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

Decided on : 25.03.2015

\+ **ITA 686/2014**

TUPPERWARE INDIA PVT. LTD. ……Appellant

Through: Sh. M.S. Syali, Sr. Advocate with Sh. Mayank Nagi, Sh. Harkunal Singh and Ms. Bhawna Bakshi, Advocates.

Versus

COMMISSIONER OF INCOME TAX ……..Respondent

Through: Ms. Suruchii Aggarwal, Sr. Standing Counsel.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.K. GAUBA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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Issue notice.

With consent of learned counsel, the appeal was heard finally today.

1. The present appeal is filed by the assessee under Section 260-A of the Income Tax Act, 1961 ("the Act"), against an order dated 14.03.2014 passed by Income Tax Appellate Tribunal ("ITAT") in ITA No. 1977/De1/2011 for Assessment Year (AY) 2007-08. The ITAT upheld the findings of the lower authorities and held that the sum of ₹4,94,09,120/- incurred by the assessee in respect of excise duty levied by the Custom & Central Excise Settlement Commission ("CESC") on Dart Manufacturing India Pvt. Ltd. ("Dart") and Innosoft Technologies Limited ("ITL") (together referred to as "contract manufacturers") was not an allowable business expenditure. The question of law that arises for this Court's determination is as follows:

> *"Did the ITAT fall into error in holding that the sum of ₹4,94,09,120/- incurred by the assessee could not be termed as*

business expenditure and was not incurred on account of commercial expediency within the meaning of the term under Section 37(1) of the Income Tax Act?"

2. The assessee is a wholly owned subsidiary of M/s. Tupperware Asia Pacific Holdings Pvt. Ltd., Mauritius which holds 99% of its equity share capital. The remaining 1% is held by M/s. Tupperware Home Parties Inc., USA. The group as a whole owns the brand name 'Tupperware' and carries out business activities through various subsidiaries in various parts of the world.

3. Accordingly, the assessee from time to time had entered into Contract Manufacturing Agreements with Dart and ITL for manufacture of Tupperware plastic tableware and kitchenware products. The designs of the Tupperware products are patented and, therefore, the moulds used to manufacture these products are not available in the open market. Therefore, the Company provides the requisite moulds to Dart and ITL on a 'free of cost basis' which are then used by the said entities in manufacturing process.

4. To determine the assessable value of the goods so manufactured, the contract manufacturer had applied a certain method to capture the notional value of "free of cost" moulds for excise valuation, i.e., value of moulds would be considered on the basis of their capacity of production during the life time use of the moulds. However, the excise authorities had a different view on valuation of notional mould value to be used for excise valuation and disputed the same. Accordingly, the Central Excise Department in Hyderabad issued a Show Cause Notice making an additional demand of excise duty (along with interest).

5. In order to arrive at an amicable settlement, Dart and ITL along with assessee (being co-applicant) applied for settlement of proceedings before CESC, for settlement of the disputed excise duty demand.

6. On 10.11.2006, the CESC passed an order raising an additional excise demand, including interest, amounting to ₹4,94,09,120/- on Dart and ITL as additional excise duty on the goods manufactured by them for the assessee. The said additional excise duty liability was borne by the assessee as it was in respect of liability that arose on contract goods manufactured for the assessee; and arose only on account of variance in notional value of moulds provided "free of cost" by Tupperware to be used in manufacturing process.

7. The assessee filed its return of income for AY 2007-08 on 24.09.2008, wherein the liability incurred by the assessee herein towards additional excise duty was claimed as revenue expenditure. As per the assessee, the additional excise duty levied on its contract manufacturers, i.e. Dart and ITL was on the goods manufactured for the assessee and due to notional re-valuation of the moulds, which the assessee was contractually bound to provide free of cost. Thus, it formed part of the purchase price adjustment. In other words, the purchase price for the assessee was increased by the amount of additional excise duty. Accordingly, the assessee had made an adjustment of the said liability amounting to ₹4,94,09,120/- in the cost of sales as "Price Adjustment". A note was inserted by the assessee to the following effect:-"*During the year the Company agreed to compensate certain contract manufacturers towards duty and interest thereon aggregating to ₹4,94,09,120/- levied by the Customs & Excise Settlement Commission as contractual obligation towards the contract manufacturers...*"

8. The Assessment Order under Section 143(3) of the Act was passed by the Assessing Officer ("AO") on 18.12.2009 holding that the liability of additional excise duty borne by the assessee herein was not an allowable deduction under Section 37(1) of the Act. While disallowing the expenditure incurred by the assessee, the AO arrived at the following conclusions:-

(a) As per the two contracts entered into between the assessee on the one hand and Dart and ITL on the other, liability of taxes and duties was that of Dart/ITL and not of the assessee.

(b) Assessee has colluded with Dart/ITL to take their liability upon itself and reduce its taxable income.

(c) AO noted that the assessee was also a co-applicant before the CESC and no liability was fixed against it.

(d) The liability of additional excise duty related back to the period from April 2000 to December 2004 in case of Dart and August 2002 to December 2004 in case of ITL. Therefore, the expenditure cannot be claimed in the year under consideration, i.e., AY 2007-08.

9. Aggrieved, the assessee preferred an Appeal before the Commissioner of Income Tax – Appeals ("CIT(A)") which was dismissed by the CIT(A) by its order dated 23.12.2010. The CIT(A), *inter alia*, held that liability created against the contract manufacturers is not an allowable expenditure in the hands of the assessee. In the appeal preferred by the assessee against the CIT(A)'s order before the ITAT, the ITAT in its impugned order upheld the findings of the lower authorities on the following grounds:-

(a) It was the contract manufacturer who was to bear all the taxes relating to the performance of the service under the agreement. There was no modification of the contract between the manufacturers and the

assessee which shifted the burden of payment of excise duty on the assessee.

(b) ITAT upheld the finding of the AO that the expenditure related back to earlier years due to which the expenditure cannot be claimed in the year under consideration.

(c) The assessee's contention that the expenditure incurred was for commercial expediency and to safeguard the long term interest of the assessee was unsubstantiated.

Aggrieved by the aforesaid decision, the assessee has preferred this appeal.

Submissions on behalf of the Parties:

10. Mr. Mayank Nagi, learned counsel for the assessee submits that the ITAT erred in disallowing the expenditure incurred by the assessee herein in lieu of additional excise duty levied on the contract manufacturers, as the only element that can be factored in while adjudicating upon the allowability of expenditure under Section 37(1) of the Act is whether the same was incurred wholly and exclusively for the purpose of business. It is not a pre-condition that the expenditure must be incurred out of necessity. He further submits that there is no dispute that liability of additional excise duty levied upon Dart India and ITL by the CESC was discharged by the assessee herein in order to enable its business to function smoothly without any disruption as the contract manufacturers were not financially equipped to bear the levy of additional excise duty. Learned counsel submits that since the assessee was not permitted to manufacture its products in India, it had a direct interest in the proper functioning/protection of business of contract manufacturers inasmuch as without them, the assessee could not run its

business of trading in India. He highlights the observations of the CESC, which noted that the contract manufacturers were "*manufacturers of plastic table ware and kitchen ware for M/s Tupperware India Pvt. Ltd. on job work basis*". Reliance is placed on the decision of this Court in *CIT v. Dalmia Cement (P.) Ltd.*, 254 ITR 377 (Delhi), approved by the Supreme Court in *S.A. Builders Ltd. v. CIT*, [2008] 288 ITR 1.

11. Learned counsel submits that the ITAT as well as the CIT(A) failed to acknowledge that the term 'wholly' in Section 37(1) cannot be read as 'necessarily'. 'Wholly' refers to quantum of expenditure and 'exclusively' refers to motive, objective or purpose with which the particular expense was incurred. He places reliance on the Supreme Court's decision in *Sassoon J. David & Co. Pvt. Ltd. v. CIT*, (1979) 118 ITR 261 (SC), wherein the Apex Court observed that as a matter of fact, initially the word 'necessarily' found place in the Income Tax Bill, 1961, but was expunged by legislature in favour of expression 'wholly and exclusively'.

12. Assessee submits that the term 'commercial expediency' is not a term of art. It means everything that serves to promote commerce and includes every means suitable to that end. In applying the test of commercial expediency, for determining whether the expenditure was wholly and exclusively laid out for the purpose of the business, reasonableness of the expenditure has to be judged from the point of view of the businessman and not of the revenue.

13. Learned counsel submits that the invoice amount of purchases for the disputed period did not include the additional excise duty payable by the manufacturer and such additional duty had only crystallized after the settlement order. Since the payment led to an outflow in the year under

consideration, i.e. AY 2007-08, it was charged as price adjustment in the P&L A/c and claimed as expenditure in AY 2007-08. Further, for subsequent years, the contract manufacturers duly charged and invoiced such additional excise duty in the invoices raised for period subsequent to passing of the order of CESC.

14. Finally, learned counsel submits that the ITAT erred in holding that the expenditure incurred by the assessee cannot be allowed in the AY under consideration since the same pertains to payment of excise duty pertaining to earlier years. It failed to consider that the said additional liability has crystallized only during AY 2007-08 on account of order of the CESC, during the year under consideration. The assessee could not have anticipated the additional demand of excise duty in the past, as this is the first time wherein such quantification was made by the excise authorities pursuant to the order of CESC. Learned counsel submits that a liability is to be claimed only in the year when it crystallizes and not before. Reliance is placed on *ACIT v. Rattan Chand Kapoor*, 149 ITR 1 (Del), which was subsequently followed in *CIT v. National Cereal Products Ltd.*, 165 Taxman 180 (Del) and in *CIT v. Shri Ram Pistons & Rings Ltd.*, (2008) 220 CTR 404 (Del).

15. On the other hand, learned counsel for the revenue defends the order of the ITAT and submits that the payment of excise duty cannot be claimed as expenditure within the meaning of Section 37(1) of the Act. Learned counsel submits that the expenditure related to years prior to the assessment year in question and, therefore, cannot be allowed as deduction in this assessment year. Further, there was no obligation on the assessee to bear the excise duty on the goods manufactured by the contract manufacturers and

therefore, the ITAT's order disallowing the expenditure claimed by the assessee cannot be faulted with.

Analysis and Conclusions

16. At the outset, this Court notes that the pre-requisites for allowability of deduction of expenditure as business expenditure under Section 37(1) of the Act are as follows:

(a) Expenditure should not be covered under section 30 to 36 of the Act;

(b) Expenditure should not be of capital or personal nature;

(c) Expenditure should be made wholly and exclusively for the purposes of business;

(d) Expenditure should be incurred during the previous year;

(e) Expenditure should not be incurred for any purpose which is an offence or which is prohibited by the law.

17. This Court in its recent decision in *CIT v. Tupperware India Pvt. Ltd.*, [2015] 229 Taxman 318, was called upon to decide, *inter alia*, the allowability of expenditure towards rent paid for moulds provided by the assessee herein to the contract manufacturers. The Court noted the aforesaid requirements for claiming deduction under Section 37(1) of the Act and observed as follows:

> *"'For the purpose of business' is a word of wide import and includes expenditure which a businessman incurs for business and commercial expediency. The question of reasonableness is not for the revenue to decide. Further, expression 'wholly and*

> *exclusively' as observed by the Supreme Court in Sasson J. David and Co. (P) Ltd. v. CIT [(1979) 118 ITR 261(SC)], does not mean 'necessarily'. Even expenditure incurred voluntary and without any necessity, but for promoting business and earning profit is allowable."*

This proposition has also been applied by the Bombay High Court in *CIT v. N.G.C. Network India (P) Ltd.*, 368 ITR 738.

18. It is not disputed by the revenue that the assessee had in fact made payment of ₹4,94,09,120/- towards additional excise duty pursuant to the CESC's order dated 10.11.2006. Once this is accepted, it is irrelevant as to whether, contractually, this liability was that of the contract manufacturers or the assessee itself. We hold this in light of the settled proposition discussed above, i.e. expenditure incurred voluntarily and without any necessity is also deductible under Section 37(1) of the Act, so long as it is incurred 'wholly and exclusively' for the purposes of business.

19. Further, the facts on record sufficiently establish that the payment was made by the assessee in the interests of commercial expendiency. The moulds for manufacturing the goods marketed by the assessee were provided to the contract manufacturers by the assessee itself, as the said moulds were patented and not available in the market. Excise duty was levied on the notional cost of these moulds. The rent for these moulds was also paid by the assessee to the overseas entities, and not by the contract manufacturers. The contract manufacturers were carrying out the manufacturing activity for the assessee and it was in the assessee's business interests that all tax liabilities of the manufacturers were duly satisfied. The ITAT could not have doubted the business efficacy of the assessee's

decision to pay the excise duty in the absence of any reasons on record indicating the contrary.

20. This Court notes that the ITAT in its impugned order had allowed expenditure claimed by the assessee towards payment of mould rentals paid to overseas entities. The ITAT rejected the revenue's contention that the appropriate entities which would claim the rental amount as expenditures were the contract manufacturers, and reasoned as follows:

> *"15. We also agree with the ld. CIT(A) that even if for the sake of argument. if it was to be presumed that the payment of mould rentals is the liability of the contract manufacturers and so incurred by them in that case the cost of such mould rentals would be part of 'purchases' as it would increase the production cost of the contract manufacturer and accordingly, the purchase price bargained by the appellant would be increased by the same amount of mould rental. Thus, in the above situation the assessee would not incur rental expenses, but will have to pay resultant higher purchase price to the contract manufacturer. Thus the position in the hands of the assessee will be that the net effect on revenue would be the same. Hence, the situation would be revenue neutral."*

21. This Court fails to understand as to how the above *rationale* applied by the ITAT to allow the deductibility of rental expenditure cannot be extended to the expenditure on additional excise duty incurred by the assessee. If, instead of the assessee, the additional excise duty were to be borne by the contract manufacturers, the contract manufacturers would have accounted for that amount in the purchase price of the goods, resulting in a higher price to be paid by the assessee. Therefore, this situation is, as per the ITAT's own explanation, 'revenue neutral' as well. The AO's determination

that the payment was made by the assessee on behalf of contract manufacturers as a part of a collusive attempt to evade tax, is thus, baseless.

22. Another ground on which the ITAT disallowed the expenditure towards payment of excise duty was that such expenditure pertained to earlier years (April 2000 to December 2004 in case of Dart and August 2002 to December 2004 in case of ITL). This reason, too, in the opinion of this Court, is erroneous. The liability, payment for which the assessee claims deduction under Section 37, arose on account of the order of the CESC, which was passed on 10.11.2006. This sum of ₹4,94,09,120/-, the *additional* excise duty, was the differential amount which became payable only upon the passing of the said order and thus, became crystallized in the subject assessment year. Therefore, even though the excise duty was for manufacturing activity that occurred earlier, the liability to pay such additional duty did not exist in the previous years and as a result, could not have been claimed by the assessee as expenditure in the concerned previous years. In arriving at this conclusion, this Court relies upon its ruling in *Rattan Chand Kapoor* (supra). In *Rattan Chand Kapoor* (supra), the issue was whether sales tax liability for the periods 1953-54 to 1958-59 could be claimed as deductible expenses in assessment year 1964-65, when the demand was made in 1964. The Court answered the question in the affirmative and noted as follows:

> *"But, what happens if the liability is not determined till much later? In the present case, the demand was raised in February, 1964, but related to the period 1953-54 to 1958-59. Obviously, the assessed could not claim the deduction on the basis that it arose at a much earlier date. Perforce, the claim could only be raised after it had been determined as the assessment for all those years would be over long ago."*

The decision in *Rattan Chand Kapoor* (supra) was affirmed by this Court in *Shri Ram Pistons & Rings Ltd.*(supra).

23. In light of the reasons stated above, this Court holds that the sum of ₹4,94,09,120/- paid by the assessee towards additional excise duty on behalf of the contract manufacturers constitutes deductible expenditure under Section 37(1) of the Act.

24. The question of law framed, therefore, is answered in favour of the assessee and the appeal is allowed.

S. RAVINDRA BHAT
(JUDGE)

R.K. GAUBA
(JUDGE)

MARCH 25, 2015