



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

+ **ITA No. 422/2007**

July 27, 2009

THE COMMISSIONER OF INCOME TAX -V ...Appellant
Through: Ms. Rashmi Chopra, Advocate

VERSUS

PANACEA BIOTECH LTD.Respondent
Through: Mr. C.S. Aggarwal, Sr. Advocate with
Mr. Prakash Kumar, Mr. Sunil Kapoor,
Advocates

CORAM:

HON'BLE MR. JUSTICE A. K. SIKRI

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

1. Whether the 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?

%

VALMIKI J. MEHTA, J. (ORAL)

1. Three issues have been raised by the Revenue in this appeal under Section 260(A) of the Income Tax Act, 1961. The first issue is that the ITAT has erred in allowing depreciation on the flat purchased by the assessee at Mumbai. The second issue raised by the Revenue is that the ITAT has erred in allowing expenditure made by the assessee for the purchase of two machines in the relevant year. The third issue canvassed is that ITAT has erred in allowing



expenditure incurred by the assessee on its R&D office and the same ought not to have been allowed.

2. Qua the first issue, the facts which have emerged from the record are that the possession of the flat was obtained on 21.3.2000, the deed in respect of the same was registered on 29.3.2000 (though the Sub-Registrar returned it to the assessee on 7.4.2000), the charges to the society where the flat is situated were paid on 29.3.2000, One consignment was sent to this office/flat through M/s. Mayur Roadways, and the flat had been fitted with the requisite amenities for using it as an office. Thus, the office was ready for use and functional and was actually used for the purpose of business. User of the flat is, therefore, a finding of fact by the two concurrent authorities below in which we need not interfere. The counsel for the Revenue has urged that passive user does not entitle the assessee to claim depreciation. In the facts of the case, there is an actual user and not passive user. Besides, so far use as an office is concerned, user of the same need not be full-fledged and nor is it so urged by the Revenue. Obviously, the assessee must have purchased this flat within the relevant financial year to take benefit of depreciation as tax planning. We do not see any illegality in the action of the assessee in the facts and circumstances of the case. The counsel for the Revenue has relied upon the judgment of the Bombay High Court in the case of **Dinesh Kumar Gulab Chand Aggarwal vs. Commissioner of Income Tax, 267 ITR 768**. However, since there are judgments of two Division



Benches of this Court in the case reported as **CIT Vs. Refrigeration & Allied Industries Ltd.**, 247 ITR 12 and **Capital Bus Services vs. CIT**, 123 ITR 404, we would be bound by the same. In the case of **Refrigeration & Allied Industries Ltd.** it had been held by this Court that the expression “used for the purpose of business” includes passive user of the assets in the business. It was held that the asset cannot be said to be not used when the same is kept ready for use. This Court, therefore, in the said case allowed depreciation allowance to the assessee and said that there was no justification to disallow the claim of the depreciation. In fact, the Division Bench of this Court had even much earlier in **Capital Bus Services Pvt. Ltd.** held that the expression used for the purpose of the business and depreciation would be allowed where the buses were kept ready by the owner for its use. Merely because the buses did not ply cannot mean that the depreciation was not allowable. We accordingly hold that the contentions of the Revenue on this issue have no force.

3. So far as the contention with regard to the disallowing the claim on the expenditure incurred on the purchase of two machineries is concerned, the counsel for the Revenue has urged that though with respect to the first machinery an advance payment was made within the Assessment year , with respect to the second machinery no payment at all was made. It was, therefore, urged that since expenditure was not incurred within the meaning of the provision of Section 35(2) (i) (a), it was said that in the present assessment year



the benefit of the same cannot be claimed and it would be entitled only in the next assessment year. *Per contra* the counsel for the assessee has urged that the books of accounts were maintained on mercantile basis and, therefore, since the invoices were raised within the relevant financial year and since a letter of credit was already opened with respect to the second machinery, it cannot be said that expenditure was not incurred. It was argued that a debt incurred is an expenditure incurred within the meaning of the expression “expenditure is incurred” occurring in Section 35(2)(i)(a). The counsel for the assessee drew the attention of this Court to Section 43 Sub-Section 2 of the Act which defines the expression “paid” to mean actually paid or incurred according to the method of accounting upon the basis of which profits or gains are computed. It is not disputed by the Revenue that the books of accounts are maintained by the assessee on mercantile basis. This is also the concurrent finding of the two authorities below. In the mercantile method of accounting incurring of the expenditure is not based on payment but on the liability to pay. Once the goods have been purchased, the invoices raised and the purchase considerations are accounted for in the books of the assessee, the expenditure can be said to have been incurred as per the method of accounting followed by the assessee. Counsel for the assessee has rightly relied upon the judgment reported as **Belapahar Refractories Ltd. vs. CIT**, 2007 ITR 144 (Orissa) in which the Division Bench of the Orissa High Court has held that incurring of expenditure for scientific research means “to become liable to” i.e. to incur a debt and at



such time the expenditure can be said to have been incurred. It was further held that the expression “incurring” includes either an actual payment or that the concerned person has become liable for payment but had not actually made payment. We agree with this view since in the facts of this case the position which has emerged from the record is that the assessee has maintained its books on a mercantile basis.

4. The third contention pertains to wrongly allowing by the ITAT of expenditure incurred by the assessee on its R & D office at Lalru of Rs. 1,15,25,117/-. The details of the expenditure incurred were mentioned by the assessee as under:-

<i>“S.No.</i>	<i>Name</i>	<i>Amount(Rs.)</i>
1.	<i>Arti Developers & Engineers</i>	<i>38,25,444/-</i>
2.	<i>Gem Construction</i>	<i>25,30,759/-</i>
3.	<i>S.S. Construction</i>	<i>36,92,530/-</i>
4.	<i>M.R.B. Construction</i>	<i>14,73,384/- ’’</i>

5. The assessee had stated before the ITAT that the doubts raised by the Assessing Officer were general in nature and the facility consists of built up area of more than 3 lakhs Sq. ft. with plant and machinery and that the assessee has given sufficient details of expenditure incurred. In fact, this work was surveyed as per the order of the Assessing Officer and the survey report did not



find any defects details in the claim of the assessee. The Assessing Officer did not refer to this survey report in the assessment order and consequently a report was called by the CIT(A) from the Assessing Officer as to why no mention was made about the survey report in the assessment order. The explanation of the Assessing Officer was that the survey report was received on fax on 31.3.2000 and since it was illegible the same was not referred to. This explanation of the Assessing Officer is indifferent to say the least.

We find that incurring of expenditure by the assessee having been duly explained to the authorities below and more so supported by a survey report prepared at the instance of the Assessing Officer, no fault can be found with the decision on this aspect by the authorities below.

6. In view of the above, no substantial question of law arises. Dismissed.

A.K. SIKRI, J

VALMIKI J.MEHTA, J

July 27, 2009

dkg