
ii) ITAT, Delhi E-Bench in the case of Modi Olivetti Ltd.; and
iii) ITAT Mumbai in the case of Gitanjali Gold & Precious Ltd.(ITA No.4232/Mum/2005)

5. Learned CIT (A) after carefully perusing the agreement dated 8-11-2005 entered into with the assessee, DTC Ltd. and DBC AG and taking note of the various clauses (which has been reproduced from pages 5 to 7 of the appellate order), he reached to the following conclusion which are very relevant :-

> *"2.3.3 From a perusal of the aforesaid agreement it is apparently clear that the entire expenditure incurred by the DTC and DBCAG is for the effective marketing strategy to grow consumer demand for diamond and Jewellery and to identify the consumer demand with the Mark owned by the DTC and DBCAG. The entire expenditure is therefore, for the creation of the Mark i.e. Nakshatra and the Brightest Circle of light. It is also abundantly clarified in the agreement that the DTC will also contribute to the promotion of the Mark and will take a certain portion of the money spent on the Mark from the appellant company. It is also clarified that entire rights and goodwill created through the advertisement are owned by the DTC or by DBCAG. The appellant has no right in the intellectual property right and goodwill. Further, it is also abundantly clear that the appellant is debarred from doing anything to damage the goodwill of the Mark or the DTC Mark. There is special Indemnity Clause (15) which has been specifically instituted to indemnify in case the appellant company does anything against the reputation of mark of DTC or DBCAG. Further, the appellant is*

www.taxguru.in

also given an option in case if he wants to own the Mark of the DBCAG and DTC. In that event a elaborate procedure has been prescribed in clause 20 of the agreement which clearly provides that entire expenditure incurred in promoting and advertising the Mark upto the transfer date is to be mutually agreed by both the DTC as well as the appellant company and the percentage of the total contribution represented by the DTC to the total contribution on the transfer day shall be the percentage applied to the value of Mark to give DTC percentage share in the value of Mark. Therefore, the entire expenditure incurred by the DTC as well as the appellant on the date of transfer shall be taken as value of Mark."

6. After drawing the above inference from the various clauses of the agreement, he proceeded to interpret the meaning of the word "brand" and discussed various case laws viz. **E.D. Sasoon J. David & Co.(P.) Ltd. v. CIT [1979] 118 ITR 261; CIT v. Chandulal Keshavlal & Co.(1960] 3 SCR 38 at page 48 : 38 ITR 601 (SC); Alembic Chemicals Works Co. Ltd. [1989] 177 ITR 377 (SC) and Empire Jute Co. Ltd. [1980] 124 ITR 1 (SC)**, to draw the conclusion that the entire expenditure of ₹.3,89,62,423/-, is capital expenditure. He thus, enhanced the disallowance from ₹.58,44,364/- to ₹.3,89,62,423/- after making following observations :-

"2.3.12. In view of the foregoing and after perusing the entire facts of the appellant's case, it is abundantly clear that through expenditure incurred is revenue in nature howsoever, the benefit accrues in the capital filed. The Hon'ble Supreme Court has laid down a test wherein it has been specified that what is material is to consider the nature of advantage in a

www.taxguru.in

*commercial sense and it is only where the advantage is in the nature of capital field, the expenditure has to be tr5eated as the capital expenditure. In the instant case I find that the entire expenditure incurred by the appellant is in the capital field i.e. creation of a property and goodwill in the form of brand or mark of DTC. Therefore, I find the entire expenditure claimed by the appellant amounting to ₹.3,89,62,423/- as an expenditure is in the filed of capital. Accordingly, during the course of appellate proceedings the ld. AR of the appellant was asked as to why the entire expenditure should not be disallowed being capital in nature. The Ld. AR of the appellant has stated that the entire expenditure is in the revenue field and is spent for the promotion of sale of branded Jewellery and it does not accrue any benefits of enduring nature to the appellant. The arguments of the appellant were considered and it is found that there is nothing new in the arguments. They are the same argument which were given by the appellant before the Ld. AO. It is, therefore, held that the A.O. has apparently erred in treating only 20% of such payments as capital expenditure for the reasons discussed in detailed in my appellate order supra. Accordingly, it is held that the entire expenditure spent by the appellant amounting to ₹.3,89,62,423/- reimbursement to DTC as capital in nature and is not a permissible deduction u/s.37(1). In the instant case since the appellant does not own the brand or the mark, the appellant is not entitled to capitalize the expenditure as intangible asset and is therefore, not even allowed to claim the depreciation as held by the Ld. A.O.. This ground of appeal is decided against the appellant and **is dismissed**.*

7. Learned Senior Counsel appearing on behalf of the assessee submitted that by entering into the agreement with the international firms like 'DTC' and 'DBC AG', the assessee's endeavour was to

www.taxguru.in

create awareness to the potential buyers in the country for branded and quality products in diamond jewellery which otherwise in the country was in a very disorganised manner. She drew our attention to various clauses of the agreement whereby the DTC has devised and deployed a marketing campaign to utilize the mark "Nakshatra" and to grow consumer demand to diamond jewellery in India. The mark "Nakshatra" belongs to 'DBCAG' which has been licensed to 'DTC' to use and promote the said mark. The DTC in turn has given sub-license to third parties to use the mark which included the assessee company also. She drew our specific attention to clause 2.1 which read as under :-

> "2.1 In consideration of the undertakings given by the Company contained in this Agreement, the DTC hereby grants the Company, for the initial Term, a non-assignable, royalty-free, sole licence to use the Mark (i) on or in relation to Licensed Products in the Territory (ii) on or in relation to retail cutlets and concession stands in the Territory; and (iii) in Company Advertisements in the marketing, supply and sale of Licensed Products in the Territory."

Relying on the said clause, she submitted that the mark has been granted to the assessee company for the initial term which is non-assignable and royalty-free and contended that the assessee is only a sub-licencee on a kind of franchisee to sell the product under the mark "Nakshatra", which belongs to DBCAG and DTC.

7.1 She also drew our attention to Clause 11 relating to intellectual property rights and goodwill to show that the assessee company does

www.taxguru.in

not have any right, title or interest in the Mark "Nakshatra" and right to use and the copyrights vests with the DTC only. The goodwill resulting from the use of the "Nakshatra" Mark by the assessee company will give enduring the benefit to DBCAG and DTC. On the contrary there is covenant that the assessee company will not do anything to damage the goodwill or diminish the rights or interests of the DTC or DBCAG. From various other clauses, she submitted that the mark "Nakshatra" is only a brand which has to be used for manufacturing or selling of the products. She further drew our attention to the logo and advertisement campaign of the mark "Nakshatra" to show that this brand does not belong to the assessee company as it carries the signature of DTC. Lastly, she submitted that due to usage of this mark, the sales of company had been increasing manifold year by year. The sum and substance of her argument that from all the angles the expenditure incurred are purely in the nature of sales and promotion which was reimbursed to DTC and was in the nature of revenue expenditure which should be allowed as a whole. In support of her contentions, she relied upon the following case law :-

i) Glaxo Smith Kline Consumer Healthcare Ltd. Vs. ACIT, reported in (2007) 112 TTJ (Chd) 94;

ii) M/s Gitanjali Gold & Precious Ltd. Vs. ITO, (ITA No.4232/Mum/2005, Passed by ITAT Mumbai "H" Bench vide order dated 22-5-2008)

iii) JCIT Vs. Modi OPlivetti Ltd., reported in (2004) 84 TTJ (Del) 1038; and

iv) CIT Vs. Salora International Ltd., reported in (2009) 308 ITR 199 (Delhi).

www.taxguru.in

8. *Per Contra*, learned CIT DR also referred to the various clauses of the agreement in support his contentions that the assessee was in fact involved in the promotion of brand which is in the nature of capital expenditure as it amounts payment for a licence. He also drew our attention to various findings and observations of the CIT(A) as has been discussed by us in the foregoing paragraphs. His main contention is that the assessee has been using the licence for manufacturing and selling of jewellery under the brand "Nakshatra" and the use of licence comes within the arena of capital fee and, thus, entire expenditure is capital expenditure.

9. We have carefully considered the rival submissions, perused the material on record and the findings given in the impugned orders. The entire controversy revolves around as to whether the payment made by the assessee towards sales promotion expenses to DTC for the usage of mark "Nakshatra" is capital expenditure or revenue in nature. From the facts and material on record, it is undisputed fact that mark "Nakshatra" is owned by DBCAG and DTC. This is evident from the agreement dated 8-11-2005 entered between the DTC, DBCAG and the assessee, that the mark belongs to DBCAG and DTC will contribute to the promotion of the mark for which the expenditure incurred, would be apportioned and same would be reimbursed by the assessee company. The entire rights and goodwill through marketing campaign and advertisement will be owned by DBCAG and DTC. The

www.taxguru.in

assessee has no right either on the mark or in the intellectual property right or the goodwill of the mark. The assessee also cannot do anything to damage either the goodwill of the mark or the mark itself. The assessee is only authorised to make diamond jewellery and sell them under the brand of "Nakshatra". Whatever goodwill is generated through such sales and promotion will not belong to the assessee but to the DTC and DBCAG.

9.1 From the above, it can be inferred that neither the assessee owns the mark "Nakshatra" nor enjoys the goodwill or intellectual property right of "Nakshatra". Whatever the benefit is derived from sales and promotion of such products under the mark of "Nakshatra", the enduring benefit belongs to DTC and what the assessee is enjoying is only profit from selling of the premium products under the said mark. The goodwill here in this case is an asset which does not belong to the assessee company but at the same time the assessee is enjoying the fruits of profit from usage of such a goodwill for which it is making payment to the owner of such asset. Thus, the payment made by the assessee does not go to create enduring benefit of an asset belonging to the assessee company but augmenting its sale and resultantly its profit. Therefore, such an expenditure, in our view, is definitely of revenue field. The advantage of using mark "Nakshatra" is mainly facilitating the assessee's business operation and to augment

www.taxguru.in

more profitability without generating any capital or fixed capital to the assessee.

9.2 Even for the sake of the argument, it is presumed that using of the mark "Nakshatra" is giving advantage of enduring benefit to the assessee or it is a some kind of license, still it would be on revenue account as there is no creation of an asset tangible or intangible to the assessee. The Hon'ble Supreme Court in the case of **Empire Jute Co. Ltd. Vs. Commissioner of Income Tax, reported in [1980] ITR Vol.124. Page 1**, has held that no tests for distinguishing between capital and revenue expenditure is paramount or conclusive. There is no all embracing formula which can provide a ready solution to the problem, whether it is a capital expenditure or revenue expenditure. Their Lordships have held that even tests of enduring benefit at times gets failed as not each and every advantage of enduring nature can be of capital field. The most celebrated observations of their Lordships on this account are reproduced herein below :-

> *"There may be cases where expenditure, even if incurred for obtaining advantage of enduring benefit, may, none the less, be on revenue account and the test of enduring benefit may break down. It is not every advantage of enduring nature acquired by an assessee that brings the case within the principle laid down in this test. What is material to consider is the nature of the advantage in a commercial sense and it is only where the advantage is in the capital field that the expenditure would be disallowable on an application of this test. If the advantage consists merely in facilitating the assessee's trading operations*

www.taxguru.in

or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future. The test of enduring benefit, is therefore, not a certain or conclusive test and it cannot be applied blindly and mechanically without regard to the particular facts and circumstances of a given case."

Here in this case the usage of mark is facilitating the assessee's trading operations, without any impact on fixed capital. Thus, the expenditure here in this case is on revenue account. It is not even a license as no royalty or fee is paid by the assessee to use the mark.

10. Such a payment has to be also seen from the context of business necessity or expediency also. If the outgoing expenditure is so intricately related to carrying on or the conduct of the business that it may be regarded as integral part of the profit earning process and not for an acquisition of an asset or a right of the permanent character, the possession of which is condition of the carrying on of the business, the expenditure may be regarded as revenue expenditure. Here in this case, payment on account of sales promotion to DTC was not for acquisition of an asset or a right of a permanent character. The payment was for a promotion of a brand from which the assessee company is getting benefit for carrying on its business for earning profit. The usage of the mark "Nakshatra" is enabling the assessee to make more sales but it has not resulted in any kind of addition or

www.taxguru.in

augmentation of any profit making asset. It may also happen that the assessee may choose not to use the mark or the owner of the mark decline the right to use of the mark, then in that situation there is no loss to the assessee on capital side. The inference drawn by the CIT(A) from interpretation of clauses of agreement was though right as highlighted in para 5 above, however, the conclusion drawn by him ultimately is erroneous. Thus, the findings of the CIT(A) that even though the expenditure incurred is revenue in nature but the benefit accrues in the capital field is not correct. Thus, we hold that the entire expenditure of ₹.3,89,62,423/- incurred by the assessee on sales promotion is on revenue account and is an allowable as an expenditure incurred wholly and exclusively for the purpose of business and is not capital in nature. Accordingly, the findings of the CIT(A) and the Assessing Officer are reversed and the grounds of appeal as taken by the assessee stands allowed.

11. In the result, appeal filed by the assessee is allowed.

Order pronounced on this 11th day of May, 2012.

Sd/- **(G.E. VEERABHADRAPPA)** **PRESIDENT**	Sd/- **(AMIT SHUKLA)** **JUDICIAL MEMBER**

MUMBAI, Dt: 11th May,2012

www.taxguru.in

Copy forwarded to :

1. The Appellant,
2. The Respondent,
3. The C.I.T.
4. CIT (A)
5. The DR, B - Bench, ITAT, Mumbai

//True Copy//

BY ORDER

ASSISTANT REGISTRAR
ITAT, Mumbai Benches, Mumbai

Pkm