IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'B', NEW DELHI

BEFORE SH. N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
SH. LALIET KUMAR, JUDICIAL MEMBER

ITA No.1113 & 505/DEL/2011
Assessment Year: 2005-06 & 2006-07

ACIT Circle – 5(1), New Delhi	**Vs**	**Dhara Vegetable Oil & Foods Co. Ltd. (Now merged with Mother Dairy Fruit & Vegetabel Ltd) Safdarjung Enclave Opp. Kamal Cinema, New Delhi**
(APPELLANT)		**(RESPONDENT)**

ITA No.1021 & 1022/DEL/2011
Assessment Year: 2004-05 & 2005-06

Dhara Vegetable Oil & Foods Co. Ltd. (Now merged with Mother Dairy Fruit & Vegetabel Ltd) Parparganj, New Delhi	**Vs**	**ACIT Circle – 5(1), New Delhi**
(APPELLANT)		**(RESPONDENT)**

Cross Objection No.58/DEL/2011
(IN ITA NO.505/Del/2011)
Assessment Year: 2006-07

Dhara Vegetable Oil & Foods Co. Ltd. (Now merged with Mother Dairy Fruit & Vegetabel Ltd) Safdarjung Enclave Opp. Kamal Cinema, New Delhi PAN No. AABCD3060H	**Vs**	**ACIT Circle – 5(1), Room No.409 A, C. R. Building I. P. Estate, New Delhi**
(APPELLANT)		**(RESPONDENT)**

Appellant by	Sh. S. D. Kapila, Advocate Sh. R. R. Maurya, Advocate Sh. Parvesh Sharma, Advocate Sh. Bhuvan Mahajan, Advocate
Respondent by	Ms. Ashima Neb, Sr. DR

Date of hearing:	25/07/2019
Date of Pronouncement:	05/08/2019

ORDER

PER N. K. BILLAIYA, AM:

ITA No.1021/Del/2011 is the appeal by the assessee for A.Y. 2004-05, ITA No.1022/Del/2011 and ITA No.1113/Del/2011 are cross appeals by the assessee and the revenue preferred against the order of the CIT(A)-8, New Delhi dated 20.12.2010 by which the CIT(A) has disposed the appeals for A. Y.2004-05 and A. Y.2005-06 by a consolidated order. ITA No.505/Del/2011 and Co.58/Del/2011 are appeal and cross objection by the assessee preferred against the order of the CIT(A)-8, New Delhi dated 22.11.2010 pertaining to A. Y. 2006-07.

2. This bunch of appeals were heard together and disposed of by this common order for the sake of convenience as common issues are involved in all the years.

3. We have heard the representatives of both the sides on the facts for A. Y.2004-05.

4. First we take up assesee's appeal. Ground No.1 is of general in nature and needs no separate adjudication.

5. Ground No.2 relates to the addition of Rs.4149824/- being write back of provision and sundry balances of Rs.3786505/-.

6. During the course of the scrutiny assessment proceedings the Assessing officer noticed that the assessee has written back excess provision of Rs.4149824/- and sundry credit balances of Rs.3786505/-. The Assessing Officer noticed that the assessee has not added the same u/s.41(1) for the purpose of computation of its total income. The assessee was asked to show cause as to why the same should not be added u/s. 41(1) of the Act. In its reply the assessee stated that these balances were transferred by NDDB as part of transfer agreement between the assessee and NDDB. It was brought to the notice of the Assessing Officer that the income of NDDB was not taxable under the income tax Act, therefore, the question of allowing deduction to them does not arise and therefore, provisions of section 41 (1) of the Act do not apply to the facts of the case. The contention of the assessee was dismissed by the Assessing Officer who was of the opinion that even if the income of NDDB was not taxable still the sundry creditors and provisions are claimed as deduction. The Assessing Officer added the amount of Rs.7936329/-. Assessee carried the matter before the CIT(A) but without any success.

7. Before us the counsel for the assessee referred to the National Delhi Development Board Act 1987 and pointed out that

as per section 44 of the Act NDDB was not liable to pay income tax. It is the say of the counsel that since there was no liability to pay income tax there was no question of any allowances of deduction in the hands of NDDB. The Counsel further stated that since no allowance or deduction has been made in the assessment of NDDB write back of the same cannot be treated as income tax u/s. 41 (1) of the Act.

8. Per contra the DR strongly supported the findings of the Assessing Officer.

9. We have carefully considered the orders of the authorities below and have gone through the NDDB Act 1987 exhibited at pages 513-537 of the paper book. Section 44 of the said Act reads as under :-

> *"Not withstanding anything contended in the income tax Act, 1961 or any other enactment for the time being enforce relating to tax on income tax, profits or gains, the National Delhi Development Board was not liable to pay income tax or any other tax in respect of its income profits or gains derived."*

10. Section 41 (1) of the IT Act reads as under :-

> *"41. [8][9](1) Where an allowance or deduction has been made in the for any year in respect of loss, expenditure or trading liability incurred by the assessee (hereinafter referred to as the first-mentioned person) quently during any previous year -*
>
> *the first-mentioned person has obtained[10], whether in cash*

or in any other manner whatsoever, any amount in respect of such expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof the amount obtained by such person or the value of benefit accruing to him shall be deer profits and gains of business or profession and accordingly able to income-tax as the income of that previous year, whether business or profession in respect of which the allowance or de has been made is in existence in that year or not; or

(b) the successor in business has obtained[10], whether in cash or in any other manner whatsoever, any amount in respect of which expenditure was incurred by the first-mentioned person or benefit in respect of the trading liability referred to in clause (a) by way of remission or cessation thereof, the amount obtained successor in business or the value of benefit accruing to the successor in business shall be deemed to be profits and gains of the business or profession, and accordingly chargeable to income-tax as the income of that pervious year."

11. A perusal of the aforementioned section shows that the amount is added to the income of the assessee only when an allowance or deduction has been made in the assessment for any year. As mentioned elsewhere the income of NDDB was not liable to tax as income tax Act was not applicable to NDDB. In our considered opinion when no allowance or deduction has been allowed to the predecessor there is no question of adding the

same when the amounts are written back by the assessee. Ground No. 2 is allowed

12. Ground No.3 relates to the addition of Rs.114834/- being the amount of tax borne by the assessee in respect of tax payment of interest on supply credit.

13. While scrutinising the return of income the Assessing Officer noticed that the assessee has claimed Rs.114834/- as an expenditure though the same represents the TDS in respect of interest on foreign suppliers credit. As the payment of tax liability is not allowable as expenditure, the Assessing officer made the addition of Rs.114834/- which was confirmed by the CIT(A).

14. Before us the Ld. Counsel for the assessee stated that the assessee has discharged the tax liability of the payment of TDS of the suppliers and, therefore, the same should be allowed as expenditure u/s. 37 of the Act. In support the counsel relied upon the decision of the Hon'ble Punjab & Haryana High Court in the case of Dashmesh Transport Company 93 ITR 275.

15. The DR vehemently stated that the income tax liability discharged by the assessee can never be claimed as legitimate business expenditure u/s. 37 of the Act.

16. We have carefully considered the rival contentions and failed to understand the logic given by the counsel. There is no dispute that the assessee has paid tax on behalf of its foreign suppliers being an income tax liability. By any stretch of imagination the same cannot be allowed as expenditure u/s. 37 of the Act. The reliance was placed on the decision of Hon'ble Punjab & Haryana High Court is misplaced in as much as in that case the assessee

company took over the assets and liabilities of another company and while discharging the liabilities of that company certain expenditure were incurred which were claimed as legitimate business expenditure.

17. Facts of the case in hand are totally different, therefore, the addition of Rs.114834/- is sustained. Ground No.3 is dismissed.

18. Ground No.4 relates to the disallowance of Rs.1734553/- u/s.14A of the Act.

19. The Assessing Officer noted that the assessee has shown Rs.17345527/- on account of interest on tax free bonds as exempt income. The assessee was asked to explain why the interest and other expenses relating to earning of this exempt income should not be disallowed u/s. 14A of the Act. In its reply the assessee stated that the investments come from NDDB and the additional investment made during the year were made out of own funds and interest no has been paid and the assessee has not incurred Nil expenditure for earning the exempt income, therefore, no disallowance should be made u/s.14A of the Act. The reply of the assessee did not find any favour with the Assessing Officer who proceeded by disallowing 10% of the total exempt income as a reasonable expenditure for earning the exempt income and made the addition of Rs.1734553/- which was confirmed by the CIT(A).

20. Before us the counsel for the assessee stated that the investments are coming from NDDB with a specific direction that these funds shall only be utilised on research and development. It is the say of the counsel that the assessee has only paid

directors meeting fees and no other expenditure have been incurred by the assessee for earning the exempt income.

21. Per contra the DR strongly supported the findings of the Assessing Officer.

22. We have carefully considered the orders of the authorities below. There is no dispute that during the year the assessee has earned an exempt income on account of interest on tax free bonds. It is also not in dispute that all the investments are coming from NDDB. The only expenditure which has been incurred by the assessee is towards the board meeting fees. In our considered opinion 100% of such board meeting fee expense need to be disallowed. We accordingly direct the Assessing Officer to disallow the entire expenditure incurred on board meeting fees towards earning of exempt income. In addition further disallowances of Rs.1,00,000/- towards the administrative expenses should meet the ends of justice. We direct accordingly. Ground No.4 is partly allowed.

23. Ground No.5 relates to the addition of Rs.183156/- incurred by the assessee on purchase of software treating the same as capital expenditure. While scrutinising the return of income the Assessing Officer noticed that the assessee has incurred certain expenditure in respect of software expenses being IBM software E-TDS software, MS office 2003, application software, GET software. The Assessing Officer was of the opinion that by incurring these expenses the assessee has acquired enduring benefit and, therefore, these are of capital in nature. The Assessing Officer accordingly treated the same as capital

expenditure and allowed depreciation as per eligible rate. Assessee carried the matter before the CIT(A) but without any success.

24. Before us the counsel stated that these are routine software expenditure which needs to be incurred every year in the up-gradation of the software are of revenue in nature and should be allowed as such. Reliance was placed on the decision of Amways 346 ITR 341 and Ashai India Safety Glass India Ltd 346 ITR 329.

25. Per contra the DR supported the findings of the Assessing Officer.

26. We have carefully considered the orders of the authorities below. Looking to the nature of software we are of the considered opinion that these are routine software which need up gradation year after year and, therefore, it can be safely concluded that no enduring benefit is derived by the assessee. The Hon'ble High Court of Delhi in the case of Amway India (supra) has held that the issue with regard to the expenditure on software application was to be held in favour of the assessee. A similar view was taken by the Hon'ble High Court of Delhi in the case of Ashahi India (supra) wherein the Hon'ble High Court held as under :-

> "*Held, dismissing the appeals, that the Tribunal observed that the expenditure was incurred under various sub-heads, which included licence fee, annual technical support fee, professional charges, data entry operator charges, training charges and travelling expenses. The*

final figure was a consolidation of expenses incurred under these sub-heads. The Tribunal rightly came to the conclusion that none of these resulted in either creation of a new asset or brought forth a new source of income for the assessee. The Tribunal classified the expenses as being recurring in nature to upgrade or to run the system. Therefore, it could not be said that the expenses brought about in an enduring benefit to the assessee. The extent of the expenditure could not be a decisive factor in determining its nature. The expenditure, in the financial year 1997-98 was for removing deficiencies which were found in the software installed in the earlier assessment year, and out of a sum of Rs. 1.71 crores a sum of Rs. 49 lakhs was incurred to modify, customize and upgrade the software installed, while the balance expenditure was used for development and implementation. The treatment of a particular expense or a provision in the books of account could never be conclusively determinative of the nature of the expense. An assessee could not be denied a claim for deduction which was otherwise tenable in law on the ground that the assessee had treated it differently in its books."

27. Respectively following the decisions of the Hon'ble Jurisdictional High Court (supra) we direct the Assessing Officer to delete the disallowance in respect of the software expenditure. Since the entire expenditure has been allowed the Assessing

Officer shall add back the deprecation allowed on such expenditure. Ground No.5 is allowed.

28. Ground No.6 relates to the disallowance of expenditure on account of shifting of machines by treating the same as capital expenditure. The Assessing Officer noticed that the assessee has incurred expenditure of Rs.395649/- on shifting its plant and machinery lying at OPS Chalthan which were shifted to OPS Palanpur. The assessee explained that since the plant and machinery were shifted dismantling was required alongwith loading transportation and un-loading of machines and, therefore, the expenditure incurred on such activity should be allowed as revenue expenditure. The Assessing Officer was of the opinion that such expenditure are capital in nature since the assessee would derive enduring benefit and treated the same as capital expenditure and allowed depreciation. Such action of the Assessing Officer was confirmed by the CIT(A).

29. Before us the counsel for the assessee stated that since the assessee has decided to shift its machines from OPS Chalthan to OPS Palanpur, the plant and machinery at Chalthan had to be dismantled and transported to the new work place. It is the say of the counsel that such expenditure are revenue in nature and should be allowed as such.

30. The DR supported the findings of the Assessing Officer.

31. We have carefully considered the orders of the authorities below. There is no dispute that plant and machinery at OPS Chalthan were shifted to OPS Palanpur. These plant and machineries had to be dismantled and transported and again

installed at Palanpur. In our considered opinion such expenditure do not given enduring benefit to the assessee on the contrary such expenditure are incurred to facilitate the business of the assessee and have to be allowed as revenue expenditure. We accordingly direct the Assessing Officer to delete the disallowance and withdraw the depreciation allowed. Ground No.6 is allowed.

32. In the result, the appeal filed by the assessee is partly allowed.

ITA No. 1022/Del/2011 (Assessee's appeal for A. Y.2005-06)

33. Ground No.1 is of general in nature and needs no separate adjudication.

34. Ground No.2, 3, 4, 5 and 6 are identical to ground No. 2,3,4,5, and 6 in ITA No.1021/Del/2011 (supra) though the quantum may differ. For a detailed reason given therein all these grounds are accordingly disposed of.

ITA No.1113/Del/2011 (Revenue's appeal for A. Y.2005-06)

35. Ground No.1 relates to the deletion of the addition of Rs.18,38,598/- made on account of lease rent.

36. During the course of scrutiny of assessment proceedings the Assessing Officer noticed that the assessee has claimed lease hold land expenses of Rs.18,54,739/-. The assessee was asked to specify the period of lease, its nature and justification for claiming this expense. In its reply the assessee stated that it has taken land on lease at Kandla for the lease period of 30 years and

at Kolkata for lease period of 30 years. It was further explained that in F. Y.2002-03 the assessee has acquired land at Vadodara on 99 years lease on which a yearly ground rent of Rs.2200/-is required to be paid. The Assessing Officer was of the firm belief that the lease hold expenses has to be disallowed as capital expenditure and accordingly made the addition of Rs.18,54,739/-. The assessee carried the matter before the CIT(A). After considering the facts the CIT(A) found that similar disallowance was made in A.Y.2002-03 and the issue has already been decided in favour of the assessee by the Tribunal and therefore, deleted the addition.

37. Before us the DR strongly supported the findings of the Assessing Officer.

38. Per contra the counsel for the assessee reiterated that the similar disallowance have deleted by the Tribunal in A.Y.2002-03.

39. A perusal of the assessment order show that the Assessing Officer himself has followed the assessment order for A. Y.2002-03 and since in that year the Tribunal has deleted the additions. We do not find any reason to interfere with the finding of the CIT(A). Ground No.2 is dismissed.

40. Ground No.3 relates to the deletion of the addition of Rs.43690/-.

41. The Assessing Officer noticed that the assessee has incurred club membership fee on behalf of its employees of BOHO Club, Anand. The Assessing Officer was not convinced with the claim of this expenditure and made the additions.

42. The CIT(A) found that the Assessing Officer has not brought

any material to suggest that the expenditure in question was not laid down in connection with the recreation facilities provided to the employees. The CIT(A) deleted the same.

43. The DR supported the findings of the Assessing Officer.

44. The counsel relied upon the findings of the CIT(A).

45. We have carefully considered the issue. We find that the Assessing Officer is disallowed the expenditure on the ground that such expenditure is not connected at all and nothing to do with the business of assessee company. In our considered view such observations of the Assessing Officer do not have any force. The expenditure has been incurred as several employees of the assessee who are members of the BOHO Club which has been established for the re-creation and welfare of the employees. In our considered view such expenditure is eligible for deduction u/s. 37 (1) of the Act. For this proposition of law we draw support the decision of the Hon'ble High Court of Gujarat in the case of Gujarat State Export Corporation reported in 209 ITR 649. We decline to interfere with the findings of the CIT(A). Ground No.3 is dismissed.

46. Ground No.4 relates to the deletion of the addition of Rs.13877311/- made by disallowing research and development expenses. The Assessing Officer's findings are given at pages 9 to 14 of the assessment order. The CIT(A) deleted the disallowance and the finding of the CIT(A) are at para 5.6 of his order.

47. We have considered the assessment order and the order of the first appellate authority. This issue has been considered at length by the Tribunal in assessee's own case in ITA

No.2875/Del/2013. The relevant finding of the coordinate bench read as under :

26. *The bone of contention is the claim of deduction u/s 35(1) (i),(ii) & (iv) of the Act. The first reason for disallowing the claim of deduction is that research work was carried out by Mother Diary Foods Processing Ltd, Delhi and not by assessee and later on, part of costs were recovered from the assessee company. The Revenue alleges that the assessee itself had not carried out R & D activities. Thus the correlation of expenses incurred with the business of the assessee could not be established which is primarily required for allowance of deduction u/s 35(1)(i) of the Act.*

27. *We find the answer to this quarrel is in the decision of the Hon'ble High Court of Bombay in the case of National Rayon Corporation Limited 140 ITR 143 wherein the Hon'ble High Court has held that for claiming the deduction u/s 35(1)(i) of the Act, research must have been carried on by the assessee itself is not borne out by phraseology of the statutory provision. The assessee can claim the deduction even if the research is carried on by some other person on*

behalf of the assessee.

28. *Second quarrel is in respect of contribution made by the assessee to Delhi University and Nagpur University.*

29. *The Assessing Officer was of the opinion that u/s 35(1) (ii) of the Act, the deduction of any sum paid to scientific research association is allowable if such association's object is undertaking of scientific research or to a university, college or other institution to be used for scientific research subject to fulfilment of certain conditions.*

30. *The Assessing Officer was of the opinion that though the assessee has furnished proof of approval under the I.T. Act, 1922, but has failed to produce any evidence under the provisions of ITAT Rules, 1962.*

*

31. *We find that a similar dispute was co9nsidered by the the then Hon'ble High Court of Gujarat in the case of the appellant in the case of Special Civil Application No. 9876 of 2009 in order dated 10.07.2012 and at para 17 of its order*

the Hon'ble High Court has decided the issue in favour of the assessee and against the Revenue.

32. *Moreover, identical issues were the bone of contention in A.Ys 2004-05 to 2007-08 where disallowances made by the Assessing Officer were deleted. This fact is also evident from the findings of the first appellate authority, who, at pages 10 to 12 of his order has extracted the findings given in A.Y 2007-08.*

3. *Considering the disallowance from all possible angles, we do not finding any merit in such disallowance and, therefore, the findings of the CIT(A) cannot be faulted with. The findings of the first appellate authority are, accordingly, upheld on this count."*

48. Revenue preferred an appeal before the Hon'ble High Court of Delhi and the Hon'ble High Court vide order dated 24.07.2019 in ITA No.454/2019 dismissed the revenue's appeal. The relevant findings of the Hon'ble High Court read as under :-

4. The second issue urged is whether the ITAT was justified in deleting the addition, made on account of disallowance or deductions claimed by the Assessee under Section 35(1)(ii) of the

Act?

5. The brief facts as far as this issue is concerned are that according to the Revenue the actual research expenses have been incurred by the Mother Dairy Fruits and Vegetables Ltd. whose subsidiary is the present Assessee. The Assessee apparently reimbursed the expenses incurred on scientific research for Mother Dairy Fruits and Vegetables Ltd. The Assessee has been assessed in Gujarat prior to the AY in question and for an earlier AY 2002- 03 where again in reassessment proceedings such expenses were sought to be disallowed, the High Court of Gujarat decided the issue in favour of the Assessee by its order dated 10 July 2012 in Special Civil Application No. 9826 of 2009 **(Dhara Vegetable Oil and Foods Co. Ltd.** *v.* **The Deputy Commissioner of Income Tax).**

6. The said decision appears to have been accepted by the Revenue. In that view of the matter this Court is not inclined to frame any question on this issue as well."

49. Respectfully following the decision of the coordinate bench and the Hon'ble High Court we decline to interfere with the findings of the CIT(A) appeal filed by the revenue accordingly dismissed.

ITA No.505/Del/2011 (Revenue's appeal for A. Y. 2006-07)

50. The only grievance of the revenue is that the CIT(A) erred in deleting the addition made u/s. 35 (I) (ii) and u/s. 35 (1) (i) (iv) of the Act. A similar addition has been deleted by us in ITA

No.1113/Del/2011 (supra). For our detail discussion therein we decline to interfere.

51. In the result, the appeal filed by the revenue is accordingly dismissed.

Cross Objection No.58/Del/2011 (cross objection by the assessee for A. Y.2006-07)

52. The only grievance of the assessee relates to the addition of Rs.568968/- being expenditure incurred on shifting of machines. An identical issue has been considered and decided by us in ITA No.1021/Del/2011 vide Ground No. 6 of that appeal. For our detail discussion therein, we direct the Assessing Officer to delete the addition.

53. In the result, the cross objection filed by the assessee is accordingly allowed.

Order pronounced in the open court on 05.08.2019.

Sd/-	**Sd/-**
(LALIET KUMAR)	**(N. K. BILLAIYA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

NEHA
Date:- 05.08.2019
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for Pronouncement	
Date on which the fair order comes back to the Sr. PS/ PS	
Date on which the final order is uploaded on the website of ITAT	06.08.2019
Date on which the file goes to the Bench Clerk	
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	