* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **ITA No.1118/2011**

% Decided on : 25th November, 2011.

C& C CONSTRUCTION PVT. LTD. ..... Appellant
Through : Mr. Ajay Vohra with
Ms. Kavita Jha, Advocates.

versus

COMMISSIONER OF INCOME TAX ..... Respondent
Through : Mr. Sanjeev Rajpal, Adv.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ?
3. Whether the judgment should be reported in the Digest?

SANJIV KHANNA, J. (ORAL) :

This appeal under Section 260A of the Income Tax Act, 1961 ('Act' for short) impugns the order dated 26.6.2009 passed by the Income Tax Tribunal ('Tribunal' for short) in ITA No.4000/Del/2007. The appeal relates to the assessment year 2003-04.

2. The findings of the authorities/tribunal and the reasoning portion of the impugned order is reproduced as under :

> "2. With regard to ground No.1, the assessee claimed 100% depreciation amounting to Rs.41,37,577/-. The AO, however, allowed depreciation on sheds @ only 10%, treating the construction as construction of office building. The assessee had submitted that the sheds were of

temporary nature and were necessary for carrying out efficient business for earning of profits; that after the project is over, the sheds are handed over to the contractee. The AO rejected this plea of the assessee since the assessee had not shown any income from any such transfer to its contractee. It was observed that Rs.20,26,181/- had been incurred at the Koklata Regional Office-I of the assessee, whereas sums of Rs.10,75,297/- and Rs.10,14,599/- had been incurred at two other different sites. It was from this that the AO concluded that the expenses had been incurred on construction of the office building. Depreciation was allowed @10% and not @100% as claimed by the assessee, keeping in view the scale of the expenditure, the past history and the above conclusion that the expenditure was on construction of office building. The ld. CIT(A) upheld the AO's order with regard to allowing depreciation @ 10% concerning the construction at the assessee's Kolkata Regional Office-1. However, it was found by the ld. CIT(A) that the other two expenses of Rs.10,75,297/- and Rs.10,14,599/- (total amounted to Rs.2,08,98,967/- pertained to two other projects, namely, GSB-WMM Project and Panogarh Palsit, where the construction was of temporary sheds. The AO was directed to allow depreciation @ 100% on these two sites.

3. xxx

4. xxx

5. We have heard the parties and have perused the material on record. The Tribunal order in the assessee's own case for assessment year 1998-99 is at pages 10 to 27 of the assessee's paper book ('APB' for short). In that year, as observed in para 6 of the Tribunal order, the structures were admittedly of temporary nature and they were constructed on the land which did not belong to the assessee. For the present year, the assessee seeks to draw parity with the facts for assessment year 1998-99 by contending that here also, the structures were of temporary nature; that they were not built on the land owned by the assessee; and that after the contract got over, these structures were to be handed over to the contractee. It has, however, been found by the authorities

> below concurrently, that the construction in question is different from the construction involved in assessment year 1998-99. It was observed that the expenditure of Rs.20,26,181/- included the purchase of cement for Rs.1,92,360/- and of sand of Rs.1,02,386/-. Likewise, there were other expenses of sanitary items, water tank, plywood, roof tiles, black stone, tube well, tiles, etc. These heads of expenses were found not to be required for construction of temporary sheds required for residence of labours and storage of material. These facts do not stand rebutted. These facts were also not before the Tribunal for assessment year 1998-99."

3. Mr. Ajay Vohra, Advocate for the appellant submits that the expenditure on the sheds was not capital expenditure and in fact was revenue expenditure. It is pointed out to Mr. Vohra that this contention and issue was not raised before the Tribunal. He submits that even if this issue and contention was not raised before the authorities/Tribunal, the Tribunal should have *sue moto*, on its own, granted the said relief. He relies upon ***Commissioner of Income Tax vs. Mahalakshmi Textile Mills Ltd.***, reported as (1967) 66 ITR 710.

4. It is not possible to accept the contention of Mr.Vohra. An appeal under Section 260A of the Act is maintainable against every order passed by the Tribunal, where High Court is satisfied that a substantial question of law is involved. A contention/ issue, which is not raised, dealt with or answered by the Tribunal, cannot be raised before the High Court for the first time in an appeal under Section 260A of the Act. A contention/question raised and answered by the

Tribunal or dealt with by the tribunal *suo motu* and a question/issue which was raised, but not answered/decided by the Tribunal, can be made subject matter of an appeal under Section 260A of the Act. Therefore, a contention/issue, which is not raised and not decided by the Tribunal, cannot form subject matter of an appeal before the High Court.

5. It may be noticed that an appeal under Section 260A of the Act is the fourth tier of appeal in most of the cases and a third tier of appeal in a few cases.

6. Learned counsel for the appellant has referred to sub-Section (6) to Section 260A of the Act and submits that jurisdiction of the Court is very wide. The said sub-Section reads as under:-

> "(6) The High Court may determine any issue which –
> (a) has not been determined by the Appellate Tribunal; or
> (b) has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law as is referred to in sub-section (1)."

7. Clause (a) of sub-Section (6) to Section 260A of the Act states that the High Court may decide an issue, which is not determined by the Appellate Tribunal. The word "determined" means that the issue is not dealt with, though it was raised before the Tribunal. The word "determined" presupposes an issue was raised or argued but there is failure of the Tribunal to decide or adjudicated the same. In a given

case, a substantial question of law may arise because of the facts and findings recorded by the Tribunal, but the said issue/question is not determined. In such cases, an appeal under Section 260A of the Act can be entertained. This would depend upon the facts of each case and the reasoning and findings recorded by the Tribunal. This is not so in the present case.

8. The facts and reasoning of the Tribunal recorded above shows that the Tribunal was of the opinion that the construction in question cannot be regarded as a temporary construction and therefore 100% depreciation was not permissible and depreciation should be as per the prescribed schedule. The nature of construction was permanent. The question, whether expenditure incurred by the assessee was capital expenditure or revenue expenditure, was not raised, argued or decided. This was not an issue or a question, which had arisen because of the findings recorded by the Tribunal. The appellant-assessee had filed an appeal before the Tribunal, having lost before the CIT(Appeals). The appellant-assessee did not raise the question/issue now raised in the appeal. The question, whether the expenditure incurred by the assessee was capital expenditure or revenue expenditure, can be decided after examining and ascertaining the facts and then applying law to the facts ascertained. This issue and question requires examination from a

different context and on distinct principles after elucidating and recording the relevant factual matrix.

9. The reliance placed by the counsel for the appellant on ***Mahalakshmi Textile Mills Ltd.*** (supra) is misconceived and not apposite. In paragraph 2 of the aforesaid case, it was observed that besides submitting the claim that expenditure was allowable as development rebate, the assessee in the said case had urged that the amount laid out for introducing the Casablanca Conversion System was allowable under Section 10(2)(v) of the Indian Income Tax Act, 1922. The expenditure was allowed by the Tribunal under the said Section. Though this issue had not been raised before the lower authorities, but the Tribunal allowed the assessee to raise the said issue and had decided the said question. The Supreme Court noticed that the Appellate Tribunal was competent to pass such orders on the appeal "as it thinks fit" as empowered and mandated by Section 33(4) of the Indian Income Tax Act, 1922. It was held that the Tribunal had not exceeded its jurisdiction.

10. In the present case, what is urged by the counsel for the appellant is that though the issue was not raised and argued before the Tribunal, but the Tribunal should have examined the issue whether the expenditure was on revenue account.

11. The aforesaid contention is not acceptable and has to be rejected.

The appeal is accordingly dismissed.

No orders as to costs.

SANJIV KHANNA, J.

R.V.EASWAR, J.

NOVEMBER 25, 2011
Sk/NA