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आयकर अपीलीय अधिकरण "एफ" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL "F" BENCH, MUMBAI

श्री जोगिन्दर सिंह, न्यायिक सदस्य **एवं** श्री संजय अरोड़ा, लेखा सदस्य के समक्ष ।
BEFORE SHRI JOGINDER SINGH, JM AND SHRI SANJAY ARORA, AM

आयकर अपील सं./I.T.A. No. 6820/Mum/2012
(**निर्धारण वर्ष /** Assessment Year: 2009-10)

Vardhman Developers Ltd. 113, Commerce House, 140, N. M. Road, Fort, Mumbai-400 001	**बनाम**/ Vs.	ITO, Ward-2(3)(4), Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAACV 1745 Q		
(अपीलार्थी /**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी की ओर से / **Appellant by**	:	Shri Awdhesh Kumar
प्रत्यर्थी की ओर से/**Respondent by**	:	Shri Pawan Kumar Beerla

सुनवाई की तारीख / **Date of Hearing**	:	02.12.2014
घोषणा की तारीख / **Date of Pronouncement**	:	04.02.2015

आदेश / O R D E R

Per Sanjay Arora, A. M.:

This is an Appeal by the Assessee directed against the Order by the Commissioner of Income Tax (Appeals)-6, Mumbai ('CIT(A)' for short) dated 07.09.2012, dismissing the assessee's appeal contesting its assessment u/s.143(3) of the Income Tax Act, 1961 ('the Act' hereinafter) for the assessment year (A.Y.) 2009-10.

2. The appeal raises four grounds, which we shall take up in seriatim. The first ground is in respect of disallowance of architect & engineering fees (Rs.1,1500/-); tender & survey expenses (Rs.1,70,950/-); and advertisement & sponsorship and brand building expenses (Rs.17,71,347/-), i.e., at an aggregate of Rs.20,57,297/-, by treating them as a part of the construction work in process; the assessee-company being a builder and

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developer. The basis of the assessee's claim is that the relevant expenses were incurred in relation to redevelopment/construction proposals that did not materialize or were otherwise not relatable to any specific project at hand. The same, thus, either represent a loss or a selling cost, not relatable directly to any particular project. The said cost would thus not qualify to be included in the valuation of the work-in-progress (WIP) as at the year-end. The Revenue's case, on the other hand, is that the entire expenditure is in relation to the assessee's construction business, which represents its' principal activity. The assessee has at the relevant year-end 13 projects, the cost of which stand capitalized under WIP; the assessee following project completion method. Further, analyzing each of the several incomes earned by the assessee, as credited to its profit and loss account at a total of Rs.229.49 lacs, it is further clarified that the said expenditure cannot be related to any of the said incomes, so that the assessee's claim is not maintainable on matching principle as well.

3. The assessee before us relied on its written submissions dated 18.03.2014 and 12.05.2014, appearing at pgs.1-10 of its paper-book (PB), while the ld. Departmental Representative (DR) would rely on the orders of the authorities below.

4. We have heard the parties, and perused the material on record. The assessee is a builder/developer engaged since 1990 primarily in executing projects, i.e., after bidding for and taking such projects from various housing societies. The nature of the expenditure is not in dispute. The same to the extent of Rs.2,85,950/- is on architect & engineering fees, tender & survey expenses and other miscellaneous expenses incurred for the project of Gala Nagar CHSL, that was not awarded to it. How we wonder could it be allocated to any of the projects, work in respect of which is under execution as at the year-end. Similarly, advertisement, sponsorship and brand-building expenses are only in the nature of selling costs, i.e., of the construction business, and which would not therefore stand to be capitalized, in-as-much as the same could only be in respect of a direct cost which adds value to or otherwise adds to its cost of production to the assessee. As regards the argument of there being no corresponding income, or it being not relatable to any revenue

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stream, the same is to our mind of little consequence. As long as the assessee is carrying a particular business during the year, income there-from has to be computed u/s.28 of the Act, allowing it all permissible deductions, i.e., in accordance with the provisions of sections 30 to 43D (refer section 29). Whether the method of accounting followed by the assessee, i.e., the project completion method, is a correct method in accordance with the law, i.e., given that it follows mercantile method of accounting, is another matter altogether, which has not been impugned by the Revenue in any manner. We, accordingly, find no merit in the Revenue's case. The assessee's plea merits acceptance, and is upheld. We decide accordingly, allowing its Ground # 1 (also refer para 8).

5. The assessee's second ground is in respect of disallowance of repair and maintenance expenses of a rented premises at Rs. 42.66 lacs. The assessee, it was explained, had taken an office premises on rent in October, 2007 for a period of five years. As the said premises was old and not in use for a long time, it incurred the impugned expenditure towards repair and renovation of the said premises. The same was only toward achieving its' functional utility. No capital asset had come into existence thereby. Further, it needed to be borne in mind that the same is in respect of rented premises and, accordingly, allowable u/s.30(a)(i), which employs the word 'repairs', in contradistinction to the words 'current repairs', i.e., in respect of non-tenanted house property, which falls u/s. 30(a)(ii). The Revenue's objection, on the other hand, is based on the premise that the nature and the volume of the expenditure would not qualify it to be a repair, which only could be allowed u/s.30 of the Act. The expenditure was admittedly on renovation, capital in nature, and would therefore stand to be capitalized, albeit eligible for depreciation, Reference for the purpose is made to sec.32 read with New Appendix 1 of Income Tax Rules, Part A-I(2).

6. We have heard the parties, and perused the material on record.

Again, we observe no dispute with regard to the primary facts of the case, the expenditure incurred being toward false ceiling; fixing tiles/flooring; replacing glasses; wooden partitions; replacement of electrical wiring; earthing; replacement of G.I. pipes,

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plumbing and sanitation lines; plaster and painting of walls. A premises, it may be appreciated, is constituted not merely by, or only of, civil structure, in-as-much as the same by itself does not render it functional for the stated purpose of its user. In fact, the impugned expenditure includes labour for civil work also, paid to one, Akshar Construction, at Rs.9.78 lacs, so that the work could possibly include some structural changes as well. The issue involved, thus, reduces to as to whether the expenditure on extensive repairs and renovation could be allowed in respect of a tenanted premises. The same can by no means be regarded as 'current repairs', the ambit of which is fairly restricted, denoting a repair that is required to be attended to as soon as the need for it arises. 'Repairs', though a term of wider scope, yet cannot extend beyond that of the term itself. A repair, by definition, is toward the maintenance and preservation of an 'existing' asset. Surely, the advantage or asset, in terms of its functional utility and capacity for the business, needs to be maintained, so that expenditure for retaining the same is essentially revenue expenditure, which, again, by definition, does not lead to or result in an enhancement or improvement. The premises in the instant case was admittedly not in use for a long time and, thus, in a dysfunctional, if not dilapidated, state prior to it being acquired by the assessee. The expenditure stands thus incurred on refurbishment and renovation of an old premises, in an inoperable state, so as to make it fit for use. It is therefore wrong to classify or describe it as 'repairs'. The expenditure was incurred to render it in a functional state and, therefore, is clearly in the capital field. Could, one may ask by way of a test, the answer be any different if the same was acquired on own account? The ingredients and prerequisites of a capital expenditure would remain the same, and not undergo any change depending on the object matter of the expenditure, i.e., whether an owned or leased premises, and which itself is the premise of *Explanation* 1 to section 32(1)(ii), invoked by the Revenue.

Total renovation, leading to substantial improvements, is only capital expenditure, as clarified by the apex court in *Ballimal Naval Kishore v. CIT* [1997] 224 ITR 414 (SC). It is nobody's case, nor could be, that the improvement is not enduring or shall not inure in future, particularly upon incurring regular, maintenance expenditure. Reference may

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also be made to the decision in the case of *CIT v. Madras Cements Ltd*. [2002] 255 ITR 243 (Mad), rendered relying on *Ballimal Naval Kishore* (supra) and applying *New Shorrock Spinning & Mfg. Co. Ltd. v. CIT* [1956] 30 ITR 338 (Bom). The asset being also not owned by the assessee, it is, strictly speaking, not a case of replacement, but of acquisition of an advantage of enduring nature - for the first time, an asset by definition. The impugned expenditure is in fact only toward effectuating the decision of acquiring the premises (by way of lease) in the first place, by making it fit for use, both in terms of capacity and capability, in-as-much as it has both quantitative and qualitative attributes, so as to constitute an improvement. It is not a case of a lumpsum payment in lieu of annual business expenditure. The benefit arising out of a capital expenditure, again, does not imply permanence, in which case no expenditure even on regular maintenance, or for keeping it in a state of good repairs, a stipulation that marks most tenancy agreements, would be required. The said benefit, though, cannot also be said to be limited to the period of lease, which may well be extended. Further, that the same, i.e., capital expenditure, is excluded, stands amply clarified per *Explanations* to sections 30 and 31 of the Act, brought on the statute by Finance Act, 2003 w.e.f. 01.04.2004. The expenditure, in our view, thus stands rightly considered by the ld. CIT(A) to form a part of an admissible asset in view of *Explanation* 1 below section 32(1)(ii), carving an exception for depreciation, which is generally allowed only on assets owned by an assessee, on a building not owned by it, but in respect of which it holds a lease or other right of occupancy. A question may arise as to the fate of the written down value (WDV) of the relevant block of assets on the termination or expiry of the lease or rent arrangement, leading to the vacation of the premises. The assessee in such a case would continue to be entitled to its claim for deduction on the relevant block of assets, subject of course to the adjustment in respect of 'moneys payable', if any, as explained by the tribunal in *Metro Exporters Pvt. Ltd.* (in ITA No. 7315/Mum/2012 dated 30.09.2014, as modified by its' further order dated 30.01.2015), on such an issue arising before it for adjudication.

Reliance by the assessee on the decision in the case of *CIT vs. Hi Line Pens (P.) Ltd.* [2008] 306 ITR 182 (Del) is in our view misplaced. The issue in the present case in

our view reduces to or rests in the narrow compass of whether the impugned expenditure is capital or revenue in nature. We have already issued a definite finding of the same as being toward making the premises functional; rather, transforming it from an inoperable state - and, further, only as per the assessee's requirements, for the first time and, therefore, capital in nature. This finding of fact is in relation to the nature of expenditure, so that no presumption with regard thereto, as with reference to the premises being not owned, shall obtain. Rather, where for an extended period, the lease-hold or other right of occupancy could itself be regarded as a capital asset, even as clarified by the hon'ble jurisdictional high court in *CIT vs. Khimline Pumps Ltd.* [2002] 258 ITR 459 (Bom). The hon'ble court in the cited case, as a reading of its decision would show, allowed the assessee's claim for similar expenditure on the basis that the same was admissible u/s. 30(a)(i), which uses the word 'repairs', the scope of which is wider that 'current repairs', covered u/s. 30(a)(ii). The apex court in *CIT vs. Saravana Spg. Mills (P.) Ltd.* [2007] 293 ITR 201 (SC) was concerned with a claim u/s. 31(i), distinguishing the said decision on that basis. The hon'ble court, with respect, however, did not examine or dilate on the scope of the term 'repairs', either with reference to judicial precedents or even otherwise. True, the hon'ble apex court in *Saravana Spg. Mills (P.) Ltd.* (supra) was concerned with a claim u/s. 31(i), which deals with 'current repairs' of plant, machinery and furniture. So, however, as a reading of its decision, binding on all courts in India, would show, it clarifies the scope and ambit of the word 'repairs' to exclude capital expenditure. This in fact represents its consistent view in the matter, applying its earlier decision in *Ballimal Naval Kishore* (supra), affirming the decision by the hon'ble jurisdictional high court reported at [1979] 119 ITR 292 (Bom). The apex court applied the test of capital or revenue expenditure, which it noted the high court had failed to, reproducing the test laid down in the matter by C.J. Chagla, speaking on behalf of the hon'ble jurisdictional high court in *New Shorrock Spinning & Mfg. Co. Ltd.* (supra), wherein it, and in the context of s. 10(2)(v) (of the Income Tax Act, 1922), which corresponds to s. 31(i) of the 1961 Act only, clarified that repairs has to be understood in contradistinction to renewals and restoration, as under:

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> 'The simple test that must be constantly borne in mind is that as a result of the expenditure which is claimed as an expenditure for *repairs* what is really being done is to preserve and maintain an already existing asset. The object of the expenditure is not to bring a new asset in to existence, nor is its object the obtaining of a new or fresh advantage. *This can be the only definition of "repairs" because it is only by reason of this definition or repairs that expenditure is a revenue expenditure*.
>
> If the amount spent was for the purpose of bringing into existence a new asset or obtaining a new advantage, then obviously such an expenditure would not be an expenditure of revenue nature but it would be a capital expenditure and it is clear that the deduction which the legislature has permitted under s.10(2)(v) is a deduction where the expenditure is a revenue expenditure and not a capital expenditure.' (para 14, at page 210)
>
> [emphasis, ours]

As thus evident, the concept of 'repairs' and 'revenue expenditure' were considered as *pari materia* and co-extensive in-as-much as in the view of the hon'ble court, since approved by the apex court, repair could not, by definition, include capital expenditure. The hon'ble court in the said case, like-wise, did not examine the expenditure from the stand point of it being revenue or capital. This could perhaps be for the reason that the year under reference before it was A.Y. 1997-98. The amendments to ss. 30 and 31 w.e.f. 01.04.2004, by way of *Explanations* thereto, to the effect that the cost of repairs and, as the case may be, current repairs, shall not include any expenditure in the nature of capital expenditure, become now incumbent to consider, even as pointed out by the hon'ble apex court. The same have a direct impact on the decision in the case of *Hi Line Pens Pvt. Ltd.* (supra). Rather, in view of the foregoing settled position of law, as clarified by the decisions which stand approved by the apex court in *Saravana Spg. Mills (P.) Ltd*. (supra), it may not be incorrect to say that the said *Explanations* are clarificatory and, thus, retrospective. The said decision, thus, apart from the fact that it does not review the binding judicial precedents explaining the scope of the term 'repairs', is also inapplicable in view of the extant law, i.e., as in force A.Y. 2004-05 onwards, and, accordingly, reliance thereon by the assessee would be of no moment.

In view of the foregoing, we uphold the impugned order on this ground, dismissing the assessee's ground # 2 before us.

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7. The assessee's third ground relates to the capitalization of 80% of the general, administrative expenses, including on employee and director remuneration, toward work-in-progress (WIP). The same, which though excludes the costs covered by the assessee's ground # 1 (Rs. 20.57 lacs), stand claimed by the assessee on the basis that these representing general, administrative costs, are not allocable to any specific project. The Revenue's case, on the other hand, is that the assessee, a builder and developer, had thirteen (13) projects under progress during the relevant year. Understandably, the expenses incurred would predominantly be in relation to the said activity, which also constitutes the assessee's principal activity for the year. The assessee's other incomes for the year, at a total of Rs. 229.49 lacs, comprise interest (Rs. 147.87 lacs); sale of development rights (Rs. 42.75 lacs); profit on derivative trading (Rs. 14.55 lacs); and other incomes (Rs. 24.31 lacs), toward which no specific costs, which would even otherwise be minimal, have been specified. The claim is thus not allowable even on ground of matching principle. Further, the allocation of 80% of the establishment costs toward WIP was thus justified inasmuch as doing so yet results in allowance of expenditure at Rs.32.55 lacs, including Rs. 4.27 lacs by way of depreciation on the renovation cost, which forms the subject matter of the assessee's ground # 2.

8. We have heard the parties, and perused the material on record.

Without doubt, the assessee being engaged principally in construction activity, the standard, commercially accepted principles of accountancy, shall apply, both with regard to revenue recognition as well as inventory valuation, i.e., *qua* the projects underway as the year-end. This would be irrespective of the quantum of the income arising on such projects, as disclosed or recognized. The assessee's entire income for the year being business income, all the expenditure not allocable to any project would, irrespective of its quantum, stand to be allowed as business expenditure, of-course subject to the condition of it being incurred wholly or exclusively for business purposes. In fact, we do not observe any dispute or adverse finding in this regard; the Revenue itself allocating the impugned expenditure between the project cost and that admissible as 'business

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expenditure'. It would be therefore incorrect to be guided by the volume of such expenditure, i.e., which is being allowed, as appears to have prevailed with the ld. CIT(A); the same being admittedly incurred wholly and exclusively for the purposes of the assessee's business. We may however add that the expenditure since allowed is not Rs.32.55 lacs, as stated by the ld. CIT(A), in-as-much as another Rs.20.57 lacs, which forms the subject of the assessee's ground # 1 before us, stands to be allowed. The Revenue's case is that as the principal activity during the year is toward project execution; the balance under the WIP A/c increasing from Rs.5.99 cr. as at the beginning of the year to Rs.10.03 cr. at its end, the general, administrative expenditure would only be directed toward the same and, thus, stand to be allocated thereto, and hence the allocation at 80% thereof.

The assessee being a builder and developer, Accounting Standard 7 (AS-7), issued by the ICAI, titled, 'Construction Contracts', would not apply, so that the prescription of AS-9 and AS-2, based on general principles that govern any business, would apply for the revenue recognition and inventory valuation respectively. We have already, i.e., while discussing the assessee's ground # 1, clarified that only costs incurred toward a particular project, or otherwise related to construction activity, would stand to be allocated and, thus, capitalized as a part of the project cost. 'Capitalized' here is not to be construed in the regular, classical sense of the relevant expenditure being not of revenue nature, but only in the sense of it being accumulated under a particular head of account (i.e., WIP), for being set off, under the matching principle, at the time the corresponding revenue is recognized. *Indirect costs could therefore include only production/project overheads, and not general office and administrative expenses*. The assessee has not specified the duties allotted to different employees or the functional responsibility of the directors. Identification of individual sites, besides work in relation to site preparation, clearances, project supervision or overseeing project execution, etc., would understandably form part of the director's duties. Further, we do not observe any employee costs in the expenses allocated to the various projects, the cost profile of which stand noted by the A.O. at pages 6 to 9 of his order. Managerial and supervisory costs are necessary inputs to project

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execution. We, accordingly, consider 50% of the personnel costs, claimed at Rs.40.22 lacs, i.e., including director's remuneration, as liable for inclusion in the project cost, to be allocated on some systematic or rational basis which would capture project execution, which is a composite activity commencing with site identification to the construction in a deliverable state. No such proportion could be applied to rent, rates and taxes, which, at Rs.70.53 lacs, constitutes the second major component of the impugned expenditure. The same would need to be examined with reference to the purpose for which each item comprising the same is incurred, to be decided accordingly. If not for any specific project, no part of the said cost could be capitalized. Rent for office premises, however, if forming part thereof, would stand to be allocated on the basis of the balance expenditure of Rs.22.48 lacs. Again, as no particulars in respect of these expenses stand specified; the account head describing only the nature of the expense and not its purpose or the activity in relation to which it is incurred, we consider 20% of such expenditure to be allocable to WIP toward project overhead cost, again on the same parameter as applied to the personnel costs. Further, renovation expenses (which is the subject matter of Gd. 1), include Rs.1.20 lacs paid to a vaastu consultant, Sh. Kirti Sheth (PB pg. 30). The same is toward consultancy for various sites at Mumbai. The said expenditure, thus, as it appears, is not toward renovation (as claimed) and, rather, relatable to projects located at different sites, and would therefore require being considered in proper perspective. We decide accordingly.

9. Ground # 4, which concerns disallowance u/s.14A, was specifically stated as not pressed at the time of hearing, and is accordingly dismissed as not pressed.

10. In the result, the assessee's appeal is partly allowed.

परिणामतः निर्धारिती की अपील आंशिक स्वीकृत की जाती है ।

Order pronounced in the open court on February 04, 2015

Sd/-	Sd/-
(Joginder Singh)	(Sanjay Arora)
न्यायिक सदस्य / Judicial Member	लेखा सदस्य / Accountant Member

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मुंबई Mumbai; दिनांक Dated : 04.02.2015
व.नि.स./Roshani, Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
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