$~R-4 & R-5

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 14.02.2013

\+ **ITR 60-61/1999**
\+ **ITR 69-72/1999**

CIT ..... Petitioner

versus

M/S K AND CO. ..... Respondent

Advocates who appeared in this case:
For the Petitioner : Mr Abhishek Maratha, sr. standing counsel
For the Respondent : None

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE R.V.EASWAR

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

These six income tax references pertaining to the assessment years 1989-90 to 1993-94 raise the following questions :-

"Assessment Year 1989-1990:

(1) Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that the assessee firm was entitled to depreciation claim of ₹18,67,822/- only in respect of commercial vehicles acquired and leased out by it on the last two days of the

accounting period even though the said vehicles were not put to use during the relevant accounting period?

(2) Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that the tickets sent to the stockist do not become a sale on their despatch but assumes the character of a sale on the happening of various events including the draw taking place?

(3) Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that 'changed method' of accounting adopted by the assessee firm did not give a distorted picture of the business for the purposes of computing the taxable income of the assessee and was acceptable even though the opening stock and closing stock were valued by different methods?

Assessment Year 1990-91:

(1) Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that the assessee firm was entitled to depreciation claim of ₹7,76,010/- only in respect of commercial vehicles acquired and leased out by it in the last week of the accounting period even though the said vehicles were not put to use during the relevant accounting period?

(2) Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that the tickets sent to the stockist do not become a sale on their despatch but assumes the character of a sale on the happening of various events including the draw taking place?

(3) Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that 'changed method' of accounting adopted by the assessee firm did not give a distorted picture of the business for the purpose of computing the taxable income of the assessee and was acceptable even though the opening stock and closing stock were valued by different methods?

(4) Whether on the facts and in the circumstances of the case, the Hon'ble Tribunal was right in law in holding that the interest income of ₹87,695/- included in ₹10,51,987/- shown as 'other income' by the assessee was eligible for deduction u/s 32 AB of the I.T. Act, 1961?

(5) Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding that investment income amounting to ₹63,365/- shown by the assessee as 'other income' was eligible for deduction u/s 32 AB of the I.T. Act 1961 even though the said income being interest received from the Bank on Short Term Fixed Deposit was assessable as income from other sources?

Assessment Year 1991-92:

Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that the assessee's firm was entitled to depreciation claim of ₹2,95,000/- only in respect of commercial vehicles acquired and leased out during the relevant previous year, even though the user of these vehicles was not proved?

Assessment Year 1992-93:

Whether on the facts and in the circumstances of the case, the Appellate Tribunal was correct in law in holding that the assessee's firm was entitled to depreciation claim of

₹4,02,588/- only in respect of six commercial vehicles acquired and leased out by it during the relevant previous year, the user of which was not proved.

Assessment Year 1993-94:

Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that the assessee's firm was entitled to depreciation claim of ₹6,71,188/- only in respect of ten commercial vehicles acquired and leased out by it during the relevant previous year, the user of which was not proved.

Assessment Year 1989-90:

Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in directing the Assessing Officer to recompute the assessee's income?"

2. We shall first take up the questions in respect of the assessment year 1989-90. There are two sets of questions for this year. The first set comprises of three questions and the second set of the fourth which is essentially a consequential issue.

3. The assessee, during the relevant years, was engaged in the business of printing of lottery tickets and organizing lotteries on behalf of, inter alia, the Government of Sikkim. Additionally the respondent-assessee also carried on the business of leasing of vehicles for commercial use. In respect of the financial year ending on 31.3.1989, the assessee had changed its method of accounting which it had adopted

earlier. In the earlier years, the respondent-assessee had shown all its dispatches of tickets to its stockists as sales without being concerned with the question of whether the tickets were sold to the ultimate customers or not or whether the draw had taken place or not. In other words, in earlier years any dispatches made by the respondent-assessee during the relevant accounting year were treated as sales. With effect from the assessment year 1989-90, the respondent-assessee sought to adopt a different method of accounting. The respondent-assessee did not show all the dispatches to stockists as sales until and unless a draw had also taken place. In other words, those dispatches in the accounting year for which the draw was to take place in the succeeding year were not shown as sales. The assessee did not show such dispatches as part of the closing stock either. It is in this backdrop that the said questions have been formulated for our consideration.

4. Insofar as question No.1 is concerned which deals with the entitlement of the respondent-assessee to depreciation to the extent of ₹18,67,822/- in respect of assessment year 1989-90 the issue before the authorities below was whether the respondent-assessee was entitled to such a claim. The point raised by the revenue being that the respondent-

assessee had procured the vehicles only two days prior to the end of the accounting year and had leased out said vehicles. Lease rental of ₹75,306/- had been realised by the respondent-assessee and had been accounted for by the respondent as part of its income for the assessment year 1989-90. The revenue's contention was that the leased vehicles had not been put to commercial use and, therefore, depreciation could not be claimed in respect of the same. Their contention was based on the premise that the said vehicles did not have permanent registrations but, only had temporary registrations and also did not have any commercial permit for being deployed as commercial vehicles. Therefore, according to the revenue, the vehicles could not have been put in use by the lessees and, consequently, the respondent-assessee should not be entitled to the claim of depreciation made by it.

5. Certain provisions of the Motor Vehicles Act, 1988 had also been referred to by the authorities below. However, we are of the view that we need not refer to those provisions. This is so because it is not the respondent-assessee who is plying those vehicles. The respondent-assessee's business is only to lease out those vehicles, which it did. Therefore, in our view the moment the respondent-assessee entered into

the agreement with the lessees for leasing the vehicles to them and transferred possession for that purpose to the lessees, the respondent/assessee would be deemed to have utilized those vehicles for the purposes of its business, which was leasing of vehicles. If any authority for this proposition were needed, the same would be supplied by the decision of this Court in ***CIT Vs. Bansal Credits Ltd. : (2003) 259 ITR 69 (Del.)***. Consequently, this question is answered in favour of the assessee and against the revenue.

6. We now move on to question No.2 which deals with the issue of the point of sale of the lottery tickets. According to the revenue, the moment the respondent-assessee dispatches the tickets to its stockists, a sale takes place. Therefore, the fact that the tickets were sent to the stockists within the accounting year would mean that the sales had been finalized during that year. It is also the contention of the revenue that it is irrelevant as to when the draw actually takes place. We notice that the Tribunal has held otherwise after examining the relevant clauses of the agreement of the respondent-assessee with the stockists. This would be clear from the paragraph 39 of the impugned order in respect of the assessment year 1989-90 which reads as under :

"39. In order to appreciate the arguments, it would be necessary on our part to set out certain relevant clauses of the agreement as follows :-

"2. That the Organizing Agent shall dispatch tickets for various the Draws so as to reach the stockists at their place of destination mutually agreed upon. In case of loss of tickets in transit, to the place of destination of the tickets, dispatched by the Organising Agent then the Organising Agent shall be responsible for such loss."

"4. That the Organising Agent shall pay service charges at the rate of 3 per cent on the basis of the total value of tickets sold. The stockists may deduct the service charges while making the payment."

"5. That the Organising Agent may fix quota of lottery tickets to be supplied to the stockists based on his actual demand and sales in the past or as may be agreed. The Organising Agent, however, reserves the right to reduce the quota of tickets for a particular draw or draws without assigning any reason whatsoever. The tickets will be supplied to the stockists on F.O.B. basis on a proper challan form (dispatch slip). The stockists would be under an obligation to tally tickets received with the challan form. Any discrepancy must be immediately intimate to the Organising Agent within 24 hours of the receipt of the tickets."

"8. The stockiest will ensure that the payment of a particular draw is made to the Organising Agent positively one week in advance of the actual date of draw and the Demand draft will be made in favour of 'K & Co.' New Delhi and shall be payable on the Nationalised bank at New Delhi."

"16. That the tickets issued for a draw and anticipated to remain unsold, should so returned that they are physically received by the Organising Agent at least one day before the actual date of the draw. Ticket received thereafter, will not be accepted and treated as sold by the stockiest and the stockiest shall remain reliable for its payment in the same manner as if the tickets have actually been sold."

"17. That telegraphic, telephone or any other information sent to the Organising Agent regarding the unsold tickets would be ignored and in case the tickets want benefit for the return of tickets, the tickets must in that event, reach the Organising Agent at least 24 hours before the draw."

30. That the stockists has deposited interest free but refundable security with the Organising Agent. This security shall be refunded when this agreement is terminated. However, the Organising Agent shall have the right to adjust from the security all dues which are payable by the stockist to the Organising Agent."

7. We notice that the Tribunal, after going through the said agreement, had observed that the arrangement by which the respondent-assessee sent tickets to the stockists who in turn sold the same to their agents did not indicate that the sale took place at the point of dispatch of tickets to the stockists. We also notice that the unsold tickets are to be returned to the organizing agent of the respondent-assessee at least one day before the actual date of the draw and any tickets received thereafter would not be accepted and treated as sold by the stockists. This makes it

clear that those tickets which are returned by the stockists cannot be treated as having been sold. The corollary to this is that mere dispatch of tickets to the stockists would not entail a sale. It is only those dispatches of tickets which are not returnable in the manner indicated above which would be recorded as sales. Thus, till the date of the draw or just prior to the date of the draw it cannot be ascertained as to whether the dispatched tickets were actually sold or not. We, therefore, agree with the view taken by the Tribunal and consequently, decide this question in favour of the assessee and against the revenue.

8. Question No.3 pertains to the change in the method of accounting adopted by the assessee which, we may straightaway say, tends to distort the picture for the purpose of taxable income of the assessee. This is so, because, even if we hold that mere dispatches to the stockists did not amount to sales, the unsold amount should have been treated as part of the stock of the respondent-assessee which has not been done by the respondent-assessee in the accounting method adopted by it. It cannot maintain the position that it has not sold the tickets and that those tickets are also not part of its stock. Therefore, to that extent, the accounting method adopted by the respondent-assessee does, in fact, distort the

picture for the purpose of ascertaining the taxable income. We answer this question in favour of the revenue and against the assessee. As a corollary, the last question, in respect of the assessment year 1989-90 to the effect as to whether the Tribunal was right in law in directing the assessing officer to re-compute the assessee's income, is to be decided in favour of the revenue and against the assessee. The Tribunal was correct in law in directing the assessing officer to re-compute the income. Consequently, the assessing officer has to re-compute the income by treating the unsold tickets as part of the stock of the respondent-assessee.

9. Insofar as the other assessment years are concerned, we find that the question with regard to depreciation is common to all of them. Therefore, the answer given by us in respect of the assessment year 1989-90 would apply to each of the other assessment years. This would mean that the question in respect of the assessment year 1991-92, 1992-93, 1993-94 stand fully answered because in those years the only question is with regard to depreciation.

10. We are left with the assessment year 1990-91 wherein the three questions raised in assessment year 1989-90 have been raised in the year 1990-91 also. They stand answered accordingly. Additionally, two

questions with regard to the claim under Section 32AB of the Income Tax Act, 1961 have been raised. The questions raised are as under :

> "(4) Whether on the facts and in the circumstances of the case, the Hon'ble Tribunal was right in law in holding that the interest income of ₹87,695/- included in ₹10,51,987/- shown as 'other income' by the assessee was eligible for deduction u/s 32 AB of the I.T. Act, 1961?
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> (5) Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding that investment income amounting to ₹63,365/- shown by the assessee as 'other income' was eligible for deduction u/s 32 AB of the I.T. Act 1961 even though the said income being interest received from the Bank on Short Term Fixed Deposit was assessable as income from other sources?"

These questions arose in the backdrop of the factual situation that the respondent-assessee had to place certain funds as margin money in order to obtain the bank guarantee which was required by the State Government of Sikkim for the purpose of enabling the respondent-assessee to carry on the business of printing lottery tickets and for conducting lotteries on behalf of the State Government of Sikkim. The funds which were placed as margin money earned interest. The question which arose was whether these amounts would be placed under the head of 'business income' or under the head of 'income from other sources' under Section 56 of the Income Tax Act, 1961. We need not labour much on this issue inasmuch

as the law stands settled in several decisions including those of the Supreme Court and this Court. The decisions are :

1. ***CIT Vs. Bokaro Steel Ltd. : (1999) 236 ITR 315 (SC)***
2. ***CIT Vs. Koshika Telecom Ltd. : (2006) 287 ITR 479 (Del.)***
3. ***CIT Vs. Jaypee DSC Ventures Ltd. : (2011)335 ITR 132 (Del.)***

These decisions make it clear that where income is received from deposits made by the assessee are deposits which are inextricably linked to the business of the assessee, such income cannot be treated as income received from other sources. In the present case, the Tribunal has held that the interest received by the assessee was inextricably linked to the business of the assessee. This is so because the margin money requirement was an essential element for obtaining the bank guarantee which was necessary for the contract between the State Government of Sikkim and the respondent-assessee. If the respondent-assessee had not furnished the bank guarantee it would not have got the contract for running the said lottery. Therefore, the interest received on the funds which were kept by way of margin money for obtaining the bank guarantee cannot but be said to be inextricably linked to the business of

the assessee. Consequently, we answer these questions in favour of the assessee and against the revenue.

All the questions referred before us are answered and the references stand disposed of accordingly.

BADAR DURREZ AHMED, J

R.V.EASWAR, J

FEBRUARY 14, 2013
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