



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

ITA NO. 381 of 2009

% Date of Decision: 5th November, 2009

Denso Haryana Private Limited,
Capital Court, 3rd Floor,
Left Wing, Palme Marg,
Munirka,
New Delhi.

through : . . . Appellant
Mr. C.S. Aggarwal, Sr. Advocate
with Mr. Prakash Kumar,
Advocate.

VERSUS

The Commissioner of Income Tax
Delhi-III,
C.R. Building, I.P. Estate,
New Delhi

through: . . . Respondent
Mr. Sanjeev Sabharwal, Advocate

CORAM :-

THE HON'BLE MR. JUSTICE A.K. SIKRI
THE HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

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. Admit.
2. Following substantial questions of law arise for determination:
 - (i) Whether, on true and correct interpretation of the agreements dated 25.12.1998 titled as "agreement for technical service" and "Agreement for personnel dispatching and receiving" between M/s Denso Corporation, Japan and the assessee, the Income Tax Appellate Tribunal was justified in law in sustaining any disallowance out of the claim of deduction of Rs. 2,11,20,147/- out of total expenditure of Rs. 7 33 46 540/- incurred by the assessee?



- (ii) Whether the Income Tax Tribunal was consequently correct in its holding that 25% of loss occurring, as a result of foreign exchange loss, is a capital expenditure and not allowable as such?
3. Filing of paper books is dispensed with since all the papers have already been filed. With the consent of learned counsel for the parties, we have finally heard the matter at this stage itself.
 4. Before we answer the aforesaid questions, it would be necessary to take stock of the background facts. The appellant (hereinafter referred to as the 'assessee') is a Private Limited Company incorporated in India. It has 100% subsidiary of the Denso Corporation, Japan and is engaged in the business of trading and manufacturing of gasoline engine management systems. It was helping, in the relevant year i.e. assessment year 2001-02, Maruti Udyog Ltd in meeting auto emission norms introduced in India. That was the second year of operations of the appellant company.
 5. For the assessment year in question, the assessee filed return on 31st October, 2001 declaring therein loss of Rs. 40,54,31,866/-. This return was process under Section 143 (1) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') and, thereafter, selected for scrutiny by issuing notice dated 29th October, 2002 under Section 143 (2) of the Act. The Assessing Officer (AO) passed the assessment order on 26th March, 2004 determining the loss at Rs.22,07,76,556/- as against the returned loss of Rs. 40,54,31,866/-. It was because that certain expenditure claim was disallowed and certain additions were made which are of the following nature:-

Sl.No.	Nature of addition/Disallowance	Amount (Rs.)
1.	Disallowance under Section 92 and Section 40A (2) of the Act.	69,62,655
2.	Technology transfer fee to Denso Corporation, Japan	13,55,96,655
3.	Technical service fee to Denso Corporation, Japan	2,11,20,147



6. The assessee went in appeal against the said order before Commissioner of Income Tax (Appeals), who partly allowed the appeal vide orders dated 3rd January, 2005 thereby deleting the additions of Rs. 2,11,20,147/-. The Commissioner of Income Tax (Appeals) while deleting these additions was of the view that this expenditure was revenue expenditure, and thus, allowable under Section 37 of the Act. The Income Tax Department was not satisfied with the deletion of the aforesaid additions and, therefore, filed the appeal before the Tribunal. The Tribunal vide impugned decision dated 27th June, 2008 has held that 25% out of the total expenditure i.e. Rs. 52,80,000/- was not revenue expenditure but capital expenditure and thus, sustained disallowance to this extent. It is now the turn of the assessee to feel aggrieved by this order and hence, this appeal on which the aforesaid substantial questions of law are framed is preferred before this Court.
7. In this conspectus, the moot question which requires to be determined is as to whether entire expenditure of Rs. 2,11,20,147/- claimed on account of technical fees paid by the assessee to Denso Corporation, Japan is revenue expenditure, as claimed by the assessee or 25% thereof is to be treated as capital expenditure as held by the Tribunal.
8. This technical service fees was paid by the assessee to its holding company for providing training to the employees of the assessee company. While holding that the entire expenditure was revenue expenditure, CIT (A) in its order dated 3rd January, 2005 gave the following rational in support of his view:-

“6. The next ground of appeal is against the disallowance of Rs.2,11,20,147/- being payments for technical assistance fees paid to Denso Corporation, Japan.

6.1 In the assessment order the AO noted that training is made through association for overseas technical scholarship under the control of Ministry of International Trade and Industry, Japan and Denso Japan is not supposed to charge any fees on this account. He further observed that in any case this training to the employees also imparts a benefit of



company possess the patent it was thus concluded by the AO that such payments were a part of the transfer of technical know how and hence was capital in nature. No depreciation was allowed in assessment.

6.2 The appellant has submitted before me that under the Technical Services Agreement dated December 25th, 1998, Denso Japan had agreed to provide technical personnel, qualified engineers and other technical personnel for conducting training of the assessee employees in its facilities in India. A perusal of the provisions of the said agreement reveals that under the said agreement technical personnel of Denso Japan would provide training to the assessee's employees which was for installation and adjustment of machines, tools and dies sold by Denso Japan, usage of machines tools and dies sold by Denso Japan; repair and maintenance of machines, tools and dies; quality control, production control, information systems, safety control, cost management, building and repairs of facilities and other works as agreed.

6.3 The said agreement also states that in the event of Denso Japan sending its technical personnel Denso Japan would charge a service fee per working day for each engineer or consultant deputed for this purpose. It is further provided that in case the technical personnel are provided through the Association of Overseas Technical Scholarship under the control of Ministry of International Trade and Industry, Japan, no services charges would be levied. Thus, the AO proceeded on a wrong factual presumption while making the said disallowance.

6.4 Before me the appellant had strongly relied on the decision of the Supreme Court in Empire Jute Company Vs. CIT (124 ITR 1) wherein it has been held that if the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure is on revenue account, even though the advantage may endure for an indefinite future. The test of enduring benefit is, therefore, not certain or mechanically without regard to the particular facts and circumstances of a given case. Other decision upholding the same principles have been cited before me.

6.5 I have considered the facts and circumstances of the case. It was brought to my notice by the authorized representative of the appellant that this issue also stands disposed off in favour of the appellant by my order for assessment year 2000-01 wherein it has been held that



has been held that technical service fee incurred subsequent to commencement of commercial production was revenue in nature and was an allowable revenue deduction. As this issue already stands covered by my order for assessment year 2000-101. Therefore, this issue is decided in favour of the appellant and the addition of Rs. 21,120,147/- is hereby deleted.”

9. However, the Tribunal treated 25% expenditure as capital expenditure, out of this aforesaid technical fees, by giving following justification:-

“4.2 We have considered the facts of the case and rival submissions. It is seen that the finding of the Assessing Officer that the two agreements were inter-linked has not been considered by the Ld. CIT (A). The Learned Counsel also proceeded on the premise that the two agreements are completely independent and apart. However, both the agreements were signed concurrently. The second agreement also contemplated assistance in the fields of installation and adjustment of machines etc. The services, being subject matter of the agreement, are mentioned below page 1 of the agreement:-

“1.SCOPE OF APPLICATION

This AGREEMENT shall be applied to the dispatch of DNJP’s personnel to DNHA as well as receiving of DNHA’s personnel at DNJHP’s premises for the purpose of the direction and assistance concerning the following works (hereinafter called as “Work Assistance”). , which are not covered by Agreement for technical service separately made and entered into between the parties hereto:

- (1) Direction or assistance concerning installation and adjustment of machines, tools and dies sold by DNJP to DNHA.*
- (2) Guidance or assistance concerning usage of machines, tolls and dies sold by DNJP to DNHA.*
- (3) Direction or assistance concerning repair and maintenance of machines, tools and dies sold by DNJP to DNHA.*
- (4) Direction or assistance concerning quality control (without manufacturing know-how) and production control (without manufacturing know-how), information systems, safety control, cost management, building and repairs of facilities and other works agreed by the parties at the request of*



for one year, extendable at the option of the parties, it is in conjunction with the first agreement for transfer of technology, being in the capital field. In this scenario, we are of the view that the expenditure involves both capital and revenue outlays. Relying on the decision of Southern Switch Gears Ltd. (Supra), it is held that 25% of the expenditure, amounting to Rs. 52,80,000/-, was on capital account. The assessee will be entitled to deduct 12 1/2 % of this amount as depreciation as discussed in ground No. (ii). Thus, this ground is partly allowed.”

10. The reasoning given by the Tribunal would show that it has been influenced by the nature of first agreement which was for the transfer of technology. No doubt, this agreement was in the capital field. The entire payments made by the assessee under the first agreement are treated as capital expenditure even by the assessee itself. Merely because second agreement was the offshoot of the first agreement, we find no justification in treating 25% of the expenditure incurred under the second agreement on capital account as capital expenditure. While doing so, the Tribunal did not, at all, appreciate the nature of second agreement and the expenses incurred thereunder. The payments made under this agreement were for the technical personnel provided by Denso Corporation, Japan to train the assessee's employees. This training was for installation, adjustment, usage, repair and maintenance of machines, tools and dies sold by Denso Japan. This training also covered quality control, production control, information systems, safety control, cost management, building and repairs of facilities and other works as agreed. Thus, the technical personnel which were provided by the Denso Japan for rendering the aforesaid services by way of training the assessee's employees were paid the amount and payment in this behalf has to be the revenue expenditure. The reliance upon the judgment in the case of *Southern Switchgear Ltd Vs. CIT, 232 ITR 359 (SC)* therefore, would not be justified. Learned Senior Counsel appearing for the assessee was right in his submission that that judgment was rendered in the light of peculiar facts of the case. In that case, the collaboration agreement with foreign company for grant of technical aid and for setting up factory and right to sell the product was



is made for services provided under the second agreement, subsequent to the commencement of commercial production.

11. Another aspect which needs to be highlighted is that the CIT (A) even in the immediately preceding previous order had allowed the claim of the assessee by holding that the above expenses have been incurred after the commencement of commercial production and, therefore, these were to be treated as revenue expenditure.
12. It is well-established principle of law that the question as to whether the expenditure is of capital nature or revenue nature will depend on the facts and circumstances of each case. No strict norms can be settled to decide the issue in a particular manner. The general principles, which emerge from the Supreme Court judgments in the case of *Alembic Chemical Works Co. Ltd. Vs. Commissioner of Income Tax*, 177 ITR 377 (SC) and in the case of *Empire Jute Co. Ltd. Vs. Commissioner of Income Tax*, 124 ITR 1 (SC) are as under:-
 - i. There may be cases where expenditure, even if incurred for obtaining an advantage of enduring benefit, may, nevertheless, be on revenue account and the test of enduring benefit may break down.
 - ii. It is not every advantage of enduring nature acquired by an assessee that brings the case within the principle laid down in the enduring benefit test.
 - iii. If the advantage consists of merely in facilitating the assessee's trading operations of enabling the management or conduct of assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite period.
 - iv. The test of enduring benefit is not conclusive test and cannot be applied blindly and mechanically without regard to particular facts and circumstances of a given case.
 - v. Outgoings on account of capital or revenue depend on practical and business point of view rather than upon juristic classification of the benefit to if an asset and benefit does



vi. In the infinite variety of situational diversities in which the concept of what is capital expenditure and what is revenue arises, it is well nigh impossible to formulate any general rule, even in the generality of cases, sufficiently accurate and reasonably comprehensive, to draw any clear line of demarcation. However, some broad and general tests have been suggested from time to time to ascertain on which side of the line of outlay in any particular case might reasonably be held to fall. These tests are efficacious and serves as useful servants; but as masters they tend to be over exacting.

vii. Judicial metaphors are narrowly to be watched, for, storing as devices to liberate though they end often by enslaving it.

viii. The idea of ‘once for all’ payment and ‘enduring benefit’ are not to be treated as something akin to statutory conditions, nor are the notions of ‘capital’ or ‘revenue’ a judicial fetish. What is capital expenditure and what is revenue expenditure are not eternal verities but must need be flexible so as to respond to the changing economic realities of business. The expression ‘asset or advantage of an enduring nature’ is evolved to emphasise the element of a sufficient degree of durability appropriate to the context.

ix. There is also no single definite criterion which, by itself, is determinative whether a particular outlay is capital or revenue. The ‘once for all’ payment test is also inconclusive. What is relevant is the purpose of the outlay and its intended object and effect, considered in a commonsense way having regard to the business realities. In a given case, the test of ‘enduring benefit’ might break down.”

13. We, thus, answer the questions, as above formulated, in favour of the assessee and against the Revenue. The present appeal is allowed accordingly and as a result the order of the Tribunal is set aside and that of the CIT (A) is restored on this aspect.

14. No order as to costs.

(A.K. SIKRI)
JUDGE