In the High Court of Judicature at Madras

Dated : 26.6.2019

Coram :

The Honourable Mr.Justice T.S.SIVAGNANAM

and

The Honourable Mrs.Justice V.BHAVANI SUBBAROYAN

Tax Case Appeal No.2442 of 2008

The Commissioner of Income Tax, Chennai ...Appellant

Vs

M/s.E.T.A. Travel Agency (P) Ltd., Chennai-4. ...Respondent

APPEAL under Section 260A of the Income Tax Act, 1961 to set aside the order dated 04.7.2008 made in ITA.No.2300/Mds/2007 on the file of the Income Tax Appellate Tribunal, Chennai 'A' Bench for the assessment year 2003-04.

For Appellant : Mr.Karthik Ranganathan assisted by Mr.S.Rajesh

For Respondent : Ms.Sree Lakshmi Valli for Mr.G.Baskar

Judgment was delivered by T.S.Sivagnanam,J

We have heard Mr.Karthik Ranganathan, learned Standing Counsel for the Revenue assisted by Mr.S.Rajesh, learned counsel and Ms.Sree Lakshmi Valli, learned counsel appearing for the respondent – assessee.

2. This appeal, filed by the Revenue, under Section 260A of the Income Tax Act, 1961 (for short, the Act), is directed against the order dated 04.7.2008 made in ITA.No.2300/Mds/2007 on the file of the Income Tax Appellate Tribuna, Chennai 'A' Bench for the assessment year 2003-04.

3. The appeal was admitted on 09.1.2009 on the following substantial questions of law :

> *"1. Whether, on the facts and circumstances of the case, the Tribunal was right in holding that the expenditure incurred in respect of renovation of leased premises is to be treated as revenue expenditure in spite of Explanation 1 to Section 32 of the Act ? And*
>
> *2. Whether, on the facts and circumstances of the case, the Tribunal was right in holding that the expenditure incurred on vasthu consultancy for setting up of a new office is to be treated as revenue expenditure ?"*

4. Ms.Sree Lakshmi Valli, learned counsel for the respondent – assessee has raised a preliminary objection with regard to the maintainability of the appeal on the ground that the appeal cannot be pursued any further by the Revenue on account of low tax effect. In this regard, the learned counsel has referred to the circular issued by the Central Board of Direct Taxes in Circular No.3 of 2018 dated 11.7.2018. By referring to paragraph 4 of the said Circular, it is submitted that for the purposes of the said Circular, 'tax effect' means the difference between the tax on the total income assessed and the

tax that would have been chargeable had such total income been reduced by the amount of income in respect of the issues, against which, appeal is intended to be filed. Further, 'tax effect' shall be tax including applicable surcharge and cess. However, the tax will not include any interest thereon, except where chargeability of interest itself is in dispute.

5. The learned counsel for the respondent – assessee has referred to a memo signed by her dated 11.6.2019. The contents of the memo are quoted as hereunder :

> *"1. In the above tax case appeal, an assessment order was passed under Section 143(3) dated 10.3.2006 assessing the total income at Rs.4,07,80,300/- and computing income tax and surcharge at Rs.1,49,86,760/-.*
>
> *2. On appeal, the Commissioner of Income Tax (Appeals), by order dated 09.7.2007, partly allowed the appeal by directing the Assessing Officer to modify the impugned assessment order by allowing a sum of Rs.60,42,076/- and Rs.87,14,311/- as deduction and to also withdraw the depreciation allowed on these sums.*
>
> *3. Consequential order dated 03.9.2007 was passed by the Assessing Officer fixing the taxable income at Rs.2,76,66,350/-.*
>
> *4. The Department's appeal before the Income Tax Appellate Tribunal was dismissed. Hence, the tax effect in the above tax case appeal would be as follows :*

Particulars	*Amount (Rs.)*
Tax and surcharge on taxable income of Rs.4,07,80,300/-	1,49,86,760/-
Tax and surcharge on taxable income of Rs.2,76,66,350/- consequent to order of the CIT(A) dated 09.7.2007 vide revision order dated 03.9.2007	1,01,67,384/-
Tax effect	48,19,376/-

5. Thus, the tax effect in the above tax case appeal is only Rs.48,19,376/-, which is less than the limit prescribed of Rs.50,00,000/-. It is hence prayed that the appeal filed by the Department may be dismissed as not maintainable."

6. It is submitted by the learned counsel for the respondent – assessee that the tax and surcharge on taxable income of Rs.4,07,80,300/- is Rs.1,49,86,760/- and after the order was passed by the Commissioner of Income Tax (Appeals) [for short, the CIT(A)] dated 09.7.2007, the Assessing Officer had given effect to the said order of the CIT(A) vide order dated 31.12.2010 passed under Sections 143(3) read with Section 147 of the Act, in which, the tax and surcharge on the total income was quantified at Rs.2,76,66,350/- and that if this is taken, the tax amount would be Rs.1,01,67,384/-. According to the learned counsel, the tax effect in this appeal would be Rs.48,19,376/-, which is less than the limit of Rs.50 lakhs prescribed in the said Circular and therefore, the Revenue cannot prosecute this appeal any further. The learned counsel for the respondent – assessee has also referred to the order passed by the Assessing Officer under Section 154 of the Act dated 27.3.2012 to substantiate her contention that the tax

and surcharge on total income has to the reckoned as Rs.2,76,66,350/- consequent upon the order passed by the CIT(A) dated 09.7.2007.

7. The learned counsel for the respondent – assessee has referred to a ***judgment*** rendered by a Division Bench of this Court, to which, ***one of us (TSSJ)*** is a party, in the case of ***CIT Vs. Ormed Medical Technology Ltd. [TCA.No.901 of 2008 dated 18.4.2018].*** With the above submissions, the learned counsel for the respondent – assessee prays for dismissal of this appeal.

8. Mr.Karthik Ranganathan, learned Standing Counsel for the Revenue submits that if the appeal filed by the Revenue is allowed, the order passed under Section 154 of the Act dated 27.3.2012 would become infructuous, that and consequently, the order passed by the Assessing Officer has to be restored and the tax has to be computed and not only that, the rate of depreciation is to be ascertained and a complete reworking has to be done by the Assessing Officer and that this cannot be done in this appeal under Section 260A of the Act by raising substantial questions of law, which has been admitted by a Division Bench of this Court.

9. It is the further submission of the learned Standing Counsel for the Revenue that even going by the stand taken by the assessee, the relief granted by the CIT(A) was to the tune of Rs.1,47,56,387/- (Rs.60,42,076/- + Rs.87,14,311/-). The tax at the relevant time was stated to be 35% and the amount would be Rs.51,64,735/- and the surcharge at 5% being

Rs.2,58,365/- and the total tax effect would be Rs.54,23,100/-, which is well above the threshold limit of Rs.50 lakhs. Therefore, it is submitted that the Revenue should be permitted to pursue their appeal before this Court.

10. After elaborately hearing the learned counsel for the parties and perusing the said Circular and the memo filed by the learned counsel for the assessee, this Court is of the view that it cannot compel the Revenue to withdraw the appeal. Furthermore, this Court, while exercising its jurisdiction under Section 260A of the Act, would not be justified in examining the computation of tax and more particularly when there is a discrepancy in the figures computed by the respondent – assessee and that of the Revenue. As noticed above, according to the assessee, the tax effect is Rs.48,19,376/- and according to the Revenue, the tax effect is Rs.54,23,100/-. Though there may be a narrow margin, this Court cannot venture into the computation details at this juncture and compel the Revenue to withdraw the appeal, which they refused to do nor this Court is inclined to dismiss the appeal by applying the said Circular. Thus, the preliminary objection raised by the learned counsel for the respondent – assessee is rejected.

11. Now, we move on to consider the case on merits. The following facts would be relevant to answer the substantial questions of law.

The assessee is in the business of running a travel agency and filed their return of income for the assessment year under consideration (2003-04) on 01.12.2003 returning a total income of Rs.1,79,95,145/-. The assessment

was completed under Section 143(1) of the Act on 10.12.2004. In the meanwhile, a notice was issued under Section 143(2) of the Act on 08.10.2004 requesting the assessee to furnish various details, pursuant to which, the assessee, through their authorized representative (chartered accountant) appeared in person, furnished the details and produced the books of accounts and bills for repairs and maintenance. The Assessing Officer, on perusal of the records, which were placed before him, examined the same based on the various establishments, which the assessee had through out the country and accordingly completed the assessment vide order dated 10.3.2006.

12. Aggrieved by that, the assessee filed an appeal before the CIT(A) contending that the expenses incurred by them for doing the interiors of the premises taken on lease cannot be treated as a capital expenditure, but as a revenue expenditure. However, during the course of arguments before the CIT(A), the assessee conceded that certain expenditure can be capitalized and requested for depreciation and in respect of other expenses, they stated that they should be treated as revenue expenditure. In support of their contention, the assessee referred to the decisions in the case of

(i) ***CIT Vs. Ooty Dasaprakash [reported in (2000) 110 Taxmann 275 (Madras)]; and***

(ii) ***CIT Vs. Kishan Chand Chellaram (India) P. Ltd. [reported in 130 ITR 385 (Madras)]*** and few other decisions.

13. The CIT(A) considered the stand taken by the assessee and after taking note of the various works done by the assessee in the leased premises, pointed out that huge expenditure had been incurred by the company by way of fixing doors, both wooden as well as aluminium, collapsible shutters, mirrors, partitions, false ceiling etc., and providing various types of furniture for executives and functions. The Assessing Officer noted that the expenditure of Rs.94,87,010/- included Rs.9,45,093/- towards future expansion and Rs.1,27,378/- towards additional works by stating it as 'ETA only', that it was not clear as to what it meant exactly and that it was seen from the measurement sheets for future expansion that only certain measurements were given for partitions, storage space, various furniture items, doors, etc., for the director's room and other staff rooms. The CIT(A) examined the floor wise break-up expenditure, samples of various types of work carried out, electrical work including the provision of entire wiring, cables, light fixtures, etc., and observed that from the description of the break-up of the expenditure claimed, the same included several items, which had been spent by the assessee on articles or things, which could be dismantled, removed and carried along at the time of vacating the rented premises and it is not so as if the assessee had not created a capital asset nor had obtained an enduring benefit.

14. After analyzing all the factual details and taking note of the submissions made by the assessee's representative that they proposed to

restrict their claim, the CIT(A) passed the order dated 09.7.2007. The assessee was granted relief to the extent of Rs.60,42,076/- which was treated as a revenue expenditure namely expenses incurred in their three branches at Ahmedabad, Chennai and Trichy respectively.

15. With regard to the consultancy charges, which were incurred by the assessee to the tune of Rs.87,14,311/-, the CIT(A) pointed out that it did not represent any expenditure incurred by the assessee towards creation of any capital asset or obtaining an enduring benefit. Accordingly, the appeal filed by the assessee was partly allowed and the Assessing Officer was directed to modify the assessment order by allowing the amounts of Rs.60,42,076/- and Rs.87,14,311/-.

16. The Revenue preferred an appeal before the Tribunal seeking to set aside the order passed by the CIT(A) and to restore the order passed by the Assessing Officer. However, the Tribunal dismissed the appeal filed by the Revenue by the impugned order. Hence, the Revenue is before us.

17. On a reading of the impugned order passed by the Tribunal, we find that the Tribunal referred to the order passed by the Assessing Officer in paragraph 2 of its order and the order passed by the CIT(A) in paragraph 3, and extracted the relevant portions of the order passed by the CIT(A) in paragraph 4 and the findings of the Tribunal appear to be in paragraph 6. All that the Tribunal stated is that the Departmental Representative could not place any justifiable reasons or contra material to convince the Tribunal to

take a different view than the one taken by the CIT(A) in respect of both the issues. Accordingly, the appeal filed by the Revenue before the Tribunal was dismissed.

18. Mr.Karthik Ranganathan, learned Standing Counsel for the Revenue is right in his submission that the Tribunal has not given any independent reasons as to why the order passed by the CIT(A) needs to be sustained.

19. It is true that the Tribunal, while affirming the order passed by the First Appellate Authority namely the CIT(A) would be well justified in concurring with the First Appellate Authority. But, being the last forum, which can go into the factual aspect, it is expected of the Tribunal to give independent reasons as to why they seek to sustain the order passed by the CIT(A). Be that as it may, we are required to decide the substantial questions of law, which were framed at the time of admission of this appeal. In fact, both the substantial questions of law involve the same issue as to whether the expenditure incurred by the assessee in respect of renovation of the leased premises and other expenses towards vasthu consultancy for setting up a new office is to be treated as capital expenditure or revenue expenditure.

20. The learned Standing Counsel for the Revenue relies upon the following decisions :

(i) in the case of ***CIT, Madurai Vs. Madura Coats [reported in (2012) 19 Taxmann.com 74 (Madras)];***

(ii) in the case of ***CIT, Madurai Vs. Viswams [reported in (2019) 105 Taxmann.com 289 (Madras)]*** and

(iii) in the case of ***Indus Motor Co. (P) Ltd. Vs. DCIT [ITA.Nos.4,14 and 15 of 2015 dated 18.8.2015].***

21. All these decisions are pressed into service by Mr.Karthik Ranganathan, learned Standing Counsel for the Revenue to substantiate his argument that Explanation 1 to Section 32 of the Act is an answer to the assessee's case and that the CIT(A) was not justified in allowing the expenditure to be treated as a revenue expenditure.

22. To be noted that this contention, which is canvassed before us, was not canvassed by the Revenue before the Tribunal nor there was any finding by the CIT(A) to that effect. Nevertheless, this being a pure question of law, we are required to examine the correctness of his submission.

23. It is submitted by the learned counsel for the assessee that the entire details were furnished before the CIT(A) and if at all this Court comes to the conclusion that the effect of Explanation 1 to Section 32 of the Act has not been considered, the matter may be remanded to the CIT(A) or to the Assessing Officer for a fresh consideration.

24. Section 32 of the Act deals with depreciation. Section 32(1A) of the Act was inserted by the Taxation Laws (Amendment) Act, 1970 with effect from 01.4.1971. It was omitted by the Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986 with effect from 01.4.1988. By the same

Amendment Act, 1986, Sub-Section (1A) stood interpolated as Explanation 1 to Section 32 of the Act with effect from 01.4.1988. Explanation 1 to Section 32 of the Act reads as follows :

> *"Where the business or profession of the assessee is carried on in a building not owned by him but in respect of which the assessee holds a lease or other right of occupancy and any capital expenditure is incurred by the assessee for the purposes of the business or profession on the construction of any structure or doing of any work in or in relation to, and by way of renovation or extension of, or improvement to, the building, then, the provisions of this clause shall apply as if the said structure or work is a building owned by the assessee."*

25. A reading of the above Explanation clearly shows that where the business or profession of the assessee is carried on in a building, which is not owned by him, but has been leased out, in respect of which the assessee holds a lease or other right of occupancy, if any expenses are incurred by the assessee for the purposes of the business or profession on the construction of any structure or doing of any work in or in relation to, and by way of renovation or extension of, or improvement to, the building, then, the provisions of the said Clause shall apply as if the said structure or work is a building owned by the assessee. The effect of Explanation 1 was considered in the decision in the case of ***Madura Coats.***

26. After referring to various other decisions, the Court pointed out that the extensive repairs and renovations carried out by the assessee cannot be said to be incurred to preserve and maintain an already existing asset since many new objects have been brought into as could be seen from the list of construction made and thus, the object of expenditure made by the assessee is definitely to bring a new asset into existence to obtain new advantage further giving enduring benefit to the assessee. The Court further pointed out that the Tribunal committed an error by allowing the expenditure incurred on repairs of the rented building as taxable expenditure under Section 37(1) of the Act ignoring Explanation 1 to Section 32 of the Act.

27. In the decision in the case of ***Viswams,*** the Court considered a similar question. The Court took note of the decision in the case of ***Silver Screen Enterprises Vs. CIT [reported in (1972) 85 ITR 578]*** wherein the Punjab and Haryana High Court held that the amounts spent for construction of the verandah, office room, side room and bath rooms brought into existence an asset of enduring nature, that the replacement of old wooden chairs by steel chairs was to attract larger and better customers and that this would go to show that the lessee (the assessee therein) brought into being an asset of enduring nature. After taking into consideration Explanation 1 to Section 32 of the Act, the Court held that the assessee had incurred substantial expenditure towards renovation leading to enduring benefit and that they are not merely repairs and ultimately rejected the

contention raised by the assessee.

28. In the decision of the Kerala High Court in the case of ***Indus Motors Co. (P) Ltd.,*** the Division Bench elaborated the effect of Explanation 1 to Section 32 of the Act. As the Division Bench entertained a doubt as to the correctness of the decision of the Division Bench of the Kerala High Court in the case of ***Joy Alukkas India Private Limited Vs. ACIT [ITA. No.230 of 2013 dated 20.1.2014], the matter was referred to a Full Bench.*** We quote the relevant portions in the decision of the Division Bench in the case of ***Indus Motor Co. (P) Limited,*** which read as hereunder :

> *"24. According to us, on a reading of Explanation, it is categoric and clear that so far as the expenditure incurred as contemplated in the Explanation is concerned, a legal fiction is created, by which, the assessee enjoying a lease hold right on a building is treated as the owner of the building. So, according to us, the question to be considered in such a case is whether the assessee has acquired any enduring benefit by putting the refurbished building to use over a period of time in accordance with the agreement entered into between the assessee and the building owner.*
>
> *25. So far as the question regarding the expenditure incurred by the assessee for refurbishing the building taken on lease is concerned, we are of the considered opinion that after the introduction of Explanation 1 to Section 32(1) of the Act, there is no scope left at all for*

any interpretation since, by a legal fiction, the assessee is treated as the owner of the building for the period of his occupation. This means that by refurbishing, decorating or by doing interior work in the building, an enduring benefit was derived by the assessee for the period of occupation and therefore, is a capital expenditure and not revenue expenditure. So also as contended by the learned Senior Counsel for the Renenue, the criteria that is to be adopted for identifying the enduring benefit is the nature of enhancement and advantage that the assessee has derived by putting the building to use for business purposes. According to us, by adding Explanation 1 to Section 32(1), Parliament has manifested its legislative intention to treat the expenditure incurred by the assessee on leasehold building as capital expenditure and therefore, Explanation 1 to Section 32(1) cannot be subjected to any other interpretation. Further, the language of Explanation 1 is very plain and clear and there was no scope for providing a different meaning for the words used and hence, we are bound to consider the question by giving the literal meaning to the expressions and phraseologies by the Legislature applied."

29. In the above decision, it was pointed out that so far as the expenditure incurred as contemplated in the explanation is concerned, a legal fiction is created, by which, the assessee, enjoying a leasehold right on a building, is treated as the owner of the building. It was further pointed out

that after the introduction of Explanation 1 to Section 32 of the Act, there is no scope left out at all for any interpretation since, by a legal fiction, the assessee is treated as a owner of the building for the period of his occupation and this would mean that by refurbishing, decorating or by doing interior work in the building, an enduring benefit was derived by the assessee for the period of occupation and therefore, it is a capital expenditure and not revenue expenditure.

30. The factual position has been pointed out by us in the preceding paragraphs and it will be worthwhile to reiterate that the entire details of the expenditure incurred by the assessee for all the branch offices spread over the country were produced before the Assessing Officer. The expenses incurred were for providing furniture, interior decoration and office equipment and also consultation charges. These details were once again placed before the CIT(A), when the assessee filed appeal against the assessment order. The CIT(A) took note of the various categories of expenses incurred by the assessee and from the details given in paragraph 5 of the order passed by the CIT(A) dated 09.7.2007, it is clear that the assessee had spent substantial funds in creating office space with a particular design to suit their requirement. In fact, the assessee had also admitted that they were granted agency by M/s.Malaysian Airlines and that they had to design the showroom with a particular design as instructed by the said Airlines.

31. Furthermore, the expenses, which were incurred, clearly show that

they are fixed and are capital in nature and that the test applied by the CIT(A) to state that the assessee cannot remove the same at the time of vacating the premises is an incorrect test applied by the CIT(A) because the CIT(A) did not take note of Explanation 1 to Section 32 of the Act. In the light of the said Explanation, it has become immaterial as to whether the assessee is the owner of the building or the lessee and there is no scope left for any interpretation since, by legal fiction, the assessee is treated as the owner of the building for the period of their occupation.

32. The learned counsel for the assessee submits that the matter may be remanded to the Assessing Officer or the CIT(A) to enable the assessee to once again canvass the factual details.

33. In our considered view, no such remand is warranted in the instant case as we have found that the entire details were made available by the assessee to the Assessing Officer as well as to the CIT(A) and that they examined all the factual details. Had the CIT(A) taken note of Explanation 1 to Section 32 of the Act in all probabilities, the result of the appeal would have been different. Thus, on account of not applying the correct legal principle to the facts, an erroneous order was passed by the CIT(A), which was affirmed by the Tribunal without assigning any reasons. For the above reasons, the Revenue has to necessarily succeed in this appeal.

34. At the risk of repetition, it is not out of place to mention here that the decision of the Division Bench of the Kerala High Court in the case of ***Indus Motors Co. Pvt. Ltd.*** was referred to a Full Bench for reconsideration of the decision rendered in ***Joy Alukkas India (P) Ltd.*** Ultimately, the Full Bench of the Kerala High Court in the decision reported in ***(2016) 382 ITR 0503*** reiterated that the observations and opinion expressed by Division Bench in the case of ***Joy Alukkas India (P) Ltd.***, for holding that the expenditure incurred by the assessee in the above case was not a capital expenditure, but was only revenue expenditure were based on facts of that case, that the relevant test was applied by the Division Bench and that the observation made by the Division Bench in paragraphs 29 and 30 in the decision in the case of ***Joy Alukkas India (P) Ltd.,*** had to confine to the facts of that case. Further, the relevant portions in the judgment rendered by the Full Bench in the case of ***Indus Motors Co. Pvt. Ltd.,*** read as follows :

> *"33. As has been observed above, whether an expenditure incurred by assessee in a particular case is a capital expenditure or revenue expenditure has to be decided on the facts of that case by applying the relevant tests. Explanation 1 to Section 32(1)(i) does not intend to lay down that whenever expenditure has been incurred by the assessee for the purpose of business or profession on the construction of any structure or doing of any work in or in relation to or by way of renovation or improvement to the building, then*

such expenditure has to be mandatorily treated as capital expenditure. The explanation only meant that in the event any capital expenditure is incurred by the assessee, the provisions of Section 32 (1) shall be applicable as if the said structure or work is a building owned by the assessee. We thus answer the reference holding that the ratio of the judgment of the Division Bench in Joy Alukkas case as expressed in paragraph 28 of the judgment needs no reconsideration.

34. We further hold that whether an expenditure incurred by the assessee is a capital expenditure or revenue expenditure is to be decided on the facts of each case by applying the relevant tests."

35. In the light of the above discussions, the above tax case appeal is allowed, the orders passed by both the CIT(A) as well as the Tribunal are set aside and the order passed by the Assessing Officer is restored. Consequently, the substantial questions of law are answered in favour of the Revenue. No costs.

(T.S.S.J.) (V.B.S.J.)
26.6.2019

Speaking (or) Non speaking Order
Index: Yes (or) No
Internet: Yes (or) No

To
The Income Tax Appellate Tribunal, Chennai 'A' Bench.

RS

T.S.SIVAGNANAM,J
AND
V.BHAVANI SUBBAROYAN,J

RS

TCA.No.2442 of 2008

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