आयकर अपीलीय अधिकरण,चण्डीगढ़ न्यायपीठ "ए", चण्डीगढ़
IN THE INCOME TAX APPELLATE TRIBUNAL, CHANDIGARH BENCH "A", CHANDIGARH

श्री संजय गर्ग, न्यायकि सदस्य एवं डा. बी.आर.आर, कुमार, लेखा सदस्य
BEFORE: Sh.SANJAY GARG, JM & DR. B.R.R. KUMAR, AM

आयकर अपील सं./ ITA NO. 1323/Chd/2012
निर्धारण वर्ष / Assessment Year : 2003-04

GlaxoSmithKline Asia (P) Ltd. DLF Plaza Towers DLF City Phase 1 Gurgaon	बनाम	ACIT Circle 4(1) Chandigarh
स्थायी लेखा सं./PAN NO: AABCS3237R		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/Assessee by : Sh. Neeraj Jain (C.A), Sh. Abhishek Mukherjee (C.A)
राजस्व की ओर से/ Revenue by : Dr. Gulshan Raj

सुनवाई की तारीख/Date of Hearing : 08/08/ 2018
उदघोषणा की तारीख/Date of Pronouncement : 28/09/2018

आदेश/Order

The present appeal has been filed by the Assessee against the order of the Ld. CIT(A), Chandigarh dt. 09/10/2012.

1. That the Commissioner of Income-tax (Appeals) erred on facts and in law in sustaining disallowance of write off of stock of aquafresh toothpaste of Rs.438.20 lacs allegedly holding that the appellant failed to establish that stock, in question, had been destroyed and also on the ground that loss, if any, was of capital nature.

1.1 That the Commissioner of Income-tax (Appeals) erred on facts and in law in observing that "the assessing officer has reproduced the exact submissions made by the appellant and a reading thereof shows that no evidence was produced before the assessing officer to prove and establish that stock of tooth paste had been destroyed".

1.2 That the Commissioner of Income-tax (Appeals) erred on facts and in law in holding that "the option to value the stock at the lower of the cost or market value is available only in the case of ongoing business and not where the business is discontinued".

2. That the Commissioner of Income-tax (Appeals) erred on facts and in law in confirming the disallowance of Rs.22.29 lacs being write off of stores and spares on the ground that the same was related to the write off of stock of aquafresh tooth paste which has been held to be not allowable.

2. Brief facts of the issue as taken from the order of the Ld. CIT(A) are that the assessee claimed that it had discontinued dealing in one of its products namely 'Aquafresh Toothpaste'. The assessee had drawn inventory of this item and debited the amount of Rs. 438.20 lacs on account of the write off of this

stock as revenue expenditure. The Assessing Officer treated the write off expenditure as capital expenditure in the original assessment order passed u/s 143(3) of the Income Tax Act, 1961 on 10.03.2006. The addition made was confirmed by the CIT(A) in the first round of appeals on the basis that appellant had not been able to establish that the stock in question had indeed been destroyed.

3. The assessee filed appeal before ITAT, which had set-aside the disallowance made to the file of the Assessing Officer vide order dated 31.08.2009 in Appeal No. 9/Del/2008 for fresh examination in the following terms:

> *"On perusal of A.O.'s order, we find the assessee's claim was disallowed for the reason that the claim was of capital in nature. The. A.O. never raised any question about the matter whether the stock were actually destroyed, and, if not destroyed, it had carried nil value. However, CIT(A) has rejected the assessee's claim on some other ground that the assessee has failed to produce any evidence with regard to discarded/destroy of Aquafresh tooth-paste, and any evidence to show that the stock of the tooth-paste carried nil value if those were not destroyed. This finding of the CIT(A) has undoubtedly taken at the back of the assessee in as much as in the course of appellate proceedings, no such opportunity was given to the assessee to produce or furnished such evidence as referred to by CIT(A) in his order. We are, therefore, of the considered view that this is a fit case where additional evidences sought to be produced by the assessee before us are to be admitted for examination and consideration. Since the additional evidences sought to be produced before us were not produced before the A.O., it would be proper to restore the matter back to the file of the A.O. for his fresh adjudication after examining and verifying all the evidences and materials that assessee may which produce before him in support of its claim, the A.O. Shall examine and decide the issue afresh as per law and that too after providing reasonable opportunities of being heard to the assessee."*

4. The Assessing Officer has now given effect to the directions of the ITAT and made the impugned assessment. The Assessing Officer has again made disallowance of the value of the stock written off of Rs. 438.20 lacs by holding that the same was the cost associated to get out of the unviable business and so the expenditure will give enduring benefit to the appellant and that the expenditure related to last many years and not a particular year.

5. Before the Ld. CIT(A) the assessee filed a written submission, relevant portion of which is reproduced below:

> *"It is respectfully submitted that the appellant as per the consistent method of valuation of stock values the closing stock at cost or net realization value, whichever is lower as mandated by Accounting Standard - 2 on 'Valuation of inventories' prescribed by the Institute of Chartered Accountants of India. Since such stocks was withdrawn could not be sold in the market, the net realizable value of such stock was taken as 'NIL'. The market price in the instant case being NIL, the value of these items was written down to NIL and was reduced from the*

profit and loss account. In accordance with the consistent method of valuation of inventory followed by the appellant, net realizable value of such stock being NIL, the same were valued as such and accordingly value of such of Rs.438.20 lacs and obsolete stores and spares ofRs.22.29 lacs was written off in the books of account.

The method of valuation of such obsolete stock, it is respectfully submitted, is in accordance with the accepted principles of accounting propounded by the Institute of Chartered Accountants of India. The Courts of India,, too, have accepted the method of valuation of obsolete/defective stock at net realizable value being lower than cost.

The test for determining whether different ventures constitutes same business, as has been enunciated by the Supreme Court in various decisions (cited infra), is whether there is any interconnection, interlacing, interdependence of unity embracing different ventures. The aforesaid interdependence/interlacing of different ventures can be established by existence of common management, common business organization/administration and common fund. What is relevant is unity of control and not the nature of products deal with by the two businesses.

Attention, in this regard, is invited to the decision of Supreme Court in the case of Produce Exchange Corporation Ltd. vs. CJT: 771TR 739 (SC). In that case, the assessee carried on the business as a dealer in diverse commodities, including stocks and shares.

The issue that camp up for consideration before the Court was whether losses suffered by the assessee in the sale of shares of public limited company could be set off against profits from transactions in other commodities in the relevant year. The High Court had decided the aforesaid issue against the assessee company on the ground that the nature of the two business, dealing in commodities and dealing in shares being different, the same would not constitute one and the same business, for the purposes of claiming set-off of losses of one business against income of the other business. The Supreme Court, however, reversed this view of the High Court and observed as under:

Further, discontinuation of one or more products cannot lead to conclusion that the business itself has been discontinued. The authorities below seem to have fallen into such an error. Further, even if a business is discontinued during a year, loss cannot be disallowed. There is no such prohibitive condition under section 70 of the Income Tax Act, 1961. Consequently, the assessee is entitled to seek set off of operating loss as business loss of the year."

6. At this juncture, Ld. CIT(A) held that there was no discussion in the assessment order regarding the evidence that the assessee was required to produce before the Assessing Officer to establish that the stock in question had in fact been destroyed. It was held that the ITAT had earlier remanded the matter back to the Assessing Officer for the specific purpose to examine the evidence which the assessee was to produce in this regard. The Assessing Officer has reproduced the exact submissions made by the assessee and a reading thereof shows that no evidence was produced before the Assessing Officer to prove and establish that stock of tooth paste had been destroyed. It is clear that the onus, which the ITAT had cast on the assessee was not discharged

by the assessee and therefore, the assessee was rightly held by the Assessing Officer to be not entitled to any relief in terms of the directions of the ITAT.

7. The Ld. CIT(A) further held that the scope in the present proceedings is limited to adjudicate whether the directions of the ITAT have been given effect to by the Assessing Officer or not. Therefore all other arguments made by the assessee are totally irrelevant because these have been considered and rejected in the earlier proceedings. Though in passing, he stated that the option to value the stock at the lower of the cost or market value is available only in the case of ongoing business and not where the business is discontinued and held that in the instant case, the business of manufacture of Aquafresh toothpaste had admittedly been discontinued and so this option was not available to the assessee.

7.1 Holding thus, the Ld. CIT(A) rejected the claim of the assessee on both the grounds namely its failure to establish that the stock in question had been destroyed and also that the loss, if any, was of capital nature.

8. Before us, the Ld. AR argued on the issue of write off of the stock on the grounds that since (a) the write off has to be allowed since the assessee could prove with documentary evidences about the destruction of the stock taken off the shelf (b) it cannot be treated as capital expenditure as this constitutes stock in trade and its made a part of the closing stock in earlier years. He submitted his written arguments as under:

> *Appellant as per the consistent method of valuation of stock values the closing stock at cost or net realizable value, whichever is lower as mandated by Accounting Standard (AS) - 2 on 'Valuation of inventories' prescribed by the Institute of Chartered Accountants of India. Since such stocks was withdrawn could not be sold in the market, the net realizable value of such stock was taken as 'NIL'. The market price in the instant case being NIL, the value of these items was written down to NIL and was reduced from the profit and loss account. In accordance with the consistent method of valuation of inventory followed by the appellant, net realizable value of such stock being NIL, the same were valued as such and accordingly value of such stock of Rs.438.20 lacs and obsolete stores and spares of Rs.22.29 lacs was written off in the books of account.*
>
> *The method of valuation of stock, it is respectfully submitted, is in accordance with the accepted principles of accounting propounded by the Institute of Chartered Accountants of India. The Courts in India, too, have accepted the method of valuation of obsolete / defective stock at net realizable value being lower than cost.*

It will be appreciated that it is an accepted method of accounting that inventory has to be valued at cost price or net realizable value, whichever is lower. Thus, the value of items, included in closing stock, which had become obsolete or slow moving, was written down by creating a provision and debiting the same to the profit and loss account.

The Supreme Court in the case of Chainrup Sampatram vs. CIT: 24 ITR 48, approved the valuation of closing stock lower of cost or market price. The same view has been reiterated by the Supreme Court in the case of CIT v. British Paints India Ltd. : 188 ITR 44 wherein the Court laid down principles for valuation of stock as under:

"It is a well recognized principle of commercial accounting to enter in the profit and loss account the value of the stock-in-trade at the beginning and at the end of the accounting year at cost or market price, whichever is the lower.

Where the market value has fallen before the date of valuation and at that date, the market value of the article is less than its actual cost, the appellant is entitled to value the articles at market value and thus anticipate the loss which he will probably incur at the time of the sale of the goods. Valuation of the stock-in-trade at cost or market value whichever is the lower, is a matter entirely within the discretion of the appellant. But whichever method he adopts, it should disclose a true picture of his profits and gains. If, on the other hands, he adopts system which does not disclose the true state of affairs for the determination of tax, even if it is ideally suited for other purposes of his business such as the creation of a reserve, declaration of dividends, planning and the like, it is the duty of the assessing officer to adopt such method of computation as he deems appropriate for proper determination of the true income of the assessee."

The method of valuing the closing stock at cost or net realizable value, whichever is lower, for the purposes of the Act have been accepted in the following cases:

- *K. Mohammed Adam Sahib v. CIT: 56 ITR 360 (Mad.)*
- *India Motor Parts and Accessories (P) Ltd v. CIT: 60 ITR 531 (Mad.)*
- *CIT v. Dalmia Cement (Bharat) Ltd: 215 ITR 441 (Del.)*
- *CIT v Indo-Commercial Bank Ltd.: 44 ITR 22 (Del.)*
- *CIT vs. Bharat Commerce & Industries Limited : 240 ITR 256 (Del HC)*

The Madras High Court in the case of K. Mohammad Adam Sahib v. CIT: 56 ITR 360, while reiterating the principle that the assessee has a right to value his closing stock at cost price or market price whichever is lower, held that where the goods are saleable only in certain foreign markets and there is no demand for the goods in such foreign markets, the assessee is entitled to value the goods at 'NIL'. He is not bound to show that he had made efforts to sell the goods in other foreign markets in the local markets, before valuing the stock at'NIL'.

The Madras High Court, again in the case of India Motor Parts and Accessories (P) Ltd. v. CIT: 60 ITR 531, held that where there is a gradual decline of market, it is a recognized method to reduce the value of closing stock in respect of the items which are slow moving or inactive and the same cannot be regarded as under valuation.

Kind attention is further drawn to the decision of Delhi High Court in the case of CIT vs. Bharat Commerce & Industries Limited : 240 ITR 256, wherein the assessee was having some items of slow moving raw material which were valued at estimated realizable value. The assessee thereby claimed trading loss of Rs.5,28,475/-. The assessing officer, however, disallowed the above amount alleging that there was no scientific basis adopted for revaluation of stock and the assessee having followed the method of valuation of cost or market value, whichever was lower, it could not be permitted to change the method of valuation of stock at its sweet will. The matter traveled upto the Tribunal when the Hon'ble Bench allowing the claim of the assessee, held as under:

"On the material submitted before the Appellate Assistant Commissioner and that submitted before us, we agree with him that the revaluation was done on the basis of specific instances of fall in value and proper reasoning. We find little substance in the submission of the learned Departmental representative that the instance of sale on September 21, 1973, could not be relied upon for such revaluation. The assessee has cited several other instances before the Appellate Assistant Commissioner. The instance of September 21, 1973, was cited only to show that trend of the market even in the subsequent years. We also agree with the Appellate Assistant Commissioner that there was nothing wrong in valuing the slow moving stocks on estimated realisable value in the light of the authorities cited before us by learned counsel for the assessee. The Madras High Court in the case reported in K. Mohammad Adam v. CIT [1965] 56 ITR 360, laid down that the assessee has a right to value his closing stock at cost price or market price, whichever is lower. The court further held that where the goods are saleable only in certain foreign markets, the assessee is entitled to value them at 'nil' and that he is not bound to show that he had made efforts to sell the goods in other foreign markets or in the local market, before valuing the stock at 'nil'. The same principle applies to the present case also. The assessee found that certain goods could not be sold even at the cost price. It, therefore, valued them at their estimated realisable value obviously because there was no market for them and the market quotations were also not available. We also agree with the Appellate Assistant Commissioner that if this involved any change in the method of valuation, that was permissible as it was bona fide and had been followed subsequently. This contention of the Department also therefore fails."

The High Court, on appeal by the Revenue, held that, the decision of the Tribunal was based on an undisputed finding of fact and, therefore, the claim of the assessee was allowable deduction. The relevant observations of the Court are as under:

"From the format of the question it is evident that it does not lay specific challenge to the correctness of the aforenoted findings arrived at by the Tribunal. Thus, in view of the undisputed findings of fact recorded by the Tribunal, namely, that the method of valuation adopted by the assessee was bona fide and it was being followed subsequently, we have no hesitation in holding that the view taken by the Tribunal in allowing the assessee's claim of loss of Rs. 5,28,475, arising out of revaluation of slow moving items of raw material was correct in law. Accordingly, we answer the second question in the affirmative, i.e., in favour of the assessee and against the Revenue." (emphasis supplied)

Reliance is also placed in this regard on the decision of the Delhi High Court in the case of CIT v. Dalmia Cement (Bharat) Ltd. : 215ITR 4411. In the case, the assessee was being assessed in the status of a company and had been carrying on the Dalmia Magnestic Corporation Unit in Salem, the business of raising magnesite ore and converting it into dead burnt magnesite (DBM). In the year under consideration, the assessee showed an opening stock value of DBM dust at Rs.77,50,677/-, but it showed the same in the closing stock at NIL value on the ground that it was having silica content above a specified percentage, i.e., at 15 per cent, and, hence, it had no market value. In the course of assessment proceedings, it was found that in the earlier years, the assessee was valuing DBM dust stock at "raw material cost plus packing charges" but for the assessment year in question, it valued the closing stock at "raw material cost plus packing charges or realizable value, whichever was lower". The realizable value of DBM dust was considered as NIL on the ground that it was not saleable. According to the assessee, the aforesaid change was made bona fide in the light of the prevailing fact situation and in conformity with the principle and practice of valuation of inventories. The change in the method of valuing the closing stock decreased the value of DBM dust by Rs.77,50,677/- thereby reducing the assessable income by the same amount.

The assessing officer rejecting the assessee's contention, valued the closing stock at Rs.77,50,677/- and added it to the assessee's income on the ground that upto the assessment year 1983-84, the assessee was showing the value of DBM dust at cost only and in order to determine the true profit in any particular year it is necessary that the system of valuation adopted for opening stock as well as the closing stock should be on identical lines.

The High Court while upholding the method of valuation adopted by the assessee held that irrespective of the basis adopted for valuation of stocks in the earlier years, the assessee has the option to change the method of valuation of the closing stock to lower of cost or market price, provided the change is bona fide and followed regularly thereafter.

The Delhi High Court in the case of CIT vs. Hotline Teletube and Component Ltd.: 2008-TIOL-424-HC-Del : 175 Taxman 286, allowed similar loss claimed by the assessee on account of diminution in the value of obsolete stock.

The Hon'ble Delhi High Court in the recent decision in the case of CIT vs. E. I. Dupont India Ltd. : 169 Taxman 184, reiterating the aforesaid position, deleted the disallowance for provision made for damaged stock - useless / obsolete stock made by the lower authorities.

To the same effect are the following decisions rendered by the Courts:

- *CIT v. Hughes Communication India Ltd.: 215 Taxman 136 (Del)*
- *CIT v Becton Dickinson India (P.) Ltd.: 214 Taxman 636 (Del)*
- *CIT v Bharat Commerce & Industries Ltd.: 107 Taxman 135 (Del)*
- *Jet Airways India (P) Ltd. vs CIT (in 4228/M/2000) (Mum)*
- *Emersons Process Management India (P) Ltd. vs Addl. CIT: IT Appeal No. 8118 (Mum.) of 2010, Assessment year2006-07 dated 12 August 2011.*
- *Digital Equipment India Ltd. vs CIT: ITA No. 6623 and 6624(Bom.)/2008 Assessment Years 1990-91 and 1991-92 ITA Nos. 7466, 6707 and 6708(Bom.)/1995 Assessment Years 1989-90, 1990-91 and 1991-92, dated 17 November 2009*
- *CIT v Nuware India Ltd.: 118 ITD 70 (Del)*

The assessing officer while making the addition, held that the assessee has decided to discontinue a particular line of business and the stock write off was a cost to get out of unviable business which resulted in enduring benefit to the assessee. The assessing officer placed reliance on the decision of the Apex Court in J.K. Cotton Manufacturers Limited vs. CIT: 101 ITR 221 and Arvind Mills Limited vs. CIT: 197 ITR 422 in this regard.

In terms of section 2(14)(i) of the Act, stock-in-trade cannot be regarded as a capital asset. The aforesaid loss on write off of obsolete stock of Aquafresh toothpaste, it is respectfully submitted, is stock-in-trade of the appellant and any loss relating to the same necessarily is in the revenue field.

Your Honour's kind attention is invited to the decision in the case of Empire Jute Co. Ltd. v. CIT: 124 ITR 1, wherein the Supreme Court laid down the test for determining as to what constitutes capital expenditure in the following terms:

"..... 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 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 ratio decidendi laid down in the aforesaid judgement has been reiterated by the Supreme Court in CIT vs. Associated Cement Companies Ltd. : 172 ITR 257 and again in the case of Alembic Chemical Works Co. Ltd. v. CIT: 177 ITR 377.

It is respectfully submitted, therefore, that the loss on account of stock write off was essentially on trading account and did not result in either an enduring benefit in the capital field or creation of capital asset and are, therefore, to be held as allowable revenue deduction.

In the case of J.K. Cotton Manufactures Ltd. vs. CIT (Supra) relied upon by the assessing officer, the Supreme Court, the payment of compensation for premature termination of managing agency was held to be capital expenditure resulting in an enduring or recurring benefit. The aforesaid decision, it is respectfully submitted, has no application to the facts of the present case. On the peculiar facts of that case, the premature termination of the managing agency affected the very structure/profit earning apparatus through which the business of the assessee was carried out. The Apex Court held the said expenditure to be capital expenditure, because both the incoming and the outgoing managing agents belonged to the family of the assessee and because there was no evidence to show that the agency had been terminated on account of its becoming onerous or difficult. The Supreme Court, therefore, held that it was not a case "where the appellant reduced its expenditure by doing away with the middleman's profit, e.g., to get rid of the managing agency and taking the managing agency itself."

Further, the Apex Court while rendering its decision added the following caveat:

"We would, however, like to make it clear that we have held that the compensation paid to the outgoing agents in the peculiar facts of the present case amounts to capital expenditure. But we should not be understood as laying down a general rule that in all cases where compensation is paid to the managing agents whose agency is terminated it would amount to capital expenditure." (emphasis added).

Further, the aforesaid decision relied upon by the assessing officer is not in conflict with the later decisions of the Supreme Court, wherein, it is laid down that every enduring and recurring benefit cannot be characterized as capital expenditure unless such benefit in the capital field.

The Hon'ble Karnataka High court in the case of Commissioner of Income-Tax, vs. Motor Industries Company Limited.:223 ITR 112 while holding compensation paid by the assessee for premature termination of the agreement of sole distributorship 'is an allowable deduction distinguished the decision in the case of J. K. Cotton Manufacturers Ltd. v. CIT(supra) as under:

"Further because the advantage gained by the assessee was chiefly to facilitate the assessee's business operations with greater efficiency and profitability without touching the fixed capital of the assessee, the expenditure could only be treated to be revenue in nature.

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In J. K. Cotton Manufacturers Ltd. v. CIT [1975] 101 ITR 221 (SC), the Supreme Court was dealing with the question whether compensation paid to an outgoing managing agent, was capital in nature. The court held that the payment was capital in nature because both the incoming and the outgoing managing agents belonged to the family of the assessee and because there was no evidence to show that the agency had been terminated on account of its becoming onerous or difficult. The payment was on the contrary found to have

been made for the benefit of both the outgoing and incoming agents, who were closely associated with the assessee. This is not, however, the position in the instant case. Here the Tribunal has returned a finding that the continuation of GEC as MICO's sole distributor was commercially disadvantageous for the latter and the termination of the distributorship would, according to it, benefit the assessee. The theory of extraneous considerations propounded by the Revenue has been rejected by the Tribunal, and, in our opinion, rightly so, for there was hardly any material to substantiate the same. It is, therefore, difficult to see how the view taken by the Supreme Court in the peculiar facts and circumstances of the above case would have any application to the instant case particularly in view of the following observations made in the said judgment

"We would, however, like to make it clear that we have held that the compensation paid to the outgoing agents in the peculiar facts of the present case amounts to capital expenditure. But we should not be understood as laying down a general rule that in all cases where compensation is paid to the managing agents whose agency is terminated it would amount to capital expenditure." (emphasis added).

Reference may also be made to the following few lines of the judgment which appear to us to be quite apposite to the case at hand :

"This is not a case where the appellant reduced its expenditure by doing away with the middleman's profit, e.g., to get rid of the managing agency and taking the managing agency itself." (emphasis added).

In the light of what has been noticed above, it is not possible to hold that an advantage like the one MICO acquired in the present case could be said to be in the capital field, assuming for the sake of an argument that the protocol was in existence and the payment in question was made only with a view to prematurely terminate the same. It is difficult for us to accept the rather broadly stated proposition canvassed by Mr. Dattu, that all that is reguired for an expenditure to be capital in nature is the acguisition of an advantage regardless of the nature thereof. The argument advanced is sustainable neither on principle nor the authority of decided cases cited before."

In the case of Arvind Mills vs. CIT (Supra) before the Supreme Court, the assessee company, which ran textile mill had to pay a sum of Rs. 2,02,907/-during the previous year relevant to assessment year 1972-73 towards its contribution as betterment charges for Bombay Town Planning Scheme under section 66 of Bombay Town Planning Act, 1954. Under the scheme, the lands of different owners including the land of the appellant were treated as included in a common pool and various improvements such as laying roads and making provision for drainage were effected for the better enjoyment of the lands under the scheme. Because of such improvements, the owner got betterment of the land and the value of the land increased. Such improvements also resulted in providing better facilities for carrying on the business of the appellant. The question was whether the betterment charge required to be paid by the appellant was revenue expenditure deductible in computing the profits of the appellant. The Appellate Tribunal and the High Court, on a reference, held that the betterment charge was capital expenditure and was not deductible. The Supreme Court affirmed on the decision of the High Court and held that the payment had no direct nexus with the day-to-day running of the business and, as a result of the payment of the betterment charge, the value of the appellant's land had increased and, therefore, betterment charge was capital expenditure in nature.

The aforesaid decision of the Supreme Court, it is respectfully submitted, was rendered on its own peculiar facts, wherein, the payment of betterment charges resulted in increase in the value of the land and consequently was held to be capital expenditure.

In the case of the appellant, it is not disputed that the stock of Aquafresh Toothpaste was the appellant's stock-in-trade. The write off/discarding of such stock has not resulted in enhancing the value of an asset, on the contrary has gone to eliminate recurring revenue losses.

In view of the aforesaid, it is respectfully submitted that the loss arising therefrom is not on capital account and does not constitute a capital expenditure.

The assessing officer has further observed that, "..... the assessee has decided to discontinue a particular line of business. The stock of finished goods with definite market value was shown as written off subsequent to this decision to get out of that particular business. The stock write off is a cost to get out of unviable business, which will give enduring benefit to the assessee. This can be understood from an example where a person has invested Rs.4 crores in a certain partnership to pursue one business. If this business does not work as expected and the investment therein has to be treated as loss as the same will not be claimed as a revenue loss. This will be a loss of investment and will be treated as capital loss not chargeable to revenue. There will be no difference in accounting treatment if instead of money the investment had been made by way of stock. The key question here is investment in kind vs. investment in cash. This by itself will not change the basic nature of transaction. Reference is made to the case law below to understand the concept improper perspective."

The test for determining whether different ventures constitutes same business, as has been enunciated by the Supreme Court in various decisions (cited infra), is whether there is any interconnection, interlacing, interdependence or unity embracing different ventures. The aforesaid interdependence/interlacing of different ventures can be established by existence of common management, common business organization/administration and common fund. What is relevant is unity of control and not the nature of products dealt with by the two businesses.

Law in this regard was laid down by the Supreme Court repeatedly in the following decisions:

- *Setabganj Sugar Mills Ltd. vs. CIT : 41 ITR 272 (SC)*
- *CIT vs. Prithvi Insurance Co. Ltd.: 63 ITR 632 (SC)*
- *Hoogly Trust (P) Ltd. v CIT 73 ITR 685 (SC)*
- *L.M. Chhabda & Sons vs. CIT : 65 ITR 638 (SC)*
- *Standard Refinery & Distillery Ltd. v. CIT: 79 ITR 589 (SC)*
- *B.R. Ltd. v. V.P. Gupta: 113 ITR 647 (SC)*
- *Produce Exchange Corporation Ltd. Vfs. CIT : 77 ITR 739 (SC)*

In the case of the appellant, aquafresh business is only part of same line of business, which the assessee is already engaged under the control and supervision of the existing management of the company. The aaquafresh toothpaste, in fact, is one of the several products dealt in by the appellant and there is common management, common administration, interlacing of funds and unity of control.

The Courts have repeatedly in the following decisions, wherein while following the tests laid down in the aforementioned decisions of Supreme Court, have held that revenue expenditure incurred in connection with expansion of business, involving setting up of new unit, which satisfies the test of unity of control, interlacing of funds, common management, etc. would be allowable revenue deduction:

- *CIT v. Relaxo Footwears Ltd: 293 ITR 231 (Del.)*
- *Enpro India Ltd. vs. DCIT: 113 Taxman 132 (Del.)*
- *Jay Engineering Works Ltd. v. CIT: 311 ITR 405 (Del.)*
- *CIT v. Tata Chemicals Ltd: 256 ITR 395 (Bom.)*
- *Addl. CIT v. Aniline Dye Stuffs & Pharmaceuticals Pvt. Ltd.: 138 ITR 843(Bom)*

- *Kesoram Industries and Cotton Mills Ltd vs CIT: 196 ITR 845 (Cal.)*
- *Hindustan Aluminim Corporation Ltd. v. CIT: 159 ITR 673 (Cal.)*
- *CIT v. Rane (Madras) Ltd.: 215 CTR 250 (Chenn.)*
- *Prem Spinning and Weaving Mills Co. Ltd. v. CIT : 98 ITR 20 (All.)*
- *CIT v. Shah Theatres P. Ltd. : 169 ITR 499 (Raj.)*
- *CIT v. Malwa Vanaspati & Chemicals Co. Ltd., 149 CTR 283 (MP)*
- *CIT v. Kerala State Industrial Development Corporation Ltd.: 182 ITR 62 (Ker.)*
- *CCIT v. Senapathy Whitely Ltd. : 101 CTR 31 (Kar.)*
- *CIT v. Hindustan Machine Tools Ltd.: 175 ITR 212 (Kar.)*

Your Honour's kind attention is also invited to a recent decision of Banglore Bench of Tribunal in the case of Wipro Limited vs. DCIT : 96 TTJ 211, wherein in identical circumstances, the Hon'ble Tribunal held the loss on account of write off of stock pursuant to closure of part of the business as operational loss allowable revenue deduction.

In that case before the Tribunal, the assessee-company, a distributor of computers and related products claimed deduction for the loss from the discontinuation of Apple Product business. The stock of computers worth Rs.2,04,95,641/- were revalued at Rs.25 lacs. The Hon'ble Tribunal while deleting the disallowance made by the assessing officer, held that "the analysis of loss of stock from Apple Products activity indicates the loss to be operational loss incurred during the course of carrying on of business. The expenditure incurred by the assessee is also genuine which is not doubted. Consequently, there appears no reason for the expenditure to be disallowed. Further, discontinuation of one or more products cannot lead to conclusion that the business itself has been discontinued. The authorities below seem to have fallen into such an error. Further, even if a business is discontinued during a year, loss cannot be disallowed. There is no such prohibitive condition under section 70 of the Income Tax Act, 1961. Conseguentlv, the assessee is entitled to seek set off of operating loss as business loss of the year."

In view of the aforesaid cumulative reasons, the disallowance made by the assessing officer holding loss on account of write off of stock of aquafresh toothpaste, which was withdrawn from the market is on t4rading loss and is allowable as revenue deduction as such. The disallowance made by the assessing officer, therefore, is without any basis and is liable to be deleted.

9. On the other hand Ld. DR supported the orders of the lower Authorities. The major arguments taken by the Ld. DR based on the rationale given in the assessment order wherein the stock written off was indeed held to be a capital expenditure are as under:

A. Bringing into existence an asset or advantage of enduring nature would lead to the inference that the expenditure disbursed is of a capital nature. These terms, such as 'asset' or 'advantage of enduring nature' are, however purely descriptive rather than definitive and no rule of universal application can be laid down. Ultimately, the question will have to depend on the facts and circumstances of each case, namely quality and quantum of the amount, the position of the parties, the object of the transaction which has impact on the business, the nature of trade for which the expenditure is incurred and the purpose thereof etc.

B. An item of disbursement may be regarded as of a capital nature when it is relatable to a fixed asset or capital, where the circulating capital or stock-in-trade would be treated as revenue receipt.'

c. Expenditure relating to framework of business is generally capital expenditure.

D. Another important and safe test that may be laid down particularly in case where the managing agency is terminated would be to find out whether the termination or the agency is in terrorem or purely voluntary for obtaining a substantial benefits.

E. The Hon'ble Apex Court while applying the aforesaid principles held that the termination of the agency can not be said to be in terrorem but was voluntary so as to obtain an enduring or recurring benefit. Thus, it was held that the compensation payable was capital expenditure and hence, not allowable as a deduction from the profit u/s. 37(3).

F. The Apex Court further clarified that the compensation paid to the outgoing agents in the peculiar facts of the present case amount to capital expenditure. Ld. DR argued that if various tests are applied with which by no means exhaustive nor are they of universal application, the present case would fall to be qualified as capital expenditure only.

G. It was argued that the Hon'ble Supreme Court laid down the principle that where according to the facts of the case, a relationship is terminated not in terrorem I.e. due to difficulties or guilt of negligence on behalf of the other party but voluntarily for obtaining substantial benefits, then it cannot be held that the compensation so paid was for the reasons of commercial expediency. Therefore, where there is no necessity to terminate an agency and the same is done voluntarily to obtain an enduring and recurring advantage the compensation paid for such voluntary termination is in the nature of capital expenditure.

H. It was argued that as per the judgment of the Hon'ble Court in Arvind Mills Ltd. Vs. CIT (1992) 197 ITR 422 (SC) payment made voluntarily or under a statutory obligation is immaterial in deciding the nature of the expenditure and hence the write off be treated as capital expenditure.

10. We have gone through the entire history of the case and the facts on record. On the issue of whether the expenditure incurred on destruction of the goods be treated as capital expenditure as held by the Revenue, we are not in agreement with any of the points taken up by the Revenue mentioned above. While the issue before us is destruction of the stock and claiming consequently the expenditure as revenue expenditure, the Revenue's submission that it is an item of disbursement and hence may be regarded as capital in nature cannot be accepted. Similarly this expenditure as pointed out in point no. 3 of the Revenue's submission cannot be considered as relates to any frame work of business or as mentioned in the point no. 1 doesn't bring out any new asset. The Revenue's reliance that this write off be treated as capital expenditure based on the contention that the action of recalling of the product amounts to termination of agency and purely voluntary for obtaining substantial benefit cannot be accepted in the facts of the case. Based on the settled position of law as to what constitutes a capital expenditure, this write off of stock cannot be treated as capital expenditure. We are also not in agreement with the contention of the Ld. DR that these expenditures were not related with particular

previous year but were related to many earlier years cannot be accepted as these products constitute a part of the closing stock for the instant year.

11. Now coming to the issue whether this expenditure has been incurred by the assessee indeed or not, the matter was referred back to the Assessing Officer to examine this specific issue in the first round of appeal by this Tribunal. The assessee could establish documentarily the fact of destruction of the off shelved products and the Assessing Officer has absolutely not discussed this issue to prove anything contra, we hereby allow the appeal of the assessee on the issue that the value of the goods destructed be treated as Revenue expenditure for the year in appeal. The Assessing Officer is hereby directed to determine the "actual cost" incurred in manufacturing of the product and allow the amount accordingly.

12. Regarding the ground no. 2 related to disallowance of Rs. 22.29 lacs, being the value of stores and spares written off by holding the same to be of capital nature.

13. Brief facts of the issue are that the assessee had claimed expenditure on write off of stores and spares of Rs. 22.29 lacs. The Assessing Officer had allowed this expenditure in the original assessment order dated 10.03.2006 passed u/s 143(3) of the Act. Subsequently, the Commissioner of Income Tax had set-aside this order by passing order u/s 263 on limited issue that the Assessing Officer had accepted claim of the assessee without conducting any proper enquiry. The Assessing Officer passed order u/s 143(3) read with section 263 on 11.12.2008 and disallowed the said expenditure of Rs. 22.29 lacs by holding that this expenditure was of capital nature. CIT(A) had dismissed the appeal filed by the assessee against which the assessee had filed appeal before ITAT, Delhi and ITAT, Delhi has set-aside this issue also to the file of the Assessing Officer for fresh adjudication vide order dated 04.02.2011 in ITA No. 354/Del/2010. The Assessing Officer held that issue is related to the write off of stores and spares, and disallowed this expenditure also by treating it as capital expenditure in the order passed in set-aside proceedings.

14. We have gone through the issue involved and find that the ratio held with regard to the Ground No. 1 discussed above holds good for this write off of stock

of goods also and we hereby allow the expenditure incurred being in the nature of revenue expenditure and direct the Assessing Officer to determine the "actual cost" incurred with regard to stores and spares and allow the amount accordingly.

15. In the result, appeal of the Assessee is allowed for statistical purposes.

Order pronounced in the open court.

Sd/-	**Sd/-**
संजय गर्ग	**डा. बी.आर.आर, कुमार,**
(SANJAY GARG)	**(DR. B.R.R. KUMAR, AM)**
न्यायकि सदस्य/ Judicial Member	**लेखा सदस्य/ Accountant Member**
गौड़	

आदेश की प्रतिलिपि अग्रेषित/ Copy of the order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्ड फाईल/ Guard File

आदेशानुसार/ By order,
सहायक पंजीकार/ Assistant Registrar