**(2009) 12 CAL CK 0040**

**Calcutta High Court**

**Case No:** Income-tax Appeal No. 123 of 2000

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| Eveready Industries India Ltd. | | APPELLANT |
| | Vs | |
| Commissioner of Income Tax and Another | | RESPONDENT |

**Date of Decision:** Dec. 22, 2009

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 100
- Income Tax Act, 1961 - Section 143(3), 260A, 260A(3), 260A(4), 260A(5)
- Income Tax Rules, 1962 - Rule 8, 8(1)

**Citation:** (2010) 235 CTR 263 : (2010) 323 ITR 312

**Hon'ble Judges:** Subhro Kamal Mukherjee, J; Sankar Prasad Mitra, J

**Bench:** Division Bench

**Advocate:** Debiprasad Pal, Manisha Seal and Malay Dhar, for the Appellant;M.P. Agarwal and Sailendra Nath Dutta, for the Respondent

**Final Decision:** Allowed

**Judgement**

Subhro Kamal Mukherjee, J.
This is an appeal against judgment and order dated October 4, 1999, passed by the Income Tax Appellate Tribunal, "B" Bench, Calcutta, in Income Tax Appeals Nos. 1259-1260 (Cal) of 1995 relating to the assessment years 1990-91 and 1991-92.

2. The aforementioned appeals were heard analogously and the Appellate Tribunal, inter alia, held that the interest earned by the assessee by investing surplus fund of the business in short-term deposits was income from other sources and not business income.

3. The assessee was carrying on the business of growing tea leaves by agricultural process in its own tea gardens in the States of Assam and West Bengal as, also, was manufacturing black tea out of the said green tea leaves grown in its tea gardens as

well as acquired from other growers and selling the same both in the domestic and in the international markets.

4. The assessee procured loans from banks and other public financial institutions for its tea growing and manufacturing business. Part of such funds procured by the assessee, by way of loans from the aforementioned sources, remain unutilized. The said unutilized funds were invested in interest bearing short-term deposits. Consequently, the assessee earned interest from such investments.

5. The assessee contended that such interest income from such short-term interest bearing investment was incidental to integral part of its tea growing and manufacturing business and, therefore, such income was to be treated as income from its tea business. The assessee asserted that the Income Tax should be assessed according to the principles envisaged in Sub-rule (1) of Rule 8 of the Income Tax Rules, 1962 (the said Rules in short). In other words, the assessee contended that only 40 per cent, (forty) per centum of such income should be deemed to be income liable to Income Tax.

6. The Assessing Officers in their assessment orders dated March 29, 1993, for the assessment year 1990-91 and dated March 28, 1994, for the assessment year 1991-92 accepted such contentions of the assessee and the Assessing Officers followed the provisions of the said Sub-rule (1) of Rule 8 of the said Rules in assessing the income of the assessee from the interest earned by the assessee from such short-term interest bearing deposits by treating the same as income from business of growing, manufacturing and selling of tea. The assessments were made in terms of Sub-section (3) of Section 143 of the Income Tax Act, 1961 (hereinafter referred to as the said Act).

7. The Commissioner of Income Tax, however, took a different view of the matter and issued composite notice dated December 20, 1994, addressed to the assessee, inter alia, proposing to invoke his power u/s 263 of the said Act holding that the Assessing Officers erroneously did not assess the interest earned by the assessee from such short-term interest bearing investments for the assessment years at 100 per cent, (hundred) per centum. The Commissioner of Income Tax was of the opinion that the said Sub-rule (1) of Rule 8 of the said Rules laid down the mode of determination of income derived from the sale of tea grown and manufactured by the seller in India and it did never extend to any other income. Therefore, the Commissioner of Income Tax opined that the orders of the Assessing Officers were erroneous and prejudicial to the interest of the Revenue.

8. The assessee submitted a reply on January 12, 1995, before the Commissioner of Income Tax and contended that the main activity of the assessee was of growing, manufacturing and selling of tea. Therefore, the Assessing Officers rightly assessed the income earned by the assessee from such short-term investments as the business income of the assessee. The income of interest was a part and parcel of the

tea business of the assessee.

9. The Commissioner of Income Tax in his consolidated order dated March 29, 1995, for the aforementioned assessment years, inter alia, directed the Assessing Officer to revise the assessments in respect of the aforementioned assessment years by treating the interest income of the assessee from such short-term investments as 100 per cent, (hundred) per centum taxable under the said Act treating the same as income from other sources and not as part of growing and manufacturing of tea. The Commissioner of Income Tax held that a distinction has to be drawn between the tea income in which manufacturing and agricultural activities were involved and non-tea income in which no agricultural activity was involved. The Commissioner, however, found that the assessee procured the loans for the purpose of its different businesses and not for earning interest by way of various investments.

10. The assessee being aggrieved by and dissatisfied with the aforementioned order dated March 29, 1995, passed by the Commissioner of Income Tax preferred two appeals before the Income Tax Appellate Tribunal, Calcutta. The appeals were registered as Appeal No. 1259 (Cal) of 1995 pertaining to the assessment year 1990-91 and Appeal No. 1260 (Cal) of 1995 pertaining to the assessment year 1991-92.

11. The Income Tax Appellate Tribunal, "B" Bench, Calcutta, considered those two appeals analogously and disposed of those appeals by a common judgment and order dated October 4, 1999, holding, inter alia, that it was difficult to find out a nexus between the tea business of the assessee and the utilization of the surplus for the purpose of generating further income by way of interest from such investments. Therefore, the Appellate Tribunal held that interest income of the assessee was rightly treated separately and taxed at the rate of 100 per cent, (hundred) per centum.

12. Being aggrieved by and dissatisfied with the aforementioned judgment and order dated October 4, 1999, the assessee prefers these two appeals. Since similar question of facts and law are involved, we also take up the hearing of these appeals analogously.

13. A Division Bench of this Court by order dated March 27, 2000, formulated substantial questions of law as under:

1. Whether the interest income by way of investment of the surplus funds generated and arising from the carrying on of the business of growing and manufacturing tea should be treated as incidental to the tea business and/or as part of the income derived from the tea business for the purpose of Rule 8 of the Income Tax Rules, 1962?

2. Whether on the facts and in the circumstances of the case the investment of surplus funds generated and arising out of the carrying on of the tea business,

constitute the same business and the income arising from the investment of the surplus funds should be treated as income from the same business, namely, the tea business for the purpose of Rule 8 of the Income Tax Rules, 1962?

14. Dr. Debiprasad Pal, learned senior advocate, appearing in support of these appeals, however, prays for formulation of a further substantial question of law at the time of hearing of these appeals. He submits that the Tribunals below substantially erred in law in failing to appreciate that as in the admitted facts and circumstances of the case two views were possible and the Assessing Officers preferred to follow a view, the Commissioner of Income Tax should not have invoked his power u/s 263 of the said Act because he preferred to follow a different view from that of the Assessing Officers.

15. Mr. M.P. Agarwal, learned advocate, appearing for the Revenue, strongly opposes the prayer of Dr. Pal. He submits that under the said Act these appeals are to be heard only on the substantial questions of law framed under Sub-section (3) of Section 260A of the said Act. Mr. Agarwal submits that the questions sought to be raised by Dr. Pal, at the time of hearing of these appeals, have been taken in the memoranda of appeal, but this Court, while formulating the substantial questions of law did not accept the aforementioned question as a substantial question of law. Mr. Agarwal submits that in view of Sub-section (4) of Section 260A of the said Act, these appeals could be heard only on the questions so formulated and the Revenue should be allowed to argue that these appeals do not involve such substantial questions of law.

16. Mr. Agarwal cites the decision of the apex court in M. Janardhana Rao Vs. Joint Commissioner of Income Tax, and draws our attention to the observation of the apex court that it is essential for the High Court to first formulate the question of law and, thereafter, to proceed with the hearing of the appeal. It is against the scheme of the Act to formulate the question subsequently after conclusion of arguments for the purpose of adjudication.

17. We do not think that M. Janardhana Rao Vs. Joint Commissioner of Income Tax, has any application in this case. Dr. Pal prays before us to formulate the new substantial question of law for the purpose of adjudication not after the conclusion of arguments. When the hearing of these appeals commences, immediately Dr. Pal prays before us to consider whether another substantial question of law is involved in this appeal or not.

18. Section 260A of the said Act is in pari materia with Section 100 of the Code of Civil Procedure.

19. Sub-section (3) of Section 260A of the said Act contemplates that the High Court shall formulate the substantial question of law when the High Court is satisfied that such substantial question of law is involved in an appeal u/s 260A of the said Act.

20. Sub-section (4) of Section 260A of the said Act contemplates that the appeal shall be heard only on the questions so formulated, and the respondent shall, at the time of hearing of the appeal, be allowed to argue that the case does not involve such question. Provided, however, nothing in the said Sub-section (4) shall be deemed to take away or abridge the power of the High Court to hear, for reasons to be recorded, the appeal on any other substantial questions of law not formulated by the High Court, if the High Court is satisfied that the appeal involves such substantial question of law.

21. Sub-section (5) of the Section 260A of the said Act says that the High Court shall decide the substantial question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as the High Court deems fit.

22. The Supreme Court in the case of Santosh Hazari Vs. Purushottam Tiwai (Dead) by Lrs., , while dealing with the provisions of Section 100 of the CPC in detail holds that at the time of hearing of the second appeal, the scope of hearing is circumscribed by the substantial question of law formulated by the High Court. The respondent is at liberty to show that the question so formulated was not involved in the case. In spite of a substantial question of law determining the scope of hearing of the second appeal having been formulated by the High Court, its power to hear the appeal on any other substantial question of law, not earlier formulated by it, is not taken away subject to the twin conditions being satisfied : (i) the High Court feels satisfied that the case involves such question, and (ii) the High Court records reasons for its satisfaction. The High Court cannot proceed to hear a second appeal without formulating the substantial question of law involved in the appeal inasmuch as the existence of a substantial question of law is the sine qua non for the exercise of the jurisdiction u/s 100 of the Code of Civil Procedure.

23. It is true that in the memoranda of appeal filed by the assessee the question sought to be formulated by Dr. Pal at the time of hearing of these appeals has been taken, but the High Court while formulating the substantial question of law under Sub-section (3) of Section 260A of the said Act only formulated the aforesaid two substantial questions of law.

24. However, we are unable to accept the objection of Mr. Agarwal that at the time of hearing of these appeals it is not permissible for the appellant to suggest that there exists another substantial question of law merely because such substantial questions of law have been stated in the memoranda of appeals, but at the time of formulating the substantial question of law such question was not formulated by the High Court.

25. The proviso to Sub-section (4) of Section 260A of the said Act recognises the power of the High Court, for reasons to be recorded, to hear the appeal on any other substantial question of law not formulated by the High Court, if the High Court

is satisfied that the case involves such question.

26. When the High Court formulated the said substantial question of law on March 27, 2000, the records of the lower courts were not available. When these appeals are placed for final hearing if the appellant satisfies the High Court with reference to the materials on record that another substantial question of law is involved, the High Court, under the proviso to Sub-section (4) of Section 260A of the said Act, can certainly formulate such question for reasons to be recorded.

27. Nevertheless we are not willing to accept the prayer of Dr. Pal for formulation of another substantial question of law inasmuch as we are of the opinion that the assessee is entitled to succeed on the questions of law already formulated by this Court on March 27, 2000.

28. Before we start to deal with the merits of these appeals we record that the learned advocates appearing for the respective parties filed their written notes of argument. The learned advocate for the Revenue in his written note of argument raises certain points, which were not argued by him at the time of hearing of these appeals. He refers to certain decisions, which were not cited by him at the time of hearing of this appeal.

29. Dr. Pal, in our view, rightly raised an objection that the Revenue is not entitled to file a written note taking new points and citing new decisions unless the appeals are fixed for further hearing and the assessee is given an opportunity of hearing. Dr. Pal mentions this matter, in the presence of Mr. Agarwal, learned advocate for the Revenue. Mr. Agarwal, in his usual fairness, submits that he shall not be relying upon the new submissions and new citations, which were neither argued nor cited at the time of hearing of these appeals.

30. Dr. Pal argues that interest earned by the assessee by investing surplus funds of the business in short-term deposits in banks and public financial institutions is an integral part of the business of the assessee of growing, manufacturing and selling of tea and is, therefore, business income of the assessee and not income from other sources. Dr. Pal in support of his submissions cites the decisions in the cases of COMMISSIONER OF Income Tax Vs. TIRUPATI WOOLEN MILLS LTD., , Commissioner of Income Tax Vs. Tamil Nadu Dairy Development Corporation Ltd., and Commissioner of Income Tax Vs. Producin P. Ltd.,

31. Mr. Agarwal, however, submits that the interest earned by investing surplus funds of the business in short-term deposits is not business income of the assessee, but is income from other sources. Mr. Agarwal submits that Sub-rule (1) of Rule 8 of the said Rules contemplates that the income derived from the sale of tea grown and manufactured by the seller in India shall be computed as if it were income derived from business and 40 per cent, (forty) per centum of such income shall be deemed to be income liable to tax. Mr. Agarwal submits that on proper interpretation of Sub-rule (1) of Rule 8 of the said Rules, the said rule is not applicable to income,

which has no relation to tea business. Mr. Agarwal heavily relies upon the decision in SOOKERATING TEA CO (P.) LTD. Vs. COMMISSIONER OF INCOME TAX, ASSAM., .

32. It is an admitted position that the assessee is carrying on the business of growing green tea leaves by agricultural process in its own tea gardens in the States of Assam and West Bengal and is, also, engaged in manufacturing black tea out of the said green tea leaves grown in its tea gardens as well as acquired from other growers. The company procured loans from banks and other public financial institutions for its tea growing and manufacturing business. Part of such funds procured by the company by way of loan from the said sources remain unutilized. The said surplus funds were invested in short-term deposits. The company earned interest from such investments.

33. In SOOKERATING TEA CO (P.) LTD. Vs. COMMISSIONER OF INCOME TAX, ASSAM., the assessee was a private limited company carrying on the business of growing, manufacturing and selling tea. It borrowed certain amount from a bank by hypothecation of the tea crop. Out of the sum taken as loan from the said bank, a portion was advanced by the assessee to three sister concerns and the assessee received interest from them. It was held that the loans advanced by the assessee to its sister concerns had no relation with the tea business of the assessee and, therefore, the Tribunal was justified in holding that Sub-rule (1) of Rule 8 of the said Rules did not apply to income from interest received by the assessee and, therefore, such income was liable to be included in the total income of the assessee in full.

34. A Division Bench of this Court in COMMISSIONER OF Income Tax Vs. TIRUPATI WOOLEN MILLS LTD., held that the income arose from the utilization of commercial assets would be business income as the assessee utilized its commercial assets in making fixed deposits, which were lying temporarily surplus with the assessee.

35. Sitting in the co-ordinate Bench we are not only bound by such decision, but we, also, do not find any reason to take a different view in the matter.

36. In Commissioner of Income Tax Vs. Tamil Nadu Dairy Development Corporation Ltd., the Madras High Court held that the interest earned on short-term deposits of the assessee-company made out of the business funds available with the assessee-company before they were utilized for actual business, the same was incidental to the business activity of the assessee and the interest on such short-term deposits should be treated as business income.

37. In Commissioner of Income Tax Vs. Producin P. Ltd., the assessee was a private limited company engaged in the business of export of processed food items. The assessee had received some amount from its foreign customers by way of advance in respect of the exports to be made by it. The advance amount so received were kept by the assessee in short-term deposits with the banks and the assessee received interest income out of those short-term deposits. The assessee treated the interest receipts on the said short-term deposits made in the bank as part of

business income.

38. The Karnataka High Court holds that it is now well settled position of law that what is business income and what is not business income has to be determined on the facts of each case. The main activity of the assessee is export business and not that of earning interest on short-term fixed deposits. When the earning of interest is connected with the carrying on of the business of the assessee and if the fixed deposits are utilised in such a manner so as to provide a sufficiently perceptible link with the business activity of the assessee there should be no objection to the treatment of the interest as business income. We are respectfully concurring with the views expressed in Commissioner of Income Tax Vs. Producin P. Ltd., .

39. As we have already narrated above that the assessee in this case procured loans from banks and other financial institutions for its tea growing and manufacturing business and part of such funds remain temporarily unutilized. The assessee, instead of keeping the amount idle, invested the surplus funds in short-term interest bearing fixed deposits and earned interest. The main activity of the assessee is growing, manufacturing and selling of teas and not that of earning interest by investing in short-term fixed deposits. The assessee earned interest on such short-term fixed deposits made out of the business funds available with the assessee before they were utilized for actual business and, therefore, the same was incidental to the business activity of the assessee-company and interest on such short-term deposit must be treated as business income. The assessee, a tea growing and manufacturing company, was left with surplus funds. The assessee invested such surplus funds in short-term deposits to exploit the business funds of the company and earned interest. Therefore, the interest income of the assessee is business income and not income from other sources.

40 We are, therefore, of the opinion that the Income Tax Appellate Tribunal and the Commissioner of Income Tax substantially erred in law in directing the Assessing Officer to revise the assessments of the aforementioned assessment years by treating the income earned by the assessee from such short-term investments as 100 per cent, (hundred) per centum assessable treating the same as income from other sources.

41. We hold that, in the facts and circumstances of the case, the Assessing Officers were right in treating the interest income earned by the assessee by investing surplus fund of the business in short-term deposits as business income and rightly applied the tests as provided in Sub-rule (1) of Rule 8 of the said Rules while making the assessments in relation to the income of the assessee.

42. Therefore, the order of the Income Tax Appellate Tribunal dated October 4, 1999, and the order of the Commissioner of Income Tax dated March 29, 1995, are set aside. The orders of the Assessing Officers are restored.

43. The appeals are, thus, allowed.

44. We, however, direct the parties to bear their respective costs in these appeals.

45. Xerox certified copy of this order, if applied for, is to be supplied to, the applicants expeditiously.

Sankar Prasad Misra, J.

16. I agree.