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Court : Income Tax Appellate Tribunal ITAT Kolkata

Decided On : Jun-13-1986

Reported in : (1986)18ITD551(Kol.)

Judge : B Mitra, A Das

Appellant : inspecting Assistant

Respondent : Black Diamond Beverages Ltd.

Judgement :

1. The assessee is a company which is engaged in the manufacture of soft drinks. Prior to the assessment year 1979-80 it produced soft drinks under the brand names of Limca and Gold Spot. During the assessment year 1979-80, i.e., from 15-2-1978 it started manufacture of a new soft drink under the brand name of Thums Up and for marketing the new product it incurred advertisement and publicity expenses of Rs.2,23,208. The assessee contended before the IAC that no part of the advertisement and publicity expenditure incurred by it could be disallowed under Section 37(3A) in view of the provisions contained in Section 37(3D) of the Income-tax Act, 1961 ('the Act'). The IAG rejected the said contention by observing, inter alia, that no separate industrial undertaking had been set up by the assessee for the production of Thums Up as "the same industrial undertaking which was producing and continues to produce the other brand of beverage, namely, Gold Spot and Limca produces this brand Thums Up also with the same plant and machinery". According to the IAC the assessee did not set up any separate plant or machinery for production of its new brand of soft

drink 'Thums Up'. The Commissioner (Appeals), however, found that the assessee installed a new chilling plant, a filler plant and other machinery including bottles and cases at a cost of Rs.16,36,723 and since the assessee had set up a new industrial undertaking for the manufacture and production of a new brand of soft drink, it fulfilled the requirements of Section 37(3D). He, accordingly, deleted the addition of Rs.33,481 and Rs.43,219, respectively, made out of advertisement expenses in the assessment years 1979-80 and 1980-81. The department has come up in appeals against the said order of the Commissioner (Appeals) by raising one common contention that the Commissioner (Appeals) erred in holding that the assessee had set up a separate industrial undertaking within the meaning of Section 37(3D).

2. The departmental representative stated that the assessee did not set up an industrial undertaking for the manufacture or production of any article in the previous year relevant for the assessment year 1979-80 as erroneously held by the Commissioner (Appeals). It has been pointed out that the existing industrial undertaking started manufacture of soft drinks since long and during the assessment year 1979-80 it only increased its capacity for manufacture of the article produced by it by adding certain new machinery items to the existing plant for the manufacture of its new brand of soft drinks, i.e., 'Thums Up'. It has been further stated that in order to entitle the assessee the exemption provided under Section 37(3D) it has to establish that the assessee by setting up a separate industrial undertaking started manufacture of its new brand of soft drinks during the previous year relevant for the assessment year 1979-80. In this connection, reference was made to the Supreme Court decision in the case of CWT v. Ramaraju Surgical Cotton Mills Ltd. [1967] 63 ITR 478 for the proposition that a unit or an undertaking can be said to be 'set up' when it is ready to discharge the function for which it is set up. It has been pointed out that it is only when the unit has been put into such a shape that it can start functioning as a business or a manufacturing organisation that it can be said that the unit has been set up. He also referred, in this connection, the decision of the Bombay High Court in the case of Century Spg. & Mfg. Co. Ltd. v. CWT [1978] 112 ITR 479. In reply, the assessee's learned counsel stated that the assessee started manufacture of a new article by installing new machinery and plant and for purposes of Section 37(3D) it

was not necessary for the assessee to set up a new industrial undertaking. For this proposition, reliance was placed on the Bombay Tribunal's decision in the case of ITO v. Ciffies Chemicals & Pharmaceuticals (P.) Ltd. [1985] 11 ITD 707. It has been pointed out that the work undertaken by the assessee in the production of a new article was in relation to an industry, viz., manufacture or production of soft drinks and as such, the assessee was an industrial undertaking.

In this connection, our attention was drawn to the Calcutta High Court decision in the case of CIT v. Textile Machinery Corpn. [1971] 80 ITR 428 wherein at p.437 the words 'industrial undertaking' in the context of the Indian Income-tax Act, 1922 ('the 1922 Act') have been interpreted to mean 'any venture or enterprise which a person undertakes to do and which has relation to some industry or has some industrial consequences. It has been pointed out that the words 'industrial undertaking' have not been defined either under the 1922 Act or under the 1961 Act and, consequently, the interpretation of the Calcutta High Court as aforesaid must be taken into consideration in judging the assessee's claim that it had set up an industrial undertaking for the manufacture or production of an article within the meaning of Section 37(3D). Our attention was also drawn to the decision of the Bombay Tribunal in the case of First ITO v. Yash Raj Chopra [1984] 10 ITD 709 wherein in the case of a film producer it was held that each movie produced amounted to the establishment of an independent industrial undertaking in order to attract the provisions of Section 37(3D).

3. Sub-sections (3A) to (3D) of Section 37 which contain detailed provisions in regard to the admissibility of advertisement expenses were introduced with effect from 1-4-1979 by the Finance Act, 1978.

Sub-section (3D) reads as under : In a case where an assessee has set up an industrial undertaking for the manufacture or production of any articles, nothing in Sub-section (3A) shall apply in respect of any expenditure on advertisement, publicity or sales promotion incurred by the assessee, for the purposes of the business of such undertaking, in the previous year in which such undertaking begins to manufacture or produce such articles and each of the two previous years immediately succeeding that previous year.

It was held in the case of Yash Raj Chopra (supra) that in the absence of a statutory definition of the term 'industrial undertaking' the meaning of the expression as understood in common parlance should be adopted. It was observed that : 'In common parlance, industrial undertaking would mean a new set up, paraphernalia or organization for a particular purpose.' The balance sheet submitted for the year ending 30-6-1978 reveals that the total addition to machinery during the year came to Rs.3,12,126 comprised of four main items of Rs.90,309 on account of chilling plant, Rs.27,925 representing the cost of filler, Rs.1,54,744 representing the cost of a generator and Rs.7,000 being the cost incurred on a boiler. It cannot be said that by installing a few machinery items including a generator the assessee had set up an independent unit of its own for production or manufacture of a new article. The items of machinery purchased during the year formed part of the existing industrial undertaking of the assessee for manufacture of soft drinks including Thums Up. In order to claim exemption under Section 37(3D), the requirement is that it should be an industrial undertaking set up for manufacturing or producing any article. It is true that such an industrial undertaking set up may not be new but it must be proved that the assessee established a new set up for production of the new article which is distinct and separate from the, existing industrial undertaking. The intention of the Legislature in introducing the new Sub-Sections (3A) to (3D) to Section 37 may be found from the Finance Minister's Budget Speech for 1978-79, the relevant portion of which reads as follows : Extravagant and socially wasteful expenditure is often incurred on advertisement, publicity and sales promotion. In order to put a curb on such expenditure at the cost of the exchequer, I propose to provide for the disallowance of a part of such expenditure in the computation of taxable profits. Where the aggregate expenditure on advertisement, publicity and sales promotion in India does not exceed per cent of the turnover or gross receipts of the business or profession, 10 per cent of such expenditure will be disallowed in computing the taxable profits. Where such aggregate expenditure exceeds per cent but does not exceed per cent of the turnover or gross receipts, the disallowance will be made at the rate of 12 per cent; and where such expenditure exceeds per cent of the turnover or gross receipts, the disallowance will be made at the rate of 15 per cent. These provisions will not apply in cases where the aggregate expenditure on

advertisement, publicity and sales promotion does not exceed Rs.20,000 in a year. Newly established industrial concerns will also be exempted from this provision for an initial period of three years....- [1978] 111 ITR (St.) 89.

Since there is no material on record to hold that the assessee had set up a separate and independent industrial undertaking for the manufacture or production of an article, we are of the opinion that the assessee is not entitled to the exemption provided in terms of Section 37(3D). We would, accordingly, by reversing the Commissioner (Appeals)'s order restore the IAC's addition of Rs.33,481 and Rs.43,219 out of advertisement and publicity expenses for the assessment years 1979-80 and 1980-81.

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