आयकर अपीलीय अधिकरण पुणे न्यायपीठ "बी" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री अनिल चतुर्वेदी, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI ANIL CHATURVEDI, AM

आयकर अपील सं. / ITA No.725/PUN/2008
निर्धारण वर्ष / Assessment Year : 2005-06

The Asst. Commissioner of Income Tax,
Circle-6, Pune .... अपीलार्थी/Appellant

Vs.

Sakal Papers Ltd.,
595, Budhawar Peth,
Pune – 411002 .... प्रत्यर्थी / Respondent

PAN: AACCS7605Q

आयकर अपील सं. / ITA No.937/PUN/2008
निर्धारण वर्ष / Assessment Year : 2005-06

Sakal Papers Ltd.,
595, Budhawar Peth,
Pune – 411002 .... अपीलार्थी/Appellant

PAN: AACCS7605Q

Vs.

The Asst. Commissioner of Income Tax,
Circle-6, Pune .... प्रत्यर्थी / Respondent

Assessee by : Shri Ashok Kothari
Revenue by : Shri Mukesh Jha

सुनवाई की तारीख / **Date of Hearing : 03.05.2018**		घोषणा की तारीख / **Date of Pronouncement: 01.08.2018**

आदेश / ORDER

PER SUSHMA CHOWLA, JM:

The cross appeals filed by Revenue and assessee are against order of CIT(A)-II, Pune, dated 29.02.2008 relating to assessment year 2005-06 against order passed under section 143(3) of Income Tax Act 1961 (in short the 'Act').

2. The cross appeals filed by Revenue and assessee were heard together and are being disposed of by this consolidated order for the sake of convenience.

3. The learned Authorized Representative for the assessee at the outset pointed out that tax effect in the appeal filed by the Revenue is low and in view of the CBDT's Circular No.21 of 2015, dated 10.12.2015, the said appeal is not maintainable. The issue which is raised in the grounds of appeal is against repairs and maintenance expenses on the fort office of ₹ 28,43,744/-.

4. The learned Departmental Representative for the Revenue fairly accepted the contention of assessee. In view thereof, appeal of Revenue is dismissed for low tax effect.

5. Now, coming to the appeal of assessee, wherein the following grounds of appeal have been raised:-

> *On the facts and the circumstances the learned Assessing Officer and Commissioner of Income Tax Appeal erred in*
>
> 1. *In treating the repairs and maintenance of Rs.94,96,845/- as capital expenditure. The same being in the nature of revenue expenditure incurred wholly and exclusively for the purpose of the business, it is prayed that the expenses be allowed in full.*

2. *In disallowing on expenditure of Rs.37,10,056/- being legal expenditure on the ground that it is not wholly and exclusively for the purpose of business. The expenses being wholly and exclusively for business the same may be allowed as business expenses.*

3. *In disallowing on expenditure of Rs.3,00,00,000/- being payment made as compensation to one of the shareholders in accordance with the direction of the Hon Supreme Court decision. The expenses being wholly and exclusively for business the same may be allowed as business expenses.*

4. *In disallowing the claim of Rs.64,88,107/- under section 80IA. This action being not in accordance with the law it is prayed that the same may be allowed.*

6. The issue in ground of appeal No.1 is against disallowance of repairs and maintenance expenses of Jalgaon office.

7. Briefly, in the facts of the case, the assessee had purchased building at Jalgaon for its Jalgaon edition of Daily Sakal. A sum of ₹ 55,03,400/- was incurred on renovation of existing building to make it suitable for running printing press. The assessee claimed that major part of expenses were in the nature of repairs and renovation and were claimed as revenue expenditure. Further, sum of ₹ 39,93,445/- was incurred on modification of existing shed and allied works at Jalgaon. The assessee had carried out modification of generator room, electric panel room, washing and toilet, LG compressor room, plinth for paper unloading area, dispatch areas etc. The total payments were made time to time amounting to ₹ 39,39,445/-. The Assessing Officer held that the expenditure was incurred on improvisation of building and was capital in nature.

8. The CIT(A) upheld the disallowance made by the Assessing Officer, against which the assessee is in appeal.

9. The plea of assessee before us is that the expenditure does not bring into existence any new asset nor does it enhance capacity and is only to facilitate

efficient management of the business operations. He further pointed out that similar expenditure was allowed by the Tribunal in assessee's own case in cross appeals in ITA Nos.724/PN/2008 and ITA No.736/PN/2008, relating to assessment year 2004-05, order dated 13.06.2014.

10. The learned Departmental Representative for the Revenue on the other hand, placed reliance on the ratio laid down by the Hon'ble High Court of Delhi in Bigjo's India Ltd. Vs. CIT (2007) 161 TAXMAN 135 (Del).

11. We have heard the rival contentions and perused the record. The assessee had taken land from MIDC on leasehold basis and had carried out repairs and renovation to make it suitable for running printing press. Note on the details of expenses are placed at page 1 of Paper Book. The assessee also submitted the Architect's final certificate for payment to contractor, wherein it has been mentioned that the total amount of bill submitted by the contractor is ₹ 41,80,903/-. Further, the total amount which is certified is ₹ 39,93,445/-, less retention amount is ₹ 1,84,000/- and the amount which was certified and due for payment to the contractor is totaled to ₹ 38,09,445/-. The said amount is against final bill submitted by the contractor of ₹ 55,03,401/-. The assessee has debited sum of ₹ 55,03,401/- to its Profit and Loss Account, in view of the nature of expenditure, the said expenditure is to be allowed as revenue expenditure in the hands of assessee. However, the same is restricted to the amount of bill which is certified by the Architect as due for payment to the contractor i.e. ₹38,09,445/-. Accordingly, we direct the Assessing Officer to allow expenditure of ₹ 38,09,445/- and the balance expenses claimed by the assessee of ₹ 55,03,401/- is disallowed.

12. The second part of expenditure debited to repairs and maintenance of Jalgaon office is on account of modification of generator room, electric panel room, washing and toilet, LG compressor room, plinth for paper unloading area, dispatch areas etc. The said expenses are in the nature of repairs and maintenance and are to be allowed as revenue expenditure. Thus, the ground of appeal No.1 raised by the assessee is partly allowed.

13. First, we take up the issue in ground of appeal No.3. The issue raised in ground of appeal No.3 is against disallowance of ₹ 3 crores paid as compensation to one of the shareholders in line with the directions of the Hon'ble Supreme Court.

14. Briefly, in the facts relating to the issue, the assessee company claimed an amount of ₹ 3 crores as payment towards compensation to one of the shareholders in accordance with the directions of the Hon'ble Supreme Court. On verification, it was found by the Assessing Officer that these were incurred in connection with a dispute in the Hon'ble Supreme Court with the wife and daughter of the founder of the company Dr. N.B. Parulekar. The suit was filed by the legal heirs of Dr. N.B. Parulekar against allotment of shares to Pawar group. It was stated that the company was also made a respondent to the suit and therefore, it was necessary for the company to defend its decision taken in the normal course of business to protect its business. The assessee claimed the said expenditure to have been incurred wholly and exclusively for the purpose of business. The Assessing Officer however, did not accept this argument and quoting from the relevant paragraphs from the orders of the Hon'ble Supreme Court regarding the nature of dispute which pertained to the allotment of shares to Pawar group, held that the dispute was in fact between Parulekar family and

Pawar group for wrongful allotment of shares to one group. As the expenditure was incurred to settle the dispute between two groups of shareholders, the expenditure incurred by the assessee was to protect the interests of one group of shareholders against another group of shareholders, for gaining control over the organization by one group and therefore, the expenditure cannot be stated to be for the purpose of business of the assessee company. The Assessing Officer held the said expenditure to be in the nature of capital expenditure. The Assessing Officer relied upon the decision of the Hon'ble High Court of Rajasthan in the case of CIT Vs. Uadaipur Mineral Development Syndicate Pvt. Ltd. (2004) 269 ITR 263 (Raj)

15. Before the CIT(A), the assessee claimed that in order to ensure smooth running of the business of the assessee was not hampered and business interests including those of employees, suppliers, creditors, etc. did not suffer, the assessee was bound to defend itself. The Hon'ble Supreme Court later in its judgment in the assessee's case in March, 2006, while granting compensation of ₹ 3 crores to the legal heirs has recognized this fact vide its observations that ".. *The situation cannot now be unscrambled. It is a course of action, which would make the company dysfunctional harming the interests of the whole body of shareholders, affect company's employees, its creditors and customers…." "and in order to protect the business interests of the company ordered the assessee to pay compensation instead of disturbing the management and share holding pattern, thereby avoiding disturbance in the functioning of the company. It is argued that if, according to the H'ble Supreme Court, the compensation paid is business expediency, the legal expenses incurred in that connection would also have to be business expenditure.* The CIT(A) after referring to the facts of the

case and the decision of the Hon'ble Supreme Court between the parties, vide para 4.16 at page 28 of the appellate order held as under:-

> *"4.16 In view of the above, in my considered view, the company was made a respondent for there was a legal necessity to involve the company for all the acts of commission and omission had been done by one group of shareholders through the company and, therefore even though the assessee company was required to defend its decision, it was not wholly and exclusively for the purpose of business in view of the clear decision of the Supreme Court referred above. Further, the amount of Rs.3 crores required to be given to the assessee was in the nature of damages / compensation for the wrong doings done by the Pawar Group including the three executors and was not in the nature of revenue expenditure. Also it was held by the Supreme Court that the entire transfer was fraught with illegalities and therefore, the unlawful acts done by the company as factually narrated by the Supreme Court could not be held to be wholly and exclusively for the purpose of business of the assessee company. Even otherwise, the payment of Rs.3 crores was one time payment for compensating the Parulekars for the wrongful transfer of shares to Pawar Group by the company. The amount of compensation / damages being clearly penal in character especially when the Supreme Court has proved the mens rea of the company, is therefore, held to be not allowable u/s. 37(1) of the I.T. Act, 1961. (Mahalaxmi Sugar Mills Co., 123 ITR 429 (S.C) followed in Prakash Cotton Mills vs. CIT 111 CTR 389 (S.C) & Standard Batteries, 119 CTR 353 (S.C). In view of the above, ground of appeal No.iv is dismissed."*

16. The assessee is in appeal against the order of CIT(A).

17. The learned Authorized Representative for the assessee took us through the factual aspects of the case and also pointed out that on the death of founder of assessee, some shares were to be transferred to the trust. However, executors of Will, sold them to Pawar group, without offering to legal heirs. The sale of shares to Pawar group was challenged by legal heirs of Dr. Parulekar. He further pointed that legal heirs as per Articles of company were entitled to shares but they refused to the said shares. However, they were not offered as shareholders and hence, the litigation and the dispute which was challenged before the Hon'ble Supreme Court. The learned Authorized Representative for the assessee pointed out that where there is dispute between the shareholders what is important is how to preserve name of the company and not the nature of dispute. Where the company was getting dysfunctional and where the dispute

was affecting workmen / functioning of the assessee company, then the settlement between the parties was for carrying on the business and it cannot be said to be a case of penalty. He placed reliance on the decision of the Hon'ble Bombay High Court in CIT Vs. Bramha Bazar Hotels Ltd. (2015) 235 TAXMAN 195 (Bom), CIT Vs. Chemosyn Ltd. (2016) 236 TAXMAN 202 (Bom) and the Mumbai Bench of Tribunal in Echjay Industries Ltd. Vs. DCIT reported in 257 ITR 1 (AT) (Mum).

18. The learned Departmental Representative for the Revenue on the other hand, referred to the transaction and pointed out that proper procedure was not followed and the CIT(A) vide para 4.16 has come to a finding that the said payment was penal in nature. He further pointed out that the Tribunal in earlier year at page 13 of the order while deciding the issue of allowability of claim of legal charges paid in respect of aforesaid transaction held the transaction to be penal in nature. He further stressed that where a company does fraud and allots shares in haste; then the company had done wrongdoing and compounding such incident is not business expenditure. Further, the company had not driven any benefit. However, the Assessing Officer and CIT(A) has held the said expenditure to be not allowable as business expenditure under section 37(1) of the Act. Without prejudice to his arguments, the learned Departmental Representative for the Revenue further pointed out that in any case the expenditure incurred was for enduring benefit and at best could be capital expenditure in the hands of assessee company. Vis-à-vis reliance placed upon by the learned Authorized Representative for the assessee on different decisions, the learned Departmental Representative for the Revenue pointed out that the facts were at variance.

19. The learned Authorized Representative for the assessee in rejoinder pointed out that the arguments made by the learned Departmental Representative for the Revenue were mis-directed. He referred to the order of the Hon'ble Supreme Court and pointed out that there were two different parts. The dispute was not in respect of original shares i.e. 1766 which were transferred by the executors to Pawar group, wherein the role of assessee company was to see whose name was on record. He referred to pages 53 and 54 of the decision of the Hon'ble Supreme Court and pointed out that there was never question of transferring those shares to the assessee. He further pointed out that compensation also did not relate to 1766 shares, for which separate relief was given. He also stressed that there was no fraud as the transaction was between the executors and the Pawar group and the assessee had to record the transaction of transfer. Referring to the decision of the Hon'ble Supreme Court, he pointed out that the Apex Court laid down that the Article had two parts i.e. first offer was made to legal heir and after they refused, then the second offer of sale of shares should have been made to all shareholders of the company, which the executors failed to do. The Apex Court thus, observed that if rectification was to be done i.e. offer is to be made to the shareholders of the company, then it would go back to the first stage of transaction i.e. way back to 20 years and in order to save the working of assessee company, the Hon'ble Supreme Court directed the assessee to pay compensation.

20. We have heard the rival contentions and perused the record. Briefly, in the facts of the case, one Dr. N.B. Parulekar and his wife Mrs. Shanta Parulekar promoted the company known as Sakal Papers Pvt. Ltd. in 1948. Dr. N.B. Parulekar died in 1973. Dr. N.B. Parulekar in his Will had appointed four executors i.e. Mrs. Shanta, his wife and 3 others as executors and trustees of the

Will. The Will *inter-alia* empowered the executors and trustees to sell from time to time all the properties vested in them for payment of estate duty and to invest the same as thought fit. The remainder, after providing for specific legacies, was required to be held for specific purpose, which pertained to the spread of education, affecting an improvement of quality and standard of living of journalism and other such objects to bring about improvement of information amongst the masses. All the four executors entered in the registered members of the company as joint shareholders of 3417 shares belonging to the estate of Dr.N.B. Parulekar on 26.04.1977. Except Shanta Parulekar, the 3 executors transferred these shares to Pawar group. Further, the dispute was also regarding the transfer of 93 shares by two executors of the company. As per the Articles of Association of assessee company, hierarchy of the persons entitled to purchase shares upon transfer was given, which was as under:-

> "(i) The first right was given to the preemptors under Article 57A;
>
> (ii) Next was any member who was willing to purchase the share at fair value as per Articles 58 and 64;
>
> (iii) The third category was any person or persons selected by the Directors as being desirable in the interest of assessee company to admit to membership;
>
> (iv) The last category was the person to whom transferor might choose to sell the shares. The Articles further provided that as long as there was any person in higher category, there was no question of sale or purchase by a person in lower category.

21. In spite of the said dictate of the Articles of Association, the three executors transferred the shares to a third party i.e. Pawar group without offering the same to Mrs. Shanta Parulekar and legal nominee Smt. Claude Lila

Parulekar. A suit in this regard was filed by the legal heirs and the contention of Mrs. Parulekar was that the price of shares was fixed in collusion by the auditors and therefore, was not acceptable; which was later on unilaterally accepted by her and her willingness to deposit an amount of ₹ 20 lakhs against the auditor's certified price at ₹ 2,10,273/- for 93 shares and ₹ 77,75,837/- for 3417 shares. The shares were transferred after giving a notice to Mrs. Shanta Parulekar stating that time was of the essence. It was, in nutshell, the transfer of these shares by the three executors in contravention of Article 57A to Article 62 of the Articles of Association, to the Pawar group, which was subject matter of dispute. The suit was filed by Parulekar against Pawar group. However, the assessee company was made a respondent as after the transfer of disputed shares, 17,666 equity shares of ₹ 100/- each were issued and allotted to Pawar group and the share capital was increased by ₹ 17,66,600/- in the Annual General Meeting; though there was no indication in the notice issued that there would be any decision taken with regard to increase in the issued capital and allotment of shares. This matter of allotment of shares was pursued by Mrs. Parulekar and her daughter by filing a suit seeking specific performance of the contract of the sale of 3417 and 93 shares to them. The trial court held that the transfer of these shares was made contrary to the assessee's right to preemption. It was also held that the transfer had been made in violation of the provisions of section 108 of the Companies Act, 1956 and the Articles of Association of the company. It was further held that Pawar group was not bonafide purchaser of shares as they were aware of the pre-emptive right of the Parulekar to the shares. The Hon'ble High Court dismissed the appeal of Parulekar and allowed cross appeal filed by Pawar group holding that although there were some irregularities in issuance of 17666 shares and also there was violation of section 108 of Companies Act in sale of 3417 shares, these were irregularities which had been cured by

subsequent rectification of those decisions. It was against the decision of the Division Bench that Smt. Parulekar and Smt. Claude Lila filed an appeal before the Supreme Court of India.

22. The Supreme Court held that entire transaction of shares transfer was riddled with illegalities. The CIT(A) in paras 4.9 to 4.13 at pages 17 to 22 has elaborately taken note of various facets of the decision of Hon'ble Supreme Court in holding the transaction of allotting additional shares to Pawar group to be carried out without following the Articles of Association of assessee company and even not giving notice as envisaged under the Companies Act for increase in share capital of any company. The Hon'ble Supreme Court thereafter, proceeded to decide the question as to what relief could be given to Parelukar especially in view of the fact that a period of 20 years had elapsed. The Hon'ble Supreme Court also took note of the submissions of Pawar group in the course of hearing that *status quo* may not be disturbed and relief be given by awarding compensation. The Hon'ble Supreme Court held as under:-

> *"VI.3 Having effectively held on all issues in favour of the appellant the question remains as to whether we should, in exercise of our discretion under section 155, grant the appellant the relief of rectification of the shares as claimed. Although the logical conclusion of our findings would be to set aside the transfers and restore the status quo ante, the question is should the share register of the company be directed to be rectified now in respect of shares, the impugned transfer of which took place more than 20 years ago ? The respondents have submitted in the course of the hearing that this Court should not in any event disturb the status quo but should mould the relief by awarding compensation, if necessary as prayed for by the appellant. They have referred to the decision in Needle Industries (I) Pvt. Ltd. V. Needle Industries Newey (I) Holding Ltd. (1981) 3 SCC 33 in support of this submission. We agree. There has been a sea change in the factual scenario. Shantha has dies. The company has become a public limited company. The respondents have been at the helm of the company more than two decades during the legal struggle. Many decisions must of necessity have been taken and implemented. The situation cannot now be unscrambled. It is a course of action which would make the company dysfunctional harming the interests of the whole body of shareholders, affect company's employees, its creditors and customers. It is not as if we are able to grant any relief directly to the appellant except to the extent of setting aside the transfer. The appellant will still have to pursue her remedies for effective relief in the two pending suits in the District Court of*

Pune in which the appellant has prayed for specific performance of the contracts for sale of the shares. The outcome of the suits is uncertain. What is certain is that whatever the outcome of the litigation it will be another long round of litigation. Yet another factor to be borne in mind is that the appellant had her own role to play in contributing to the situation which she had to face eventually. Admittedly, Shanta and the appellant ultimately accepted the Chartered Accountant's report. As we have noted, no reason whatsoever was given for the sudden change of attitude. If they could agree subsequently to pay the price they could have done so earlier, paid the price and then challenged the value. Further, the Single Judge also gave the appellant and Shanta an opportunity of paying the share price into the Court within a period of six weeks. Had the appellant and Shanta done so, they might have been in a stronger position vis-à-vis the Pawars intangible assets he appeal court.

VI.4 In these circumstances and weighing in the balance the comparative advantages and disadvantages of granting the appellant the relief of rectification we are of the view that it would not be appropriate at this stage to exercise our discretion to grant the relief of rectification. However, the fact remains that the appellant has been wronged and she is entitled to be compensated. Section 155 of the Companies Act, allows the giving of damages in addition to or in lieu of rectification. In the pending suits, the appellant has put forward alternative prayers for payment of compensation of Rs.3 crores on account of 3417 share and Rs.1 crore for the transfer of the 93 shares in the event specific performance of the contracts was not grantable. It was pointed out by some of the respondents' counsel, without prejudice to their contentions on merits, that the figure specified in the plaint, though on the higher side, could form a rough and ready basis to quantify the compensation. Having due regard to these submissions and in order to give a quietus to the litigation we are of the view that the ends of justice would be met by directing that the appellant should be compensated with an amount of Rs.3 crores to be paid by the company to the appellant in full and final settlement of the appellant's claims in respect of the 3417 and 93 shares. Additionally, the company will also allot shares to the appellant out of 17,666 shares on par proportionate with the appellant's present shareholding. We are told that the appellant is at present employed by the company and is also a Director of the company. The appellant shall continue in this capacity for the appellant's life time."

23. The Hon'ble Supreme Court first decided the issue of compensation to be paid by the assessee company to Parulekar at ₹ 3 crores for not offering 3417 shares and 93 shares first to Parulekar and violating the Articles of Association of the assessee company, by offering the same to the Pawar group. The second part of the decision of Hon'ble Supreme Court was in respect of issuance in allotment of 17,666 shares in the company which was said to have been validly done to the Pawar group. In this regard, Apex Court directed the assessee company to allot shares to Parulekar on proportionate basis out of 17,666 shares.

24. The learned Authorized Representative for the assessee pointed out that the case of Revenue is that there is violation of provisions of the Companies Act and hence, compensation paid by the assessee cannot be allowed as expenditure. It was clarified by him that violation, if any pertained to allotment of 17,666 shares to Pawar group, against which the direction of the Hon'ble Supreme Court was to allot proportionate shares to Parulekar. Further, the assessee had been directed to pay compensation of ₹ 3 crores to Parulekar on account of 3417 shares and 93 shares, which in the first instance were not offered to Parulekar but were transferred to Pawar group. The Hon'ble Supreme Court while deciding the question of awarding compensation had taken note of the fact that the aforesaid transaction was nearly 20 years before the decision in the case and during that period the company had been carrying on its business. The Hon'ble Supreme Court observed that *Many decisions must of necessity have been taken and implemented. The situation cannot now be unscrambled. It is a course of action which would make the company dysfunctional harming the interests of the whole body of shareholders, affect company's employees, its creditors and customers. It is not as if we are able to grant any relief directly to the appellant except to the extent of setting aside the transfer.* The Hon'ble Supreme Court also took note of the role of Parulekar in contributing to the situation since they had ultimately accepted the Chartered Accountant's report and also that Single Judge had given them an opportunity of paying share price into the Court within period of six weeks which was not done and if they had done so, then they would have been in a stronger position vis-à-vis Pawars. The Apex Court awarded compensation in view of section 155 of the Companies Act, wherein appellants before the Apex Court had put in an alternate prayer for such payment of compensation. The said compensation was directed to be paid by the assessee to Parulekar. In such circumstances, the question which arises is

whether the compensation paid by the assessee was to be allowed as revenue expenditure. The answer stands decided by the jurisdictional High Court in two decisions rendered in 2015.

25. The first decision is in the case of CIT Chemosyn Ltd. (supra). In the facts of the said case, *consequent to difference between the two groups, the dispute reached the Company Law Board as well as the Supreme Court of India. Thereafter, a settlement was arrived at between the two warring groups of shareholders and as per directions of the Company Law Board the assessee-company was directed to buy 34% shareholding of one of the warring group and cancel the same. The respondent-assessee had claimed before the Assessing Officer that the amount of Rs.6.81 crores (being the difference between consideration paid and face value of the shares acquired for cancellation) was revenue expenditure.* The Hon'ble High Court took note of the order of Tribunal, wherein it was held that the expenditure incurred by the assessee company to purchase its shares was deductible as revenue expenditure, in view of the dispute between the two warring groups of shareholders the business of respondent assessee had suffered. The Hon'ble High Court held as under:-

> *"11. We find that the impugned order records a finding of fact that the amounts which were paid by the respondent assessee for the purpose of purchase of its shares, to its shareholder for subsequent cancellation was an expenditure incurred only to enable smooth running of the business. Thus, the expenditure was incurred for carrying on its business smoothly and therefore, was a deductible expenditure. Thus, the impugned order of the Tribunal is essentially a finding of fact. The respondents have not been able to show that these findings are in any manner perverse or arbitrary. Therefore, questions Nos.3 to 5 do not give rise to any substantial question of law. Thus, question Nos.3 to 5 are dismissed."*

26. The Hon'ble High Court in a later decision dated 26.08.2015 in the case of CIT Vs. Bramha Bazar Hotels Ltd. (supra) also decided similar issue. In the

facts of the said case, the dispute between the shareholders was carried to the Company Law Board in proceedings for oppression and mismanagement. This dispute between the warring groups affected the business of the Respondet-Assessee, resulting in an arrangement being reached before the Company Law Board by which the Respondent-Assessee would buy-back shares of one of the group of shareholders and cancel the same. This was done by the Respondent-Assessee to only ensure that its business can prosper. The extra amount paid over and above the face value of the shares to the departing group of shareholders was debited as revenue expenditure. The Hon'ble High Court while deciding the issue of exercise of power of revision under section 263 of the Act referred to the decision of the Tribunal in Echjay Industries Ltd. Vs. DCIT (supra) and CIT Vs. Chemosyn Ltd. (supra) (decision of Hon'ble High Court dated 11.02.2015) and held that where there is no increase of share capital but the Company has been forced to pay off one of the warring group of shareholders by buying its shares for its own well-being and carrying on business; it was the expenditure which was forced upon the Respondent-Assessee so as to carry on its business and not an expenditure of choice. The Hon'ble Bombay High Court also held that the decision of Apex Court in Brooke Bond India Ltd. Vs. CIT (1997) 225 ITR 798 (SC) was inapplicable to the facts of the case since in the said case, the assessee therein issued shares to the general public with a view to increase its share capital. The expenditure incurred by Brooke Bond to increase its capital, was claimed to be Revenue in nature and, therefore, deductable. The Apex Court upheld the order of the High Court and held that the amount spent to increase the share capital is not revenue but capital expenditure.

27. In the facts of the present case also and as is clear from the dictate of the Hon'ble Supreme Court in the litigation between two groups of shareholders of the assessee company what weighed with the Apex Court was the functioning of assessee company and various decisions taken in respect of business, shareholders, employees, etc., which spanned over a period of 20 years and in such circumstances, provisions of section 155 of the Companies Act were utilized.

28. Another aspect which weighed with the Apex Court in awarding compensation was alternate prayer made by the appellants before the Apex Court i.e. Parulekar for payment of compensation on account of 3417 and 93 shares. The directions to pay compensation to the assessee company in full and final settlement of the claims in respect of 3417 and 93 shares was given to the assessee company in order to maintain smooth running of business of the assessee company and also to cover the decisions taken by the assessee company while carrying on its business for the prior period of about 20 years and what weighed with the Apex Court that such a situation / decision should not be overturned by the litigation between the parties.

29. The issue which arises before us stands squarely covered by the decision of the Hon’ble Bombay High Court in CIT Vs. Chemosyn Ltd. (supra) and CIT Vs. Bramha Bazar Hotels Ltd. (supra) and applying the said proposition, we hold that the expenditure of ₹ 3 crores is to be allowed in the hands of assessee as revenue expenditure. It may be pointed out that the Assessing Officer while deciding the issue had placed reliance on the decision of Hon’ble High Court of Rajasthan in the case of CIT Vs. Uadaipur Mineral Development Syndicate Pvt.

Ltd. (supra). Further, it may also be pointed out that the decisions of Hon'ble Bombay High Court are subsequent to the decision of non-jurisdictional High Court and following the laws of proprietary, decisions of the jurisdictional High Court are to be applied in order to decide the present issue.

30. Before parting, we may also refer to the decision of the Tribunal in assessee's own case in assessment year 2003-04, wherein while deciding the issue of allowability of legal charges paid in relation to the litigation before the Hon'ble Supreme Court, it was held that the said legal charges are not to be allowed. After referring to the facts of the case and the decision of the Hon'ble Supreme Court, remark was made that the compensation paid was penal in nature. However, in the present case, there was non-fulfillment of mutually decided terms and the dispute which was settled by the Apex Court was with regard to non-fulfillment of contractual obligations, which could not be said to be penal in nature. The aspect of penal nature is only for infraction of law and as decided by us in the paras hereinabove, there is no infraction of law in the present case. In any case, the remarks of the Tribunal while deciding a connected issue of allowability of legal charges cannot impede our decision in deciding the issue on merits in the year of claim of expenditure. Applying the ratio laid down by the jurisdictional High Court, we hold that the expenditure claimed by the assessee on account of compensation paid as per directions of the Apex Court in order to settle the issue between warring groups of shareholders and in order to maintain smooth running of business of the assessee, is to be allowed as revenue expenditure. The ground of appeal No.3 raised by the assessee is thus, allowed.

31. The issue raised in ground of appeal No.2 is against disallowance of legal expenses of ₹ 37,10,056/-.

32. The learned Authorized Representative for the assessee fairly pointed out that the said issue stands covered against the assessee by the order of Tribunal in earlier years i.e. assessment years 2003-04 and 2004-05.

33. The learned Departmental Representative for the Revenue placed reliance on the orders of authorities below.

34. Though we have decided the issue of allowability of compensation in the hands of assessee as revenue expenditure, however, we do not disturb the issue of allowability of legal expenses which has been decided against the assessee, in turn, relying on the ratio laid down by the Tribunal in assessee's own case relating to assessment years 2003-04 and 2004-05 (supra). The ground of appeal No.2 raised by the assessee is thus, dismissed.

35. The last issue raised in the present appeal is against claim of deduction under section 80IA(4) of the Act.

36. Brief facts relating to the issue are that both the authorities below had re-computed the deduction claimed under section 80IA(4) of the Act on the ground that brought forward depreciation / business loss was to be adjusted against profits of business from windmill activity and therefore, deduction under section 80IA(4) of the Act is to be computed.

37. The case of assessee before the authorities below and even before us is that the year under consideration was the first year of claim of deduction under section 80IA(4) of the Act and the assessee is entitled to chose initial assessment year. The learned Authorized Representative for the assessee further pointed out that losses arising in earlier years had already been set off. Losses on account of depreciation / business losses from the windmill activity were already adjusted against other business income of the assessee and there is no merit in notionally carry forward of the said losses. In this regard, he placed reliance on the ratio laid down by the Hon'ble Supreme Court in CIT Vs. Best Corporation Ltd. (2017) 244 TAXMAN 151 (SC) and CBDT's Circular No.1/2016, dated 15.02.2016 clarifying the term 'initial assessment year' in section 80IA(5) of the Act.

38. We find that the issue raised in the present appeal is squarely covered by the order of Tribunal in ACIT Vs. M/s. RDS Construction Co. in ITA No.135/PUN/2016, relating to assessment year 2011-12, order dated 09.04.2018, wherein it was held as under:-

> *''10. We have heard the rival contentions and perused the record. The issue which arises in the present appeal is the allowability of deduction under section 80IA(4)(iv)(a) r.w.s. 80IA(5) of the Act. The assessee had set up first windmill in assessment year 2006-07 and the second windmill in assessment year 2007-08. In the initial years, there were losses from windmill activity. The assessee was simultaneously carrying on business of civil construction, from which the assessee was making profits. The said losses were adjusted against the income arising from other business activity of the assessee. For the first time, the windmill activity had shown profit in assessment year 2010-11 and the assessee claimed deduction under section 80IA(4) of the Act. The said year i.e. assessment year 2010-11 was the initial assessment year for claim of deduction under section 80IA(4) of the Act. The CIT(A) at page 22 has given a finding that there were no brought forward losses in the hands of assessee and the same were adjusted upto assessment year 2009-10. The Assessing Officer for assessment year 2010-11 had not allowed the claim of deduction on account of windmill activity. However, the CIT(A) and the Tribunal thereafter, allowed the claim of deduction.*
>
> *11. The issue which is raised in the present appeal is the aforesaid claim of deduction under section 80IA(4)(iv)(a) of the Act in respect of windmill business.*

The Tribunal in assessee's own case (supra) in assessment year 2010-11 had already allowed the claim of assessee. The case of Revenue is that the losses of earlier years if have not been absorbed, then the same have to be adjusted against the undertaking before allowing deduction under section 80IA(4)(iv)(a) of the Act. The CIT(A) in the present case has given a finding that there were no brought forward losses in the hands of assessee, which in any case were adjusted upto assessment year 2009-10. The said findings of CIT(A) have not been controverted by learned Departmental Representative for the Revenue except to stress that the same needs verification. We find no merit in the plea of learned Departmental Representative for the Revenue in this regard, especially where in assessment year 2010-11 which was the preceding year to the instant assessment year, the claim of deduction has been allowed in the hands of assessee. It may also be pointed out herein itself that the assessee was running civil construction activity from which it was showing profits from year to year and the losses arising from windmill in the earlier years have already been set off against the said income and the balance income had been assessed in the hands of assessee. It is not case of Revenue that after adjustment of losses in the respective years the assessee had shown any losses. There is no merit in the order of Assessing Officer in holding that deemed losses have to be adjusted against profits of undertaking. In view thereof, we hold that the assessee was entitled to the claim of deduction under section 80IA(4)(iv)(a) of the Act. The grounds of appeal raised by the Revenue are thus, dismissed."

39. The issue raised in the present appeal is identical to the issue before the Tribunal. Further, the Hon'ble Supreme Court dismissed the Special Leave Petition filed in the case of CIT Vs. Best Corporation Ltd. (supra), wherein the High Court held that since it had consistently followed decision in case of Velayudhaswamy Spinning Mills (P.) Ltd. Vs. ACIT (2012) 340 ITR 477 (Mad) and on the basis of said decision CBDT had issued Circular No.1 of 2016, dated 15.02.2016 clarifying term 'initial assessment year' in section 80IA(5) of the Act, order of Tribunal holding that assessee was entitled to deduction under section 80IA of the Act without setting off losses/unabsorbed depreciation pertaining to windmill, which were set off in earlier year against other business income was deserved to be upheld.

40. The CBDT vide Circular No.1/2016, dated 15.02.2016 has also clarified situation of claim of deduction under section 80IA(4) of the Act by any concern by adopting initial assessment year as the first year of claim, irrespective of the fact

that the windmill was installed and started functioning in any of the earlier years. Following the same parity of reasoning, we hold that the assessee is entitled to claim deduction under section 80IA(4) of the Act. The ground of appeal No.4 raised by the assessee is thus, allowed.

41. In the result, appeal of Revenue is dismissed and appeal of assessee is partly allowed.

Order pronounced on this 1st day of August, 2018.

Sd/-
(ANIL CHATURVEDI)
लेखा सदस्य / ACCOUNTANT MEMBER

Sd/-
(SUSHMA CHOWLA)
न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक Dated : 1st August, 2018.

GCVSR

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to :

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A)-II, Pune;
4. The CIT-III, Pune;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "बी" / DR 'B', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune