IN THE HIGH COURT OF DELHI

\+ **ITA NO. 775/2005**

Judgment reserved on : May 20, 2005
% **Judgment delivered on : July 14, 2005**

\# **Commissioner of Income Tax**
Delhi-II, New Delhi

....Petitioner

! **through:** **Ms. Prem Lata Bansal with Mr. Ajay Jha, Advocates.**

Versus

$ **M/s. Khosla Indair Limited,**
C/o M/s. Kirloskar Pneumatic Co. Ltd.
18.8 Kms Delhi Mathura Road,
Faridabad (Haryana).

....Respondent

^ **through : Mr. Ajay Vohra, Mr. Vinay Vaish and Ms. Kavita Jha, Advocates.**

CORAM :

HON'BLE MR. JUSTICE SWATANTER KUMAR
HON'BLE MR. JUSTICE MADAN B. LOKUR

1. Whether reporters of local paper may be allowed to see the judgment? No.
2. To be referred to the reporter or not? Yes
3. Whether the judgment should be referred in the Digest? Yes.

SWATANTER KUMAR, J.

1. Vide its order dated 25th August, 2003, the Income Tax Appellate Tribunal dismissed the appeal preferred by the Joint Commissioner of Income Tax, Range-II, New Delhi, holding that the income of the assessee had to be treated as income under the head 'business' and not 'other sources'. It also held that there was no cessation of business, and at best it would only be a lull or a temporary cessation, and affirmed the order passed by the Commissioner of Income Tax (Appeals). While relying upon the judgment of this Court in the case of ***Indraprastha Steel Industries Ltd. vs. Income-Tax Appellate Tribunal, New Delhi 1973 (Vol.88) Income Tax Reports 138***, it was argued that the set of carry forward losses of earlier years was not available to the assessee in the present case as there was cessation of business and also that mere realisation of some income on account of interest, could not be treated as income from business. On this premise, the challenge is raised to the the correctness of the order of the Tribunal, which according to the appellant has fallen in error of law giving rise to the question of law for consideration of this Court as framed in paragraph 2 of the

present appeal under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

2. Before we proceed to discuss the merit or otherwise of these contentions raised before us, reference to the basic facts would be necessary. The assessee had filed return of the income declaring net loss of Rs.69,385/- on 1st November, 1996. Apart from these losses being of current year, the assessee also claimed brought forward losses of Rs.1,47,04,081/-, uabsorbed depreciation of Rs.1,24,09,462/- and investment allowance of Rs.95,572/- The return was processed initially under Section 143 (1) (a) of the Act whereafter it was selected for scrutiny and notices under Section 143 (2) of the Act was issued on 17th September, 1997, in response to which the representative of the assessee had attended the proceedings. The Assessing Officer formed an opinion that there was no organized course of activities because assessee sold all its assets during the year and only some spare parts continuing from earlier years were sold during the relevant year. Receipts by way of service charges received by the assessee-company could not be said to be a distant and new activity. Referring to various judgments which were cited before

the Assessing Officer, the Assessing Officer disallowed expenditure and while holding that the assessee was carrying no business, declined the allowance on account of depreciation and finally the assessee was assessed at income of Rs.67,26,820/- vide order dated 9th November, 1998. This order was challenged by the assessee before the Commissioner of Income Tax (Appeals), who vide his order dated 11th February, 1999 partly allowed the appeal of the assessee and held as under:-

> "As I have held that the appellant's income is assessable under the head profit and loss account of business and profession the Assessing Officer shall examine the appellant's claim for deduction u/s 43B, bad debts written off, deduction for unabsorbed depreciation by treating the same as profit of current year depreciation and other similar claims shall be considered by the Assessing Officer after examining the books of accounts of the appellant and company documents, in support of such claims. The appellant shall file the details along with evidence of its claim before the Assessing Officer so as to enable him to deduce its income properly under the head profit and loss account of business and profession.
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> Thus so far the appellant's claim for being assessed within the meaning of section 28 of the Income Tax is concerned, this contention is accepted. So far its claim for deduction of expenses are concerned the matter is set aside and as observed earlier the Assessing Officer shall decide such claim in accordance with law after allowing the appellant a

fresh opportunity to substantiate it claim.

In the result, the appeal is partly allowed."

3. It may be useful to notice here that the Commissioner of Income Tax passed a detailed judgment while relying upon the judgment of the Supreme Court in the case of ***CIT vs. Virmani Industries Pvt. Ltd. 216 ITR 618***. In its detailed discussion, the Commissioner of Income Tax (Appeals) specifically noticed that during the relevant assessment year, the appellant had earned Rs.58,000/- on account of service charges and it had earned service income of Rs.3.45 lacs which includes erection and commissioning charges for the services rendered to MAX GB and NTPC in respect of compressors supplied by outside parties. The assessee had contended before the authorities that activity of providing various services in connection with installation, erection and commissioning of compressors, maintenance thereof, and the activity of manufacturing and sale of compressors constitute one and the same business. The Appellant was not merely a manufacturer. Even in the earlier years it was specified in the statement of computation of total income from 1.4.1995 to 31.3.1996 i.e. the assessment year 1996-97. It had shown profit

and loss account of Rs. 1,99,143/- and it claimed deductions and investment allowances. It was upon noticing all these facts relevant to the material produced before the authorities that the Commissioner had partly allowed the appeal of the assessee. Being dissatisfied with the order of the Commissioner of Income Tax (Appeals), an appeal was preferred by the Department before the Income Tax Appellate Tribunal. As already noticed, the Tribunal had dismissed the appeal by holding as under:-

> "We have carefully considered the rival submissions. From the facts on record and on the basis of the orders placed before us, it is not denied that the assessee sold the land, the plant and machinery etc during the year for which capital gains was duly assessed by the A.O. Also. It is also an admitted fact that the assessee continued to sell stores and spare parts and also render services to the customers for which the income under the head "service charges" was shown at Rs.58000/-. The assessee, therefore, claimed the income under the head "business Income" and claimed deduction of depreciation including losses brought forward from earlier years. The A.O., therefore, held that the business of the assessee has already ceased after the sale of the land and the plant and machinery etc. He, therefore, denied the claim of depreciation including deduction of carried forward losses from the earlier years. The learned CIT (A), however, found that in the case of the assessee, it cannot be held to be cessation of business as the assessee continues to render services and also continue to

sell stores and spare parts which are part of the objects of the assessee company. He accordingly allowed the claim as per the order extracted above.

We are of the view that there is not much debate on this point. The revenue in this case raised objection for this assessment year only and assessed the income under the head "other sources". It is, however, seen that in the subsequent assessment years right up to assessment year 2001-2002, the claim of the assessee has been accepted and the income has been assessed under the head "business". The claim of depreciation and carry forward of brought forward losses also has been allowed. In such a case, it cannot be said that the business of the assessee ceased during the year. Even if it is admitted that there has been no activity during the year, it will be only a lull or a temporary cessation and cannot be said to be complete discontinuance of the business. We, therefore, see no reason to interfere with the order of the learned CIT (A). It is accordingly upheld.

In the result, the appeal fails and is dismissed."

4. Challenge in the present appeal is to this order and judgment of the Income tax Appellate Tribunal.

5. 'Service and Maintenance Contracts' is a well accepted concept of modern business activity. It is neither factually incorrect nor would be absurd in terms of business if it is stated

that a particular concern is carrying on the service and maintenance contracts and is not involved in the business activity.

6. Contract of maintenance can itself be an occupation squarely covered by the expression 'business'. It will have to be construed as 'business' with all its consequential or incidental repercussions. The Joint Commissioner of Income tax during the assessment proceedings had observed and recorded in the order of assessment that in the case in hand it could not be said that there was any organised course of activity because assessee sold all its assets, and during the year only some spare parts continuing from earlier years were sold. While the assessee had specifically pleaded that in addition to this activity they were carrying on the business of maintenance and were receiving charges not only from the customers to whom they had sold the compressors, but even from other customers. This factual controversy was accepted by the First Appellate Authority and fully affirmed by the Income Tax Appellate Tribunal. Once this finding of fact is recorded that the assessee was carrying on the business of maintenance and was receiving service charges as its regular activity, there is no reason why the normal consequences of this

being treated as 'business income' should not flow. Nothing has been placed on record before us to show that this finding of fact recorded by the authorities is palpably erroneous or illogical. As is clear from the above narrated facts, even the Commissioner of Income Tax (Appeals) in its order recorded that during the relevant assessment year the appellant had earned Rs.58,000/- on account of service charges and service income of Rs.3.45 lacs which include erection and commissioning charges for services rendered to its customers.

7. The reliance placed by the learned Counsel upon the case of ***Indraprastha Steel Industries Limited (supra)*** is of no help to the Revenue as it has no bearing on facts of the present case. In that case the Court held that "the assessee company could not be said to be engaged in any business during the relevant year merely because in realising its assets it had earned interest on the outstanding or some profits in selling its stores and spares, the company was not carrying on business and thus, was not entitled to deduction of any expenditure, and/or set of the business losses of the earlier years against the subsequent years. In the present case there is concurrent finding recorded by the

authorities that the assessee-company was carrying on the business and had a direct income therefrom on account of service and maintenance charges. They had installed systems and had considerable income from the business itself. The learned Counsel appearing for the assessee has rightly relied upon the judgment of the Supreme Court in the case of ***Produce Exchange Corporation Ltd. vs. Commissioner of Income Tax (Central), Calcutta 1970 Vol.77 Income Tax Reports 739*** and upon judgment of a Division Bench of this Court in the case of ***Commissioner of Income-Tax vs. Neo Poly Pack (P.) Ltd. 2000 Vol. 245 Income Tax Reports 492***. The business of maintenance carried on by the assessee resulting in payment of service charges under the common management, common accounts would not alter the status of a 'composite business' merely because the assessee-company has disposed of its assets. Reference in this regard can also be made to another judgment of the Supreme Court in the case of ***Commissioner of Income Tax, Madras vs. Prithvi Insurance Company Ltd. 1967 Vol. 63 Income Tax Reports 633.***

8. We may also make a reference to a recent judgment of

this court in the case of ***Commissioner of Income Tax, Delhi-IV vs. M/s. Excellent Commercial Enterprises & Investments Ltd.*** *in* ***ITA 521/2004*** decided on ***12th May, 2005*** where the Court held as under:-

> "7. Even in the case of Western States Trading Co.P.Ltd. Vs. Commissioner of Income-tax (Central), Calcutta (1971) 80 ITR 21, the Supreme Court was concerned with the question whether the appellant which owned a colliery and entered into an agreement to sell the colliery to another company w.e.f. September, 1954 pending completion of sale, the business was being carried on on behalf of the purchaser company since the price fixed less than the book value of the assets, the appellant claimed a balancing allowance under section 10(2)(vii) of the Act for the assessment year 1956-57. For part of the year, apparently, the assessee had carried on business, while for the remaining part, it has not carried on business. The High Court had denied the admissibility of the allowance to the assessee. While reversing the judgment of the High Court, the Supreme Court answered both the formulated questions whether dividend income was to be taken as income, profit and gains of the business of the Company as well as set off against losses brought forward for the earlier years in favour of the assessee.
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> 8. Applying the above settled principles, the Income-tax Appellate Tribunal had affirmed a finding of the Income-tax Commissioner (Appeals) that the Company in the interest of its business and to earn additional profits arising from such stock-in-trade had invested its money which was earning dividends on shares held in stock-in-trade. This was thus and rightly so treated as income from business and not income from other sources. No

distinctive features have been placed before us which could persuade the Court to take a view different than the one which has been taken in the above orders. Even otherwise, it would be a finding of fact based and referrable to the records which were produced before the Income-tax Tribunal."

9. Keeping in view the well settled principles of law aforestated, there is no scope for this Court to admit the present appeal, as the question sought to be raised in the present appeal has been well answered by catena of judgments. Thus, we dismiss the present appeal, while leaving the parties to bear their own costs.

SWATANTER KUMAR
(JUDGE)

MADAN B. LOKUR
(JUDGE)

July 7th, 2005
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Certified that the corrected copy of the judgment has been transmitted in the main Server.