

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 31ST DAY OF MAY, 2016

PRESENT

THE HON'BLE MR.JUSTICE JAYANT PATEL

AND

THE HON'BLE MR.JUSTICE E.SREENIVASE GOWDA

ITA NO.419/2009

BETWEEN:

M/S. UNITED BREWERIES LTD.,
UB TOWERS, LEVEL 4 (4TH FLOOR), UB CITY,
24, VITTAL MALLYA ROAD,
BANGALORE – 560 001,
REPRESENTED BY ITS
MANAGING DIRECTOR,
MR. KALYAN GANGULY,
AGED ABOUT 58 YEARS,
S/O. LATE KALIDAS GANGULY.

... APPELLANT

(BY SRI. S. PARTHASARATHI, ADV.)

AND:

THE DEPUTY COMMISSIONER
OF INCOME-TAX, CENTRAL CIRCLE-2(3),

BANGALORE.

... RESPONDENT

(BY SRI. K. V. ARAVIND, ADV.)

THIS ITA IS FILED U/S.260-A OF THE INCOME TAX ACT, 1961, ARISING OUT OF ORDER DATED 01-05-2009 PASSED IN ITA.NO.635/BANG/2008, FOR THE ASSESSMENT YEAR 2004-05, PRAYING THAT THIS HON'BLE COURT MAY BE PLEASED TO: I. FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED THEREIN, II. ALLOW THE APPEAL AND SET ASIDE THE ORDER PASSED BY THE ITAT BANGALORE IN ITA NO.635/BANG/2008, DATED 01-05-2009, IN THE INTEREST OF JUSTICE AND EQUITY.

THIS ITA COMING ON FOR HEARING THIS DAY, **JAYANT PATEL J.**, DELIVERED THE FOLLOWING:

J U D G M E N T

The appellant – assessee has preferred the present appeal by raising the following two substantial questions of law :

- a) Whether in law, the Tribunal was justified in upholding the disallowance of business loss under Section 28 of the Act even though it was conclusively established that the initial

advances were made on account of business expediency to M/s. Castle Breweries Ltd. and the non-recovery of these advances was due to the fact that M/s. Castle Breweries Ltd. was declared as a sick company and later ordered to be wound up both by BIFR and the Hon'ble High Court of Calcutta ?

- b) Whether in law, the provisions of Section 14A of the Act are applicable to the expenses incurred by the appellant towards interest and others on the loan borrowed for advances made to the subsidiaries in the course of business for its expansion ?

2. We have heard Mr. S.Parthasarathi, the learned Counsel appearing for the appellant – assessee and Mr. K.V.Anand, the learned Counsel appearing for the respondent.

3. As such, on the first question, the reasoning recorded by the Tribunal are at paragraph 8, which reads as under :

8. We have carefully considered the facts and the rival submissions as well as the paper books submitted by the assessee. In the agreement dated 1.3.1998, it was agreed by the assessee and Castle Breweries (then known as Jupiter Breweries) that the assessee shall have the right to use the brewery facilities of Jupiter and thereafter to market the beer so manufactured in Jupiter's brewery. Under clause (3) of this agreement the assessee undertook to pay Jupiter an advance up to Rs.3 crores since Jupiter "will have to incur large capital expenditure to improve the quality and the same shall be adjusted against the monthly facility fee payable to Jupiter and no payment shall be made against the facility fee until such time as the advance of Rs. 3 crores is fully adjusted by United Breweries Ltd." The Commissioner of Income-tax (Appeals) has found that this amount of Rs.3 crores was not actually paid but was adjusted by a journal entry. Even if this means that the advance

has been adjusted by journal entry against the facility fee payable by the assessee, the facility fee would have been allowed as a deduction in computing the business income of the assessee. The amount of Rs.3 crores cannot, therefore, again be allowed as a deduction under the nomenclature of business loss. Be that as it may, it seems to us that the assessee has not established with facts as to how the claim can be allowed as business loss. It may be that Castle Breweries is controlled and managed by the assessee but for that reason alone it cannot be said that the amount standing to the debit of Castle Breweries can be allowed as business loss. The loss must be incidental to the assessee's business. Simply meeting or reimbursing the expenditure of the controlled company, without anything more, does not afford any nexus between the business of the assessee and the loss. The fact that Castle Breweries was being controlled and managed by the assessee does not take its case any

further. We have also perused the authorities cited on behalf of the assessee. Those cases were rendered on their own facts. Whether there was connection between the assessee's business and the loss is a question of fact to be considered in the background of each case. There can be no dispute with the proposition that if the loss is incidental to the business, it should be allowed. However, it should be established by necessary facts that the loss is incidental to the business. We have before us a case where the assessee made advances to a controlled company and also incurred expenditure and debited these amounts to the account of the controlled company. This, in our opinion, may be prudent business practice or it might have arisen because of the assessee's anxiety to save its controlled company from facing financial crunch. But, this by itself affords no nexus between the assessee's business and the loss. In our view, the loss cannot be allowed as business loss u/s.28 of the Act.

The disallowance is confirmed and the appeal is dismissed.

4. The aforesaid shows that the Tribunal has considered the question as to whether there was connection between the assessee's business and the loss but such is a question of fact to be considered in the facts of each case. The Tribunal has further observed that the nexus is not established and therefore, the loss is not allowed as a business loss under Sec. 28 of the Act and the disallowance is confirmed.

5. However, the learned Counsel appearing for the appellant – assessee contended that the finding of fact recorded by the Tribunal of not proving of the nexus is contrary to the record, that the Tribunal has not properly appreciated the documents and the material

produced on record and therefore, it becomes a question of law to be agitated in the present appeal.

6. In our view, whether the nexus is established or not, is to be examined in the facts of each case. It is essentially a question of fact, for which the Tribunal is the ultimate fact finding authority. However, the attempt to contend that the Tribunal has not properly considered the material on record, in our view, will also fall in the arena of re-appreciation of facts, which cannot be undertaken to upset the finding of fact in an appeal before this Court, which is limited to only a question of law.

7. Under the circumstances, we do not find that, first question of law would arise for consideration in the present appeal.

8. So far as second question of applicability of Sec.14A of the Act to the expenses incurred by the appellant towards interest and others on the loan borrowed is concerned, the finding of the Tribunal is at paragraph 11 which reads as under :

11. The revenue is in appeal and we have considered the rival contentions. IN our view, the recent judgment of the Special Bench in Bombay in ITO v. Daga Capital Management Pvt. Ltd., (2009) 312 ITR (AT) 1, is applicable to the facts of the present case. In this order, it has been held that section 14A is applicable even where the motive in acquiring the shares was to obtain controlling interest in the companies. The finding of the Commissioner of Income-tax (Appeals) cannot, therefore, be upheld as it is contrary to the decision of the Special Bench. We, accordingly, uphold in principle the applicability of section 14A. However, it is for the Assessing Officer to ascertain from the facts of the case as to how

much interest bearing borrowings was utilized to acquire shares in the companies. It is also necessary to see as to whether any interest bearing borrowed funds were used in making the advances and expenditure in the case of Castle Breweries. This factual exercise has to be carried out by the Assessing Officer after giving due opportunity to the assess of being heard. The Assessing Officer may make the disallowance of interest u/s.14A only if it is found that interest bearing borrowed funds were used to acquire shares in the companies or for making advances to Castle Breweries. We, therefore, restore this issue to the file of the Assessing Officer with the above directions. The ground is treated as partly allowed.

9. The aforesaid shows that the Tribunal after holding in principle the applicability of Sec. 14A, has further directed the Assessing Officer to ascertain from the facts of the case as to how much interest bearing

borrowings was utilized to acquire shares in the companies and the matter is relegated to the Assessing Officer. As per the language in Sec.14A, the enquiry has to be undertaken by the Assessing Officer which has been so ordered by the Tribunal. Hence, it can be said that the Tribunal has exercised the discretion where rights of both sides are kept open for admissible deduction under Sec.14A. When such a discretion is exercised and the rights of the appellant –assessee is also kept open to satisfy the Assessing Officer, it cannot be said that any substantial questions of law would arise for consideration, as sought to be canvassed. In our view, at the stage of enquiry under Sec.14A, it is open to the Assessing Officer to independently consider the matter for admissibility of the interest on borrowings and if yes to what extent. Hence, when the question at large is further to be considered by the

Assessing Officer, we do not find that any further observations are required to be made in this regard. In any case, the question of law as sought to be canvassed would not arise for consideration at this stage on the said aspects as sought to be canvassed.

10. The learned Counsel for the appellant relied upon various decisions of the High Court and of the Apex Court, but in none of the decisions, the question arisen before the respective Court as to whether the finding of fact recorded by the Tribunal can be disturbed or upset at the stage of appeal before this Court, which is limited to the question of law. All decisions proceed on the basis that the nexus is established, which as per the finding of fact recorded by the Tribunal is not established in the present case. Hence, the said decisions are of no help to the appellant.

11. Hence, subject to the aforesaid observations,
the appeal is dismissed.

**SD/-
JUDGE**

**SD/-
JUDGE**

mgn/-