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

Judgment Reserved On: 2.12.2011

% *Judgment Pronounced On:16.12.2011*

\+ **ITA 1251/2008**

AIRPORT AUTHORITY OF INDIA . . . **APPELLANT**

Through :. Mr. O.S. Bajpai, Sr. Advocate with Ms. Manasvini Bajpai and Mr. V.N. Jha, Advocates.

VERSUS

COMMISSIONER OF INCOME TAX . . .**RESPONDENT**

Through: Mr. Kamal Sawhney, Sr. Standing Counsel.

CORAM :-
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE R.V. EASWAR

A.K. SIKRI, ACTING CHIEF JUSTICE:

For orders, see ITA 432/2008.

ACTING CHIEF JUSTICE

(RAJIV SHAKDHER)
JUDGE

(R.V.EASWAR)

DECEMBER 16, 2011

* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ ITA 432 OF 2008
ITA 433 OF 2008
ITA 437 OF 2008
ITA 517 OF 2008
ITA 792 OF 2008
ITA 1250 OF 2008
ITA 1251 OF 2008

Judgment Reserved On: 2.12.2011
% *Judgment Pronounced On:16.12.2011*

(1) **ITA 432/2008**

AIRPORT AUTHORITY OF INDIA . . . **APPELLANT**

Through :. Mr. O.S. Bajpai, Sr. Advocate with Ms. Manasvini Bajpai and Mr. V.N. Jha, Advocates.

VERSUS

COMMISSIONER OF INCOME TAX . . .**RESPONDENT**

Through: Mr. Kamal Sawhney, Sr. Standing Counsel.

(2) **ITA 433/2008**

AIRPORT AUTHORITY OF INDIA . . . **APPELLANT**

Through :. Mr. O.S. Bajpai, Sr. Advocate with Ms. Manasvini Bajpai and Mr. V.N. Jha, Advocates.

VERSUS

COMMISSIONER OF INCOME TAX . . .RESPONDENT

Through: Mr. Kamal Sawhney, Sr. Standing Counsel.

(3) **ITA 437/2008**

AIRPORT AUTHORITY OF INDIA . . . APPELLANT

Through :. Mr. O.S. Bajpai, Sr. Advocate with Ms. Manasvini Bajpai and Mr. V.N. Jha, Advocates.

VERSUS

COMMISSIONER OF INCOME TAX . . .RESPONDENT

Through: Mr. Kamal Sawhney, Sr. Standing Counsel.

(4) **ITA 517/2008**

AIRPORT AUTHORITY OF INDIA . . . APPELLANT

Through :. Mr. O.S. Bajpai, Sr. Advocate with Ms. Manasvini Bajpai and Mr. V.N. Jha, Advocates.

VERSUS

COMMISSIONER OF INCOME TAX . . .RESPONDENT

Through: Mr. Kamal Sawhney, Sr. Standing Counsel.

(5) **ITA 792/2008**

AIRPORT AUTHORITY OF INDIA . . . APPELLANT

Through :. Mr. O.S. Bajpai, Sr. Advocate with Ms. Manasvini Bajpai and Mr. V.N. Jha, Advocates.

VERSUS

COMMISSIONER OF INCOME TAX . . .RESPONDENT

Through: Mr. Kamal Sawhney, Sr. Standing Counsel.

(6) **ITA 1250/2008**

AIRPORT AUTHORITY OF INDIA . . . APPELLANT

Through :. Mr. O.S. Bajpai, Sr. Advocate with Ms. Manasvini Bajpai and Mr. V.N. Jha, Advocates.

VERSUS

COMMISSIONER OF INCOME TAX . . .RESPONDENT

Through: Mr. Kamal Sawhney, Sr. Standing Counsel.

(7) **ITA 1251/2008**

AIRPORT AUTHORITY OF INDIA . . . APPELLANT

Through :. Mr. O.S. Bajpai, Sr. Advocate with Ms. Manasvini Bajpai and Mr. V.N. Jha, Advocates.

VERSUS

COMMISSIONER OF INCOME TAX . . .RESPONDENT

Through: Mr. Kamal Sawhney, Sr. Standin Counsel.

CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE R.V. EASWAR

A.K. SIKRI, ACTING CHIEF JUSTICE:

1. In all these appeals, preferred by the singular assessee namely Airport Authority of India, two additions made by the Assessing Officer and sustained by the Tribunal are questioned. Vide orders dated 14th July, 2011 the Division Bench of this Court referred these two additions/issues for a decision by the Full Bench. At the time of arguments, it was agreed to between the parties that these issues can be decided on merits by the Full Bench. Accordingly, appeals are admitted on the following substantial questions of law:-

> " (i) Whether on the facts and circumstances of the case and in law, the ITAT has erred in holding that the appellant was not entitled to deduct the amount provided under mercantile system of accounting towards the liability on account of expenditure to be incurred in removal of encroachments in and around the technical area of the Airport which was necessitated out of safety and security consideration in

the normal course of business of authority enjoined with the responsibilities of maintenance and operation of airports all over India?

(ii) Whether on the facts and circumstances of the case and in law, the ITAT was justified in treating the amount raised in proforma invoices as income relying on its order for the assessment year 1998-99?

(iii) Whether the order passed by the ITAT is perverse in law and on facts of the case?"

2. It is not necessary to state in detail the factual matrix. Our purpose shall be served by mentioning the material facts, that too, in brief, which touch upon the aforesaid question.

3. The appellant Airport Authority of India is a statutory Authority constituted first under the International Airports Authority of India, Act, 1972 when it took over the Central Warehousing Corporation. After repeal of the said Act, the Airport Authorities Act of 1994 was enacted and the appellant/assessee took over the functions of management of certain airports and other allied activities. On some of these airports, illegal encroachments were found in and around the security area of the airports. With the intervention of local authorities, schemes were devised to rehabilitate the

encroachers and the money required for rehabilitation. For this reason, tl assessee has been making provisions for the aforesaid expenditure to be incurred in removal of encroachers and has been incurring the expenditure for the said purpose from time to time. Such a provision was made in all these assessment years from 1996-97 onward which are the subject matters of these appeals. The Assessing Officer disallowed the same and added to the income of the assessee which order has been upheld till the stage of the Tribunal.

4. The assessee has also given space in the airports to various government agencies like the Police Department, Post and Telegraph, Metrological Department etc. According to the assessee, no payment is made by these government agencies to the assessee, however, on the advice of CAG the assessee has been raising proforma invoices/bills. Even when no money was received in respect of those proforma bills ever since the assessee Authority came into existence, the Assessing Officer treated the amount of those invoices/bills as income of the assessee in all these assessment years on the ground that the assessee was following mercantile system of accounting and, therefore, the income has accrued by the very fact that spaces were given to

these agencies and against those spaces proforma invoices/bills were raised These additions have also been sustained till the stage of the Tribunal.

QUESTION OF LAW NO. (i):

5. The case setup by the assessee before the authorities below was that due to influx and increase in population in metropolitan cities, the land around the airport area was illegally encroached and hutments were constructed thereon, thus, endangering the safety of aircraft while taking off or landing. The cluster of hutments also attracted vultures and birds which prove dangerous to the aircraft. Over the years the hutments became slums. In Mumbai alone it was estimated that there were about 63 slum pockets with about 85,000 hutments. These illegal encroachments were sought to be removed with the help of the State Governments. It was further submitted that expenditure on such removal was estimated at about Rs.200 crore in Mumbai alone. Similar situations existed in other metropolitan cities. Since removal of encroachments was a on-going process, a liability of Rs.20.00 crores was provided in each of these assessment years in the books of

accounts of the assessee. It was also argued that apart from making provisio certain amount was in fact paid as well every year.

6. On the aforesaid basis the case set up by the assessee was that the expenditure was only to secure the existing assets and no new assets came into existence in the books of the assessee and therefore such an expenditure was revenue in nature. It was further submitted that since the assessee was maintaining the books of accounts on mercantile method, it was necessary to take this liability in its books. Reliance was placed by the assessee in the case of ***Bharat Earth Movers*** *Vs.* ***CIT***, 112 ITR 61 to argue that if a liability had been incurred, the deduction should be allowed even though it may have to be quantified and discharged at a future date. It was also argued that in any case some specified amounts had been paid in these assessment years. For example, as per the assessee in the assessment year 1998-99 a sum of Rs. 16.01 crores had in fact been paid. The Tribunal, however, did not accept the aforesaid submissions of the assessee giving its own reasons. We will advert to these reasons at a later stage. Before that, we would like to point out that a Division Bench of this Court in its decision dated 15th October 2001 passed in the case of the assessee itself, in a case related to the assessment year 1997-98

held that such an expenditure was capital in nature. Therefore, it would b necessary to take note of that judgment and first decide the issue as to whether the expenditure in question, if incurred would be capital or the revenue in nature.

7. For identical purpose namely for removal of hutments/encroachers, the assessee had paid a sum of Rs. 19.89 crores to the DDA for development of an alternate site for the residents of that area who were vacated as their lands were acquired for expanding of International Airport of Delhi. The Assessing Officer and the Tribunal held that the expenditure was capital in nature. Reference was made to the High Court on the following question:-

> "Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the expenditure of ` 19.89 crores was a capital expenditure as it gave the assessee addition of enduring nature?"

8. This Court answered the aforesaid question in the affirmative i.e. in favour of the Revenue and against the assessee. It had referred to the judgment of Supreme Court in ***V. Jagannmohan Rao*** *Vs.* ***Commissioner of Income Tax,*** *751 ITR 373* where money was paid to perfect a title or as consideration for getting rid of a defect in the title or a threat of litigation the

payment would be a capital payment. Two more decisions of Suprem Court in ***Sitalur Sugar Works Ltd.*** *Vs.* ***Commissioner of Income Tax*** *491 ITR 160* and Bombay High Court in ***Hardiallia Chemicals Ltd.*** *Vs. CIT, 218 ITR 598* were noted wherein the Court had held that where expenditure was incurred by the assessee for shifting the factory from one place to another to improve the business, the same was capital expenditure in nature.

9. However, at the time of arguments nobody had appeared on behalf of the assessee. An application was filed for setting aside the aforesaid ex parte order which was allowed by this Court vide a detailed judgment which is reported in *286 ITR 323*. Thereafter, the reference was heard afresh. After hearing the counsel for the parties, the Division Bench of this Court passed orders dated 6th October, 2006 reiterating the ex parte view taken by the Division Bench in its order dated 15th October, 2001. While deciding the question in the aforesaid manner the discussion which ensued is as under:-

> "We have heard learned Counsel for the Revenue. There is no appearance on behalf of assessed in spite of notice. Learned Counsel for the Revenue submitted that the Tribunal has analysed the factual position and has come to hold that the expenditure incurred resulted in bringing into existence an enduring benefit

and, Therefore, was rightly held to be capital in nature.

In V. Jagannmohan Rao v. Commissioner of Income Tax [1970]75ITR373(SC) it was held that where money is paid to perfect a title or as consideration for getting rid of a defect in the title or a threat of litigation the payment would be a capital payment and not a revenue payment. In Sitalpur Sugar Works Ltd. v. Commissioner of Income Tax [1963]49ITR160(SC) it was held that where expenditure was incurred by the assessed for shifting the factory from one place to another to improve the business, same was capital expenditure in nature. Similar view was also expressed by the Bombay High Court in Hardiallia Chemicals Ltd. v. CIT (1996) 218 ITR 598.

Above being the position, the conclusion of the authorities below and the Tribunal are in order. We answer the question referred in the affirmative, in favor of the Revenue and against the assessed."

10. In fact, a perusal of orders dated 6th October, 2006, revealed that earlier order is reproduced in its entirety. Thereafter, certain contentions raised by the counsel for the assessee are dealt and rejected and it is held that the view expressed earlier was correct. This decision is reported as ***Airport Authority of India*** Vs. ***CIT,*** 303 ITR 433.

11. The argument of Mr. Bajpai was that identical issue had fallen fo consideration in ***Bikaner Gypsum*** *Vs.* ***Commissioner of Income-Tax*** *(1991) 187 ITR 39* and the Supreme Court had held such an expenditure to be the revenue in nature. It would, therefore, be necessary to find out the ratio of Bikaner (supra). . In that case the assessee company had taken over a lease of 4.27 square miles for mining gypsum for a period of 20 years with provision for renewal for a further period of 20 years and carried on the business of mining gypsum in accordance with the terms and conditions of the lease. One of the clauses in the lease deed provided that no mining operation shall be carried on in or under the lands within a distance of 100 yards from any railway, reservoir, canal or other public works or any buildings, etc., except with previous permission. The railway authorities extended the railway area on the leased land by laying down fresh track, providing railway siding and also constructing quarters. The suit of the appellant for ejecting the railway was dismissed. Thereafter, under an agreement with the Government, the Railway Board and the Sindri Fertilisers to whom the appellant company supplied gypsum , the railway station, track, etc. were removed to another area offered by the appellant company. Out of the total expenses of Rs. 12 lakhs incurred by the railway for shifting, the

appellant company paid Rs. 3 lakhs as its share under the agreement. Th appellant claimed deduction of the sum of Rs. 3 lakhs in computing its profits. The Appellate Tribunal held that the sum was allowable as a deduction as it was a revenue expenditure. But the High Court, on a reference, held that the amount was capital expenditure. On appeal to the Supreme Court, the decision of the High Court was reversed holding that the amount was spent on the removal of a restriction which obstructed the carrying on of the business of mining within a particular area in respect of which the appellant had already acquired mining rights. The payment of Rs. 3 lakhs was not made for initiating the business of mining operations or for acquiring any right; the payment was made for shifting the railway station, track, etc, i.e. to remove an obstruction to facilitate the business of mining, and it did not bring into existence any advantage of an enduring nature. The expenditure was on revenue account. The Supreme Court took note of its various judgments in earlier cases decided by it and noted the following simple test laid down by it in ***Assam Bengal Cement Co. Ltd.*** *Vs.* ***CIT*** **(1995)** 25 ITR 34 for determining the nature of expenditure:-

> "if the expenditure is made for acquiring or bringing into existence an asset or advantage for the enduring benefit of the business it is properly

> attributable to capital and is of the nature of capital expenditure If on the other hand it is made not for the purpose of bringing into existence any such asset or advantage but for running the business or working it with a view to produce the profits it is a revenue expenditure. If any such asset or advantage for the enduring benefit of the business s is thus acquired or brought into existence it would be immaterial whether the source of the payment was the capital or the income of the concern or whether the payment was made once and for all or was made periodically. The aim and object of the expenditure would determine the character of the expenditure whether it is a capital expenditure or a revenue expenditure."

12. Applying the text to the crux of the case before it, the Court was influenced by the fact that the assessee had already been granted a mining lease and under that lease it had acquired full rights to carry on mining operations in the entire area including the railway area. The payment of Rs. 3 lacs was not made for grant of permission to carry on mining operation within the railway area, instead it was made towards the cost of removing the construction which obstructed the mining operation. In this premise, the expenditure was treated to have been made in relation to carrying on business in a profitable manner and was, therefore held to be on revenue account. A Division Bench of this Court, authored by one of us (Rajiv Shakdher,J.) has

succinctly culled out the principle/factors which go into determining tl nature of the expenditure in the case of ***Commissioner of Income-Tax*** *Vs.* ***J.K.Synthetics Limited,*** *(2009) 309 ITR 0371*, in the following manner:-

> "Broad principles which emerge on reading of various authorities
>
> An overall view of the judgments of the Supreme Court, as well as, of the High Courts would show that the following broad principles have been forged over the years, which require, to be applied to the facts of each case:
>
> (i) the expenditure incurred towards initial outlay of business would be in the nature of capital expenditure, however, if the expenditure is incurred while the business is on going, it would have to be ascertained if the expenditure is made for acquiring or bringing into existence an asset or an advantage of an enduring benefit for the business, if that be so, it will be in the nature of capital expenditure. If the expenditure, on the other hand, is for running the business or working it, with a view to produce profits, it would be in the nature of revenue expenditure;
>
> (ii) it is the aim and object of expenditure, which would, determine its character and not the source and manner of its payment;
>
> (iii) the test of 'once and for all' payment i.e., a lump sum payment made, in respect of, a transaction is an inconclusive test. The character of payment can be determined by looking at what is the true nature of the asset which is acquired and not by the fact

whether it is a payment in 'lump sum' or in an instalment. In applying the test of an advantage of an enduring nature, it would not be proper, to look at the advantage obtained, as lasting forever. The distinction which is required to be drawn is, whether the expense has been incurred to do away with, what is a recurring expense for running a business, as against, an expense undertaken for the benefit of the business as a whole;

(iv) an expense incurred for acquisition of a source of profit or income would in the absence of any contrary circumstance, be in the nature of capital expenditure. As against this, an expenditure which enables the profit making structure to work more efficiently leaving the source or the profit making structure untouched, would be in the nature of revenue expenditure. In other words, expenditure incurred to fine tune trading operations to enable the management to run the business effectively, efficiently and profitably leaving the fixed assets untouched would be an expenditure of a revenue nature even though the advantage obtained may last for an indefinite period. To that extent, the test of enduring benefit or advantage could be considered as having broken down;

(v) expenditure incurred for grant of License 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:

(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 License to third parties without the consent of the licensor,

(d) whether the Licence transfers the 'fruits of research' of the licensor, 'once for all',

(e) whether on expiry of the Licence the licensee is required to return back the plans and designs obtained under the Licence to the licensor even though the licensee may continue to manufacture the product, in respect of, which 'access' to knowledge was obtained during the subsistence of the 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;

(vi) the fact that assessee could use the technical knowledge obtained during the tenure of the License for the purposes of its business after the Agreement has expired, and in that sense, resulting in an enduring advantage, has been categorically rejected by the courts. The Courts have held that this, by itself, cannot be decisive because knowledge by itself may last for a long period even though due to rapid change of technology and huge strides made in the field of science, the knowledge may with passage of time become obsolete;

(vii) while determining the nature of expenditure, given the diversity of human affairs and complicated nature of business; the test enunciated by courts have to be applied from a business point of view and on a

fair appreciation of the whole fact situation before concluding whether the expenditure is in the nature of capital or revenue"

13. When we apply the aforesaid test laid down by this Court as well as the ratio of ***Bikarner Gyupsum*** (supra) to the facts of this case, a conclusion would be that the expenditure in question by the assessee was revenue in nature. It is not in dispute that the land belongs to the assessee. Certain encroachers in all these airports had encroached upon the part of the land. In the schemes formulated by the Government for removal of these encroachers and rehabilitate them at other places, if the assessee had paid the amount that amount is not for acquisition of new assets. The payment was made to facilitate its smooth functioning of the business i.e. in relation to carrying on the business in a profitable manner.

14. We are therefore of the opinion that the Division Bench of this Court in ***Airport Authority of India*** *Vs.* ***CIT, 303 ITR 433*** does not lay down the correct law. We accordingly over rule the same holding that such an expenditure if incurred by the assessee would be on revenue account and is

not capital in nature. Having held so, we turn to the reasons given by t Tribunal in denying this expenditure.

15. The Tribunal proceeded to discuss the case on the basis that only a provision for such an expenditure was made and in fact there was no payment made in the assessment year (s) in question. It, thus, went on the determine whether it was a contingent liability to be accrued at a future date on happening of certain events. The Tribunal first observed that the liability was not a statutory in nature. If at all, it was contractual. Thereafter, it addressed the issue as to whether the liability was contractual in nature and was capable of fair ascertainment taking note of ***Bikaner Gyupsum*** *(supra).* Such an expenditure if incurred in the year would be revenue in nature as is clear from the following observations of the Tribunal:-

> "We may also refer to the decision of Hon'ble Supreme Court in the case of Bikaner Gypsum Ltd. in which it was held that any sum paid for removal of disability in carrying on the business will be of revenue nature. Obviously, removal of hutments is in the nature of removal of disability and, therefore, if any liability has been incurred in this year, it will constitute an admissible deduction."

16. However, the Tribunal stated that on the facts of that case, no suc liability had been incurred or crystallized. It held that various meetings had taken place between the assessee and the Government, apart from making certain recommendations and estimating the likely expenditure, no agreement came into existence between the assessee and the hutment dwellers with or without the involvement of any third party and as no agreement between the assessee and hutment dwellers has been filed, we are of the view that no legally enforceable liability was fastened on the assessee in this year, and therefore, even under mercantile system of accounting, the assessee is not entitled to deduct the impugned amount simply because a provision was made. The Tribunal also took note of the submission of the assessee that it had in fact released a payment of ₹16.01 crore, but rejected this plea on the ground that the date of release of the money and the person to whom the money had been paid had not been stated.

17. No doubt, having regard to the judgment of the Apex Court in ***Bharat Earth Movers*** *Vs.* ***CIT***, *245 ITR 428* which laid down that the liability should have been actually incurred in the year and it should be capable of reasonable ascertainment, the assessee is to prove that such a liability had actually been

incurred and was capable of reasonable ascertainment. A finding of fac arrived at that no such ascertainment of liability could be proved by the assessee. To that extent the order of the Tribunal cannot be faulted with. However, it would be necessary to mention at this stage that certain documents were produced before us by the learned counsel for the assessee to show that amount of ₹ 16.01 crores in the assessment year 1998-99 was in fact paid and similar amounts were paid in other years as well. Once we have held that such amounts are paid, these are admissible deductions being revenue in nature, we answer the question no.1 in favour of the assessee and against the Revenue. At the same time, we hold that the deduction would be allowed by the Assessing Officer only after the assessee furnishes proof of having made such a payment in the different assessment year in question.

18. We may also state that the criteria laid down by the Tribunal that for admissibility of the expenditure there has to be an agreement between the assessee and the hutments dweller is clearly wrong. It is a matter of record that in these schemes no such agreement is actually arrived at between the persons who make the payment like the assessee herein and the hutments dwellers. Therefore, even if, in a given case, the assessee is able to show that

rehabilitation scheme was formulated by the Government and the asses beneficiary was asked to make the payment under the said scheme, that would be sufficient evidence to claim the deduction on expenditure as held by the Supreme Court in ***Bikaner Gyupsum*** *(supra)*. However, we find that in the present case, a finding of fact is recorded by the Tribunal that no such scheme could be furnished by the assessee for which the assessee was supposed to make the provision. To that extent, therefore, the Tribunal is correct in its view. At the same time, following ***Bikaner Gyupsum*** *(supra)*, this finding has become irrelevant as we are allowing the deductions on the basis of actual payment.

QUESTION OF LAW NO.(ii)

19. It is a matter of record that certain Government Department like Customs, Immigration, Meteorological Department, Post Office, Police Agencies including BSF, CISF, Special Bureau of Govt., FRRO, Intelligence Bureau etc. have been provided accommodation in the terminal buildings and other technical areas by the assessee. It is the case of the assessee that these departments have their offices to facilitate the functioning of the assessee and they do not agree to pay any licence fee of the space occupied by them on the plea that they are regulatory bodies to provide special services in

terms of the Government directions. Still the assessee had raise proforma invoices in all these years and kept in memoranda account for example in the assessment year 1998-99. The proforma invoices were to the tune of ₹ 19.66 crores. According to the assessee these memoranda accounts are maintained by the assessee only because its auditors namely CAG of India had suggested/emphasized the assessee to maintain these accounts. The assessee also emphasized that such use by Government Department should not be treated as commercial departments since they have to be provided space for the performance of duty. Therefore, no regular revenue was being generated. The advices were only proforma in nature. The Assessing Officer, however, did not accept the aforesaid plea and treated the amount of proform advices as income of the assessee. The plea of the assessee that there was no 'real income' accrued to the assessee was turn down. The CIT (A) upheld the aforesaid addition, on the ground that some of these government agencies had in fact paid the amount. On this very reasoning, the Tribunal has also rejected the ground of the assessee. The question is as to whether there is a 'real income' which has accrued to the assessee. This real income theory is accepted by the Apex Court in ***State Bank of Travancore*** Vs. ***CIT,*** (1986) 158 ITR 102. As per this judgment, the concept

of real income is applicable in judging whether there has been income not. If income does not result at all, there cannot be a tax, even though in book-keeping, an entry is made about a hypothetical income which does not materialized. This principle is applicable whether the accounts are maintained on cash system or under mercantile system. If the accounts are maintained under the mercantile system, what has to be seen whether income can be said to have been really accrued to the assessee company. (see ***Godhara Electricity Co. Ltd.*** Vs. ***Commissioner of Income-Tax,*** 225 ITR 746). It is not in dispute that there is some realization from the aforesaid Government Agencies though details are not available. In the year 1998-99 ₹ 19.66 crores towards proforma advices were made. These included private parties as well as Government Departments. Insofar as private parties are concerned, there is no issue that the income has accrued and would be taxable in the year in which these invoices is made. In case money from these private parties is not realized lateron, that can always be claimed as bad debt. We are here concerned with the proforma bills in respect of government parties in respect of which proforma advices totaling ₹ **5.33** crores were made. However, in respect of assessment year 1998-99 against the total proforma invoice of ₹ 5.33 crores, the payment receipt was of a meager sum

of ₹ 10.30 lacs. The same is the position in respect of earlier assessm years.

20. We are of the opinion that the Tribunal is not correct that merely because a meager sum of ₹ 10.33 lacs is received, the entire amount of ₹ 5.33 crores is to be treated as income and same treatment is to be given in other assessment years. What was to be seen as to which Government Department is remitting the amount. From the details furnished, it is obvious that some of the Departments have never made any payment.

21. We thus restore this issue back to the Assessing Officer to examine the matter in the light of our aforesaid discussion. In respect of the Government Agencies, like Police, Customs who have never paid any amount to the assessee, on the application of 'real income' theory and taking a realistic view, it is held that no income has accrued merely because proforma advices were raised, that too, at the instance of the CAG of India.

22. This question of law is answered accordingly with the direction to the Assessing Officer to determine the taxability of proforma invoices in respect of those parties who have been remitting part payments and have accepted

their liability and not in respect of those Government Agencies who h never paid any amount.

23. All these appeals are disposed of in the aforesaid terms.

24. There shall be no order as to the costs.

ACTING CHIEF JUSTICE

(RAJIV SHAKDHER)
JUDGE

(R.V.EASWAR)
JUDGE

DECEMBER 16, 2011
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