IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX REFERENCE NO. 13 OF 2001

M/s. Standard Batteries Ltd.
Vakola, Santacruz (East)
Mumbai – 400 055 .. Applicant

v/s.

Commissioner of Income Tax, Mumbai
City II, Mumbai .. Respondent

Ms. Aarti Sathe with Mr. Rajesh Poojary i/b Mint and Confreres for the applicant
Mr. P.C. Chhotaray for the respondent

CORAM : M.S. SANKLECHA &
SANDEEP K. SHINDE, J.J.

RESERVED ON : 20th APRIL, 2018
PRONOUNCED ON : 27th APRIL, 2018

JUDGMENT : (Per M.S. Sanklecha, J.)

1. This Reference under Section 256(1) of the Income Tax Act, 1961 (the Act) by the Income Tax Appellate Tribunal (the Tribunal) seeks our opinion on the following two questions of law.

> *(i) Whether on the facts and in the circumstances of the case and in law, the Tribunal was right in law to hold that the excise duty paid by the assessee is not to be excluded from the total turnover for purposes of computation of deduction under*

Section 80HHC of the Income Tax Act, 1961?

(ii) Whether on the facts and the circumstances of the case and in law, the Tribunal was right in law to hold that the assessee had acquired the ownership rights in the technical know-how included in the agreement in contra-distinction to lease of rights in such know-how and accordingly the assessee was entitled to deduction under Section 35AB as against under Section 37(1) of the Act ?

2. This Reference relate to Assessment Year 1986-87.

3. <u>Regarding question no.(i) :-</u>

(a) It is an agreed position between the parties that this question stands concluded in favour of the applicant assessee and against the respondent Revenue by the decision of this Court in ***Commissioner of Income Tax Vs. Sudarshan Chemicals Industries Ltd. 245 ITR 769***.

(b) In the above view, for the reasons indicated in Sudarshan Chemicals Industries Ltd. (supra), this question has to be answered in the negative i.e. in favour of the applicant assessee and against the respondent Revenue.

4. <u>Regarding question no.(ii) :-</u>

(a) The statement of case refers to the following facts as giving rise this question :-

> *"6. The facts and findings relating to question no.(iii) are found in para nos. 9 and 10 of our appellate order. The assessee had claimed a deduction of Rs.17,85,000/- in regard to the amount paid / payable for technical know-how. The expenditure was claimed to be revenue in nature on the ground that the amount was paid for the use of technical know-how and there was no acquisition of any such know-how. The Assessing Officer, however, rejected the claim of the assessee but allowed deduction at the rate of 1/6th of the amount and the balance amount to be deducted in equal installments for each of the five immediately succeeding previous years. In our considered view, a question of law does arise out of the finding of the Tribunal. ...."*

5. Before dealing with the rival submissions, it would be appropriate to set out the relevant provision as in force in A.Y. 1986-87 which arise for our consideration :-

> Section 35AB reds as under :-
>
> ***"Expenditure on know-how :-***
>
> *Section 35AB: (1) Subject to the provisions of sub-section (2), where the assessee has paid in any previous year any lumpsum consideration for acquiring any know-how for use for the purposes of his business, one-sixth of the amount so paid shall be deducted in*

computing the profits and gains of the business for that previous year, and the balance amount shall be deducted in equal instalments for each of the five immediately succeeding previous years.

(2) .....

Explanation : - For the purpose of this section, 'know-how' means any industrial information or technique likely to assist in the manufacture or processing of goods or in the working of a mine, oil well or other sources of mineral deposits (including the searching for, discovery or testing of deposits or the winning of access thereto.):

(Emphasis provided)

Section 37 of the Act reads as under :-

"General

37. (1) Any expenditure (not being expenditure of the nature described in section 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head "Profits and gains of business or Profession".

Explanation 1. .....

Explanation 2. .....

(2) to (5) ....."

6. Ms. Sathe, learned Counsel appearing in support of the Reference

invited out attention to paragraph 9 and 10 of the order of the Tribunal which is referred to in the statement of case as setting out the facts leading to the Reference. In particular, she invited our attention to the Agreement dated 19th June, 1984, entered by the applicant with M/s. Oldham Batteries Ltd. U.K. In terms of the above agreement, the applicant was to receive outside India a license to transfer and import information, know-how, advice, materials, documents and drawings as required for the manufacture of Miners Caplamp Batteries and Stationery Batteries. This for a lumpsum consideration of £ 100,000/- (pound sterling) in three equal installments and the permission was only to use the know-how and information. There was no transfer of ownership. In particular, she invites our attention to the following clauses in the agreement dated 19th June, 1984, which read as under :-

> *"2.3 To facilitate the transfer and imparting of information as aforesaid, LICENSOR agrees to make available, at its plant and offices in the United Kingdom to the authorized representatives of LICENSEE, the production and other engineers and personnel of LICENSOR to consult with such representatives in the utilization and implementation of the information and date imparted and transferred herein.*
>
> *2.4 LICENSEE expressly agrees to utilize the drawings, data and information furnished hereunder only for the production of the Licensed Products and its parts and for no other purposes.*

2.5 All obligations undertaken and to be performed by LICENSOR under this Agreement shall be performed in the United Kingdom and all communications, delivery, handling over, transfer and imparting of the information, know-how, advice, materials documents and drawings herein shall be made to LICENSEE's representative in the United Kingdom or, if so required by LICENSEE in writing, be transmitted by post or by air courier service from the United Kingdom to the address of LICENSEE in India on which latter event the United Kingdom Post Office or the courier service / airline shall be deemed to be the agent of LICENSEE shall be deemed to be completed upon such mailing or handling over to the courier service/ airline outside of the Republic of India.

2.6 It is expressly agreed that LICENSOR shall not transfer or impart in India nor shall anything in this Agreement be construed as requiring or obtaining LICENSOR to transfer or impart in India, any of the information agreed to be transferred or imparted by LICENSOR under this Agreement nor shall LICENSOR perform in India, or be required to perform in India any of its obligation under this Agreement"

7. This expenditure for receipt of technical know-how on the above facts, according to the applicant, will not fall under Section 35AB of the Act but would appropriately fall under Section 37 of the Act. In support of the above, she made the following submissions :-

(a) Section 35AB of the Act requires a lumpsum consideration to be

paid for acquiring any technical know-how. In this case, admittedly payment of £ 100000/- was was made in 3 installments, therefore not lumpsum payment. Therefore, outside the scope of Section 35AB of the Act;

(b) There is no acquisition of a technical know-how in the present facts, as the applicant merely obtained a lease / license of the rights to use such technical know-how. Therefore, not having any ownership rights over the technical know-how, the requirement of acquiring the know-how under Section 35AB of the Act is not satisfied. Thus, outside the mischief of Section 35AB of the Act;

(c) The technical know-how as obtained by the applicant under the Agreement dated 19th June, 1984 was to be used in the regular course of its business of manufacturing batteries. Therefore, would be revenue in nature. It is submitted Section 35AB of the Act would apply only where the expenditure is in the nature of a capital expenditure. Therefore, Section 35AB of the Act would not apply and the expenditure for obtaining technical know how being of revenue nature, would fall in the residuary Section 37 of the Act.

(d) In the above view, it was submitted that the question as referred to hereinabove be answered in favour of the applicant assessee.

8. As against the above, Mr. Chhotaray, learned Counsel appearing for the respondent Revenue submits as under :-

(a) The payment made in three equal installments continues to be a lumpsum payment;

(b) The right to acquire as provided under Section 35AB of the Act, the amounts paid for acquiring any know-how. It does not require obtaining ownership of the technical know-how. The license to use the know how by itself be covered by the words "consideration paid for acquiring any know-how". There is no basis for restricting the plain meaning of the word "acquiring" in Section 35AB of the Act.

(c) In this case, the applicant has used the technical know-how so obtained in its business and on plain interpretation of Section 35AB of the Act would apply. This is so as it does not exclude revenue expenditure from its purview as there is no requirement in Section 35AB of the Act that the same would be available only if the expenditure is of a capital nature and not if it is revenue in nature. It was pointed out that wherever the legislature wanted to restrict the benefit in respect of the deduction claimed of expenditure dependent upon its nature, described in Section 30 to 36 of the Act, it specifically provided so therein as in Sections 35A and 35ABB of the Act;

(d) In any event, it is submitted that Section 37 of the Act excludes expenditure of a nature described in Section 30 to 36 of the Act from the purview of Section 37 of the Act. Section 35AB of the Act falls within Sections 30 to 36 of the Act. Therefore, no occasion to apply Section 37 of the Act can arise;

In the above view, it is submitted that question as referred to hereinabove be answered in favour of the respondent Revenue.

9. We have considered the rival submissions. The first submission on behalf of the applicant that Section 35AB of the Act is not applicable as no lumpsum payment was made for the reason that the payments were made in three equal installments is no longer *res integra.* Our Court in ***Commissioner of Income Tax Vs. Raymond Ltd. (2012) 209 Taxman 154*** while dealing with an identical submission as made herein had negatived it by holding that merely because the payments were made in installments for using the technical know-how, it would not cease to be a lumpsum payment. This was so as the amount payable was fixed and not variable. It must also be borne in mind that words used in Section 35AB are lumpsum payment and not one time payment. Therefore, making of lumpsum payment in 3 installments would not make the payment any less a lumpsum payment. Thus, in

the face of the decision of this Court in Raymond Ltd. (supra), the submission that payment made in installment would *ipso facto cease* to be a lumpsum payment, is not sustainable. Therefore, not accepted.

10. The applicant next submitted that the word acquiring as used in Section 35AB of the Act would necessarily mean acquisition of ownership rights of the technical know-how. Mere lease / license, Ms. Sathe submits, would not amount to acquisition of technical know how. In support placed reliance upon the dictionary meaning of the word "acquisition" as found in The New Oxford dictionary, Clarendon Press, Oxford 1998, which reads as under :-

> *"acquisition :- 1. an asset of object bought or obtained. Typically by a library or museum.*
> *– An act of purchase of one company by another.*
> *– buying or obtaining assets or objects western culture places a high value on material acquisition.*
> *2. The learning or developing of a skill, habit and quality, the acquisition of Management Skill"*

She also relies upon Black's Dictionary, Ninth Edition, which states the meaning of the word "acquisition" as under :-

> *"acquisition :- 1. The gaining of possession or control over something (acquisition of the target company's assets)*
> *2. Something acquired (a valuable acquisition)*

As against the above, we note that the impugned order of the Tribunal has relied upon the "Chambers Twentieths Century Dictionary, 1976 which defines the terms "acquire" means "to gain", "to attain to".

11. We find that the dictionary meaning relied upon by the applicant do not exclude obtaining any knowledge or a skill as in this case technical know-how for a limited use. The gaining of knowledge is complete / acquired by transfer of know-how, the limited use of it will not detract from the scope and meaning of the word acquisition. The word "acquisition" as defined in the larger sense even in the Oxford Dictionary referred to above, would cover the use of technical knowledge know-how by the applicant assessee which was made available by M/s. Oldham Batteries Ltd. Reliance placed by the applicant upon the decision of the Full Bench of this Court in ***Smt. Radhabai Vs. State of Maharashtra & Ors. AIR 1970 (Bom) 232 (FB)*** was in the context of the use of the word "acquisition" with the words "partition". Therefore, in a completely different context and does not in terms decide the meaning of the word "acquisition" to be universally adopted. Thus, no support can be drawn by the applicant from the above case. Thus, the restricted meaning of the word 'acquisition' to mean 'only obtaining rights on ownership' is not the

plain meaning in English language. Thus, obtaining of technical know-how under a license would also amount to acquiring know-how as the words 'on ownership basis' is completely absent in Section 35AB(1) of the Act. Therefore, accepting the contention of the applicant, would necessarily lead to adding the words 'by ownership' after the word 'acquiring' in Section 35AB(1) of the Act. This is not permitted while interpreting a fiscal statute. Thus, the second submission made on behalf of the applicant is also not sustainable.

12. It was next submitted that the technical know-how which has been obtained by the applicant is used in the regular course of its business of manufacturing batteries. Thus, it would necessarily be in the nature of revenue expenditure allowable under Section 37 of the Act. This submission cannot be accepted for the reason that Section 35AB of the Act itself specifically provides that any expenditure incurred for acquiring know-how for the purposes of the assessee's business and as further detailed in the Explanation thereto the know-how to assist in the manufacturing or processing of goods would necessarily mean that any expenditure on know-how which is used for the purposes of carrying on business would stand covered by Section 35AB of the Act. Moreover, as rightly pointed out by the Revenue

Section 37 of the Act itself excludes expenditure of the nature described in Sections 30 to 36 of the Act without any qualification. Therefore, we would need to examine whether Sections 30 to 36 restrict its benefit to only capital expenditure. On examination,it would be found that Section 35AB of the Act as pointed out above, makes no such exclusion / inclusion on the basis of the nature of expenditure i.e. Capital or Revenue. In fact, wherever the Parliament sought to restrict the benefit on the basis of nature of expenditure falling under Sections 30 to 36 of the Act, it specifically provided for so in the provision viz. Section 35A of the Act as in force along with Section 35AB of the Act during the subject Assessment Year 1986-87. In fact, later Sections 35ABA of the Act (w.e.f. 2017) and Section 35ABB of the Act (w.e.f. 1996) has also provided for deduction thereunder only to capital expenditure specifically. Further, we find that wherever the Parliament sought to restrict the expenditure falling within Sections 30 to 36 of the Act only to capital expenditure, the same was provided for in the section concerned. To illustrate section 35A and 35ABB of the Act have specifically restricted the benefits thereunder only for capital expenditure. In the above view, submission on behalf of the applicant that Section 35AB of the Act would only apply to capital expenditure and exclude revenue expenditure, would necessarily require adding

words to section 35AB of the Act which the legislature has specifically not put in. This the Court cannot do while interpreting the fiscal legislation in the absence of any ambiguity in reading of section as it stands. Thus, even if it technical know-how is Revenue in nature, yet it would be excluded from the provisions of Section 37 of the Act.

13. Thereafter, Ms. Sathe, learned Counsel for the applicant placed reliance upon the decisions of Gujarat High Court in ***Deputy Commissioner of Income Tax Vs. Anil Starch Products Ltd. 232 Taxman 129*** and ***Deputy Commissioner of Income Tax Vs. Sayaji Industries Ltd. (2012) 82 CCH 412*** and a decision of the Karnataka High Court in ***Diffusion Engineers Ltd. Vs. Deputy Commissioner of Income Tax, (2015) 376 ITR 487,*** to contend that the issue now stands concluded in its favour. This for the reason that while dealing with an identical situation the above three decisions have held that where the expenses are of revenue nature, Section 35AB of the Act will not be available and the expenditure must necessarily be allowed under Section 37(1) of the Act. This was contested by the Revenue contending that the decision of Madhya Pradesh High Court in ***Commissioner of Income Tax Vs. Bright Automotives and Plastics Ltd. 273 ITR 59*** and decision of Madras High Court in ***Commissioner***

of Income Tax Vs. Tamil Nadu Chemical Products Ltd, 82 ITR 259 have taken a view that expenditure incurred for acquiring technical know-how would fall under Section 35AB of the Act. This irrespective of the fact that whether the expenditure is revenue or capital in nature. It is the above decisions of the Madhya Pradesh and Madras High Courts, Mr. Chhotaray contends the Court should follow / accept.

14. We note that the decisions of the Gujarat High Court in Anil Starch Products Ltd. (supra) and Sayaji Industries Ltd. (supra) did not agree with the view of M.P. High Court in Bright Automotives and Plastics ltd. (supra) and Madras High Court in Tamil Nadu Chemical Products Ltd. (supra). The Karnataka High Court in Diffusion Engineers Ltd. (supra) did not agree with the Madras High Court in Tamil Nadu Chemical Products Ltd. (supra). The basis of all the above three decisions was the subsequent decision of the Apex Court in ***Commissioner of Income Tax Vs. Swaraj Engines Ltd. (2008) 301 ITR 284***. The above case before Apex Court arose from the decision of the Punjab & Haryana High Court in Commissioner of Income Tax Vs. Swaraj Engines Ltd. 301 ITR 294 (P&H) that payments made on account of the royalty would be liable as deduction under Section 37 of the Act and not under Section 35AB of the Act as contended by the

Revenue.

15. Being aggrieved, the Revenue had filed an appeal before the Apex Court which led to its order in Swaraj Engines Ltd.(SC) (supra), wherein the Court while restoring the issue to the Punjab and Haryana High Court, by way of remand, held in the context of the question framed that the High Court should first decide whether the expenditure incurred on making payment of royalty would be capital or revenue in nature at the very threshold before deciding the applicability of Section 35AB or 37 of the Act. In fact, the Apex Court while remitting the matter to the Punjab & Haryana High Court observed as under :-

> *"At the same time, it is important to note that even for the applicability of Section 35AB, the nature of expenditure is required to be revenue in nature, then section 35AB may not apply. However, if it is found to be capital in nature, then the question of amortization and spread over, as contemplated by section 35AB, would certainly come into play. Therefore, in our view, it would not be correct to say that in this case, interpretation of section 35AB was not in issue."*

Further, the Apex Court while restoring the issue has clearly recorded that it has not expressed any opinion on the matter and observed as under :-

"On a bare reading of the said question, it is clear that applicability of section 35AB in the context of royalty paid to Kirloskar as a percentage of the net sale price being revenue or capital in nature and depending on the answer to that question, the applicability of section 35AB also arose for determination before the High Court. Be that as it may, the said question needs to be decided authoritatively by the High Court as it is an important question of law, particularly, after insertion of section 35AB. Therefore, we are required to remit the matter to the High Court for fresh consideration in accordance with law.

On the second question, we do not wish to express any opinion. It is for the High Court to decide, after construing the agreement between the parties, whether the expenditure is revenue or capital in nature and, depending on the answer to that question, the High Court will have to decide the applicability to section 35AB of the Income Tax Act. On this aspect we keep all contentions on both sides expressly open."

16. Thus, the entire issue whether Section 35AB of the Act would apply only in case of capital expenditure and not in case of revenue expenditure has not been decided by the Apex Court in Swaraj Engines Ltd. (SC) (supra). This would have to be decided by the Punjab & Haryana High Court on the basis of the submissions made by the respective parties. However, we are informed that in view of low tax effect, the Revenue has not pressed its appeal before the Punjab &

Haryana High Court (Order dated 14th July, 2016 in ITA No.131 of 2004). It is clear that the Apex Court in Swaraj Engines Ltd. (SC) (supra) has not concluded the issue by holding that Section 35AB of the Act would only apply where the expenditure is capital in nature. In fact, the Apex Court has observed as extracted hereinabove that where the nature of expenditure is capital, then, it must certainly fall under Section 35AB of the Act, but where the nature of expenditure is revenue in nature, it may not fall under Section 35AB of the Act. Therefore, the above was only a tentative view and the issue itself was left open to be decided by the Punjab & Haryana High Court on remand. Therefore, the reliance by the Gujarat High Court in Anil Starch Products Ltd. (supra) and Sayaji Industries Ltd.(supra) and Karnataka High Court in Diffusion Engineers Ltd. (supra) on the basis of the Apex Court decision in Swaraj Industries Ltd. (supra) to hold that all expenditure which is revenue in nature would not fall under section 35AB of the Act and would have necessarily to fall under Section 37 of the Act to our mind is not warranted by the decision of the Apex Court in Swaraj Engines Ltd. (SC) (supra).

17. In the above view, with respect, we are unable to agree with the decision of the Gujarat High Court and Karnataka High Court on the

above issue, as we are of the view that the Apex Court had not conclusively decided the issue and left it open for the Punjab & Haryana High Court to adjudicate upon the said issue.

18. In the above view, on the application of law to the facts in the present facts, the expenditure on account of technical know-how incurred under the Agreement dated 19th June, 1984 is classifiable under Section 35AB of the Act and not under section 37 of the Act. Therefore, question no.(ii) is answered in the affirmative in favour of the respondent Revenue and against the applicant assessee.

19. We answer the question raised for our opinion as under :-

Question No.(i) :- In the negative i.e. in favour of the applicant assessee and against the respondent Revenue.

Question No.(ii) :- In the affirmative i.e. in favour of the respondent Revenue and against the applicant assessee.

20. The Reference is disposed of in the above terms. No order as to costs.

(SANDEEP K. SHINDE, J.) **(M.S. SANKLECHA, J.)**