* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ ITA No. 837 of 2009

% *Decided on : September 03, 2009*

Commissioner of Income Tax (LTU) . . . Appellant

through : Ms. Prem Lata Bansal with
Ms. Anshul Sharma, Advocates

*VERSUS*

Sharda Motor Industrial Ltd. . . . Respondent

through : Mr. Satyen Sethi, Advocate

CORAM :-
THE HON'BLE MR. JUSTICE A.K. SIKRI
THE HON'BLE MR. JUSTICE VALMIKI J. MEHTA

1. Whether Reporters of Local newspapers 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?

A.K. SIKRI, J. (ORAL)

1. The respondent/assessee had filed the income tax return on 27.11.2003 declaring income of Rs.10.36 crores under the MAT Scheme. Within one year, i.e. on 28.10.2004, this return was revised. Income shown was the same as shown earlier. In this revised return, however, the assessee had claimed additional depreciation @ 15% of the actual cost of addition of a new machinery under Section 321(1)(iia) of the Income Tax Act, 1961 (for

original return filed by the assessee, the assessee had not fu form No. 3AA. This decision of the AO was reversed by the CIT(A) on the ground that even the revised return was filed within the limitation period and, therefore, this could not be a ground for disallowance. The ITAT has upheld the order, and rightly so, inasmuch as a very hyper-technical view was taken by the AO in disallowing the additional depreciation. Moreover, it is held by this Court as well as various other High Courts that furnishing of form No. 3AA, i.e. the Audit Report, is only directory and not mandatory.

2. The AO had also disallowed the royalty which as paid by the assessee to the Korean company, namely, Se Jong Industrial Co. Ltd., treating the same as capital expenditure. The CIT, in appeal, reversed this decision of the AO holding that the said royalty was revenue expenditure. For holding so, the CIT(A) went into the various clauses of the agreement entered into by the assessee with the Korean company. It was found that two agreements, one dated 28.8.1997 and the other dated 8.5.2001, were entered into between the parties. As per the first agreement, the assessee was to pay a lump sum amount of US$100,000 for transfer of technical knowhow and running royalty at specified rate per piece of production of different products, i.e. catalytic converter and exhaust muffler. Under the second agreement, technical knowhow of US$60000 and royalty at

admittedly shown these expenses as capital expenditure. It royalty paid during the year in question which was treated as revenue expenditure by the assessee. The CIT(A) found that as per the agreement, this royalty was running royalty payable every year, which depended upon the number of pieces produced of the aforesaid products, namely, catalytic converter and exhaust muffler.

4. We are of the opinion that this finding of the CIT(A), as approved by the ITAT, is a finding of fact which is rightly arrived at as expenditure is purely a revenue expenditure, which is annual expenditure depending upon the quantum of production in the relevant year.

5. In *CIT* v. *J.K. Syntheticx Ltd.*, 309 ITR 371, after elaborately discussing the entire case law on the subject, the Court culled out the broad principles to determine as to whether expenditure in a particular case would be capital or revenue expenditure. One of the principle enumerated therein reads as under :-

> "(v) expenditure incurred for grant of licence which accords *"access"* to technical knowledge, as against, *"absolute"* transfer of technical knowledge and information would ordinarily be treated as revenue expenditure. In order to sift, in a manner of speaking, the grain from the chaff, one would have to closely look at the attendant circumstances, such as :
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> a) the tenure of the licence,
> b) the right, if any, in the licensee to create further rights in favour of third parties.
> c) the prohibition, if any, in parting with a confidential information received under the licence to third parties without the consent of the licensor,

knowledge was obtained during the subsistence of licence.

f) whether any secret or process of manufacture was sold by the licensor to the licensee. Expenditure on obtaining access to such secret process would ordinarily be construed as capital in nature."

6. In the present case, on facts, it was *inter alia* found as follows :-

"(a) in that case the grant of technical aid was for setting up of the factory combined with the right to sell products while in our case our company is already producing exhaust systems and the technology agreement was not for setting up of the factory.

(b) in the cited case the foreign company who gave the technology agreed not to manufacture similar products in India while there is no such regulation in our agreement.

(c) in the cited case the technical knowledge obtained was held to given an advantage of enduring nature of the assessee company and as it had the right to continue to manufacture the product even after termination of the agreement. While in our case the design patent applies to the foreign company and we are only licensed to produce the goods for Hyndai Car and we cannot continue to produce the goods if the agreement is terminated. This itself is a major difference between the case cited by your Honor and the facts of our case."

On these facts and after applying the aforesaid principle, it becomes crystal clear that the expenditure is of revenue nature.

7. Learned counsel for the Revenue submits that the Tribunal has not considered the effect of the judgment of the Supreme Court in *Southern Switch Gears Ltd.* v. *CIT*, 232 ITR 359, inasmuch as in that case the payment of royalty was treated as capital expenditure. However, what is glossed over is that under the terms of the

Tribunal had disallowed 25% thereof. In the present c pointed out above, royalty is to be paid on the quantity of the goods produced, calculating per piece of the said goods produced. Therefore, the Tribunal rightly held that the aforesaid judgment is not applicable to the facts of the present case.

8. Since no substantial question of law arises for consideration, this appeal fails and is dismissed.

(A.K. SIKRI)
JUDGE

(VALMIKI J. MEHTA)
JUDGE

September 03, 2009
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