2009:DHC:9425-DB

IN THE HIGH COURT OF DELHI AT NEW DELHI

ITA No. 903 of 2009

% *Reserved on: 13th October, 2009*
Pronounced on : 6th November, 2009

FAB India Overseas P. Ltd. . . . Appellant
through : Mr. Rajan Bhatia, Advocate.

VERSUS

Commissioner of Income Tax . . . Respondent
through: Mr. N.P. Sahini and Mr. P.C. Yadav, Advocates.

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.

1. The Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal'), vide its impugned order dated 14.01.2009, has remitted the case back to the CIT(A) with a direction to re-examine the details of expenditure incurred by the assessee and to determine as to whether the said expenditure is revenue or capital

in nature. According to the assessee/appellant, the expendit incurred was revenue in nature and there was no need to remit the case back to the CIT(A) for this purpose.

2. The expenditure in question is the one which was incurred by the assessee during the relevant Assessment Year 2003-04 for carrying out renovation at its show-rooms in Greater Kailash, New Delhi and head office at Punchsheel Park, New Delhi. Premises at Kolkata taken on lease were also converted into a show-rook and expenditure was incurred thereupon. Likewise, show-rook at Hyderabad was declared by the assessee as the revenue expenditure, which was to the tune of Rs.35,24,767/- Details of this expenditure incurred on renovation of the aforesaid show-rooms and office are as under:

"**HO**

Aluminum and wooden partitions on 2nd floor, electric work etc. 398973

Interior for mock show room, electric fitting etc. 215876

G.K.

Renovation	542010
Renovation N 14 & N 13	84095
Bangalore	
Tera tiles purchased	22689
Hyderabad	
Sundry granite works in pantry counter and steps	15935
Replacement of switches, wires & lights	490017
Plastering & Painting of inner and out walls ceiling etc.	287255
Repair of false ceiling	263935
Kolkata	
Painting of shop and plaster of pairs work	271677
Grinding and polishing of floor	57064
Changing of electric wire and light	333467
Changing of window glass	163314
External glazing of doors and windows	38700
Block of existing doors	92235
Replacement of single holders	58540
Renovation of entrance area	38700
Replacement of telephone and intercom	38700
Replacement of pantry equipment	19350
Civil work of pantry	25800
Replacement of dividers, door handles and fans	25155
Floor grinding and repair charges	41280
	3524767"

3. The Assessing Officer (AO) found that the assessee is carrying on the business of purchase and sale of garments including export garments. The aforesaid expenditure incurred was treated by him as capital expenditure. While coming to the conclusion, the AO

relied upon the decision of the Apex Court in the case of *Ass Bengal Cement Co. Ltd.* Vs. *The Commissioner of Income-tax, West Bengal,* (1955) 27 ITR 34. Therefore, he disallowed the aforesaid expenditure by treating it as capital expenditure and instead allowed depreciation thereupon @ 10%. The assessee filed appeal there against. The CIT(A) allowed the appeal preferred by of the assessee holding that the expenditure incurred had not led to an enduring benefit of appellant, but was an expenditure incurred by a businessman in a normal course of trade. According to the CIT(A), no new asset had been brought into existence by the appellant and the expenses had been carried on to earn by attracting more and more customers. This expense would clearly be governed by ***Hi Line Pens Pvt. Ltd.*** (supra). Expenditure incurred on the aforesaid aspect was treated as revenue in nature following the judgment of the Supreme Court in the case of ***Commissioner of Income-Tax, Tamil Nadu II, Madras*** Vs. ***Madras Auto Service (P) Ltd.***, (1998) 233 ITR 468. The CIT(A) found merit in the contention of the assessee that

modalities of the assessee's trade entail the need of maintair good show rooms with fine interiors to meet the standards of the elite class who are the customers of the assessee. Therefore, the expenditure was carried out for business more efficiently. The advantage obtained for the business purpose and not for acquisition of any asset.

4. The Tribunal, however, remitted the case back to the CIT(A) with the direction to re-examine the details of the expenditure incurred and giving clear basis for working them out into revenue and capital expenditure.

It is clear from the expenditure incurred on different items, enumerated above, that the expenditure incurred by the assessee is claimed as revenue expenditure on the ground that the same was for the purposes of repair and renovation of its show-rooms and head office. The principle that has to be kept in mind for determining as to whether such an expenditure is capital or revenue is succinctly stated by Bombay High Court in the case of ***New Shorrock Spinning and Manufacturing Co. Ltd.*** Vs.

Commissioner of Income-tax, Bombay North, [1956] 30 I 338 (Bom.) is as under:

> "The simple test that must be constantly borne in mind is that as a result of the expenditure which is claimed as an expenditure for repairs what in really being done is to preserve and maintain an already existing asset. The object of the expenditure is not to bring new asset into existence, nor is its object the obtaining of a new or fresh advantage. This can be the only definition of "repairs" because it is only by reason of this definition of repairs that the expenditure is a revenue expenditure.
>
> If the amount spent was for the purpose of bringing into existence new asset or obtaining a new advantage, then obviously such an expenditure would not be an expenditure of a revenue nature but it would be a capital expenditure, and it is clear that the deduction which the Legislature has permitted under section 10(2)(v) is a deduction where the expenditure is a revenue expenditure and not a capital expenditure."

5. The aforesaid passage is reproduced by the Tribunal in its impugned judgment and there cannot be any quarrel about the principle stated therein. The Tribunal also noted that the question whether the expenditure or revenue in nature depends on facts and circumstances of each case. In ***Assam Bengal Cement Co. Ltd.*** (supra), the Supreme Court accepted that the

Outlay is deemed to be capital expenditure when it is made for initiation of a business, for extension of a business, or for a substantial replacement of equipment. It is to be seen as to what has been acquired by incurring expenditure. Test is to find out as to whether repair has been carried or current repairs. In the case of ***Commissioner of Income Tax*** Vs. ***Hi Line Pens Pvt. Ltd.***, [2008] 306 ITR 182, this Court had made the following pertinent observations in this behalf:

> "16. After having considered the arguments advanced by the learned Counsel for the parties and examined the decisions cited by them, we are of the view that the assessee's claim for deduction under Section 30(a)(i) has been rightly allowed by the Tribunal. The decisions cited by the learned Counsel for the revenue relate to 'current repairs'. There is a clear distinction between the expression 'repairs' and the expression 'current repairs'. It is obvious that the word 'repairs' is much wider than the expression 'current repairs'. This fact has also been taken note of by the Supreme Court in the case of Saravana Spinning Mills P.Ltd. (supra). The expression 'current repairs' is much more restricted than the word 'repairs' because the latter is qualified by the word 'current'. What the assessee has done in the present case has been construed to be repairs by the Tribunal as a finding of fact. It has not brought about any new asset and more importantly it was not the intention of the assessee to bring about any new capital asset. The expenses that were incurred by the assessee were towards repairing the

premises taken on lease so as to make it more conducive to its business activity. Such expenses would clearly fall within the expression of repairs to the premises as appearing in Section 30(a)(i). The legislature has made a distinction between expenses incurred by a tenant for 'repairs' of the premises and expenses incurred by a person who is not a tenant towards 'current repairs' to the premises. This distinction has to be given meaning. Perhaps the logic behind the distinction was that a tenant would, by the very nature of his status as a tenant, not undertake expenditures as would endure beyond his likely period of tenancy or create a new asset. Whereas, an owner may undertake expenditures so as to even bring about new assets of capital nature. It was, therefore, necessary to qualify the expenditure on repairs. The deduction was, therefore, limited to expenditure on 'current repairs' only. It follows, therefore, that the cost of repairs that have been incurred by a tenant in respect of such premises would have to be allowed under Section 30(a)(i). The question of disallowing such an expenditure and relegating the assessee to claim depreciation under Section 32 does not arise. The assessee has not claimed depreciation. It has claimed deduction under Section 30(a)(i). Once the assessee's claim falls within that provision there is no question of considering the question of applicability of Section 32. Consequently, the question that has been framed is answered in favour of the assessee and against the revenue. The appeal is dismissed."

6. Taking note of the aforesaid principles, the Tribunal found that in the present case, the assessee had taken on lease the residential house at Kolkata, which was completed into a show-room. In the process, the assessee incurred Rs.21.55 lakhs for opening to set

new branch at Kolkata. Out of this, the assessee had it capitalized Rs.10 lakhs spent on wood work, making of shelves, projecting system, rack, etc. Balance amount was charged to profit and loss account as repair and maintenance expenses, consisting of paint work, grinding and polishing of floors, change of electric wiring, fittings, glazing of doors and window work, labour charges, etc. According to the Tribunal, it was not clear as to how this bifurcation between the capital and revenue expenditure was made by the assessee. In the words of Tribunal, it was because of the reason that:

> " Capital expenditure like wood work, making of shelves also needed paint and polishing, fittings, labour charges, etc. These expenses, if incurred on capital work, could not be given a separate treatment. It is clear that a residential old place has been converted into a new show room of the first time. A part of expenditure incurred in the act of conversion has been accepted to be expenditure of capital nature. How balance is being considered of revenue nature, is not clear from record. Along with the capital *work goes* expenditure on glazing of floors and windows, grinding and polishing of floor etc. The justification for taking part of expenditure as of revenue nature, has not been brought on record. Similar is the position of Hyderabad show room which was opened for the first time after taking some old premises on lease. Out of total expenses of Rs.24 lacs, Rs.12 lacs has been capitalized by the assessee and remaining claimed as revenue,

> expenditure. However, the basis of bifurcation; is not clear at all. There can be no dispute that expenditure on shifting of office from one place to another, loading & unloading and polishing of old furniture etc. cannot be taken as capital expenditure. But it is not clear whether polishing etc. was carried for the first time. What has been brought into existence was to be seen with details of expenditure. For lack of clear details, we are unable to finally determine the issue. It would meet interest of justice if impugned order is set aside and learned CIT (Appeals) is directed to re-examine the details of expenditure incurred and give clear basis for working them out into revenue and capital expenditure. For all the above reasons, impugned order is set aside and matter is restored to the file of learned CIT (Appeals) for re-examination of the issue."

7. Against the aforesaid judgment of the Tribunal, present appeal is filed by the assessee on which following substantial question of law was framed:

> "Whether the ITAT was correct in law in setting aside the order of the CIT (A) and remitting the case back to the CIT (A) with direction to re-examine the details of expenditure incurred for determining as to whether the expenditure incurred by the assessee is revenue or capital expenditure?"

8. After hearing counsel for both the parties, we are of the opinion that the manner in which the Tribunal dealt with show-rooms in Kolkata is in tune with the settled proposition of law noted above. Necessary exercise to ascertain as to whether various expenditure

incurred were of capital or revenue in nature was not underta by the CIT (A). Therefore, to this extent, the order of the Tribunal does not call for any interference.

9. At the same time, we find that the impugned order of the Tribunal does not discuss anything about the expenditure incurred on the head office as well as Greater Kailash, Bangalore and Hyderabad show-rooms. Likewise, no details are given in respect of expenditure incurred on the renovation. However, the expenditure incurred on the renovation of the Head Office, Greater Kailash, Bangalore and Hyderabad show-rooms on the face of its appears to be revenue in nature. These are merely expenditure, which can be treated as expenses incurred for repairs to preserve and maintaining the assets which are already existing. The object was not to obtain a new or fresh advantage.

10. Finding of fact recorded by the CIT (A) has not been questioned by the Tribunal insofar as these expenditures are concerned. Thus, while holding that the Tribunal was right in remitting the case back to the CIT (A), we make it clear that the inquiry of the CIT

(A) would be restricted to the expenditure incurred on Kolk

branch. Insofar as other expenses are concerned, the same would be treated as revenue expenditure as held by the CIT (A) and benefit thereof shall be given to the assessee. As a result, this appeal is allowed partly in the aforesaid terms.

(A.K. SIKRI)
JUDGE

(SIDDHARTH MRIDUL)
JUDGE

November 06, 2009.
pmc