$~21 & 22

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

\+ ITA 1315/2009

THE COMMISSIONER OF INCOME TAX III ..... Appellant
Through Ms. Rashmi Chopra, Adv.

versus

SQL STAR INTERNATIONAL LTD. ..... Respondent
Through Mr. O. S. Bajpai, Sr. Adv. with Mr. V N Jha and Ms. Manasvini Bajpai, Adv.

\+ ITA 1399/2009

THE COMMISSIONER OF INCOME TAX ..... Appellant
Through Ms. Rashmi Chopra, Adv.

versus

SQL STAR INTERNATIONAL LTD. ..... Respondent
Through Mr. O. S. Bajpai, Sr. Adv. with Mr. V N Jha and Ms. Manasvini Bajpai, Adv.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V.EASWAR

O R D E R

% **02.11.2011**

First Issue

After hearing counsel for the parties, the following substantial question of law is framed :

> "Whether the tribunal is right in allowing the appeal filed by the assessee and holding that expenses to the tune of Rs.132.16 lacs were entitled to be amortization under Section 35D of the Income Tax Act, 1961 for the reasons set out in para 7 of the order dated 31.12.2002?"

2. Section 35D of the Income Tax Act, 1961 (Act, for short) reads under :

> "(1) Where an assessee, being an Indian company or a person (other than a company) who is resident in India, incurs, after the 31st day of March, 1970, any expenditure specified in sub-section (2), -
>
> (i) Before the commencement of his business, or
>
> (ii) After the commencement of his business in connection with the extension of his industrial undertaking or in connection with his setting up a new industrial unit, the assessee shall, in accordance with and subject to the provisions of this section, be allowed a deduction of an amount equal to one-tenth of such expenditure for each of the ten successive previous years beginning with the previous year in which the business commences or, as the case may be, the previous year in which the extension of the industrial undertaking is completed or the new industrial unit commences production or operation:
>
> Provided that where an assessee incurs after the 31st day of March, 1998, any expenditure specified in sub-section (2), the provisions of this sub-section shall have effect as if for the words "an amount equal to one-tenth of such expenditure for each of the ten successive previous years", the words "an amount equal to one-fifth of such expenditure for each of the five successive previous years" had been substituted.
>
> (2) The expenditure referred to in sub-section (1) shall be the expenditure specified in any one or more of the following clauses, namely :-
>
> (a) Expenditure in connection with –
>
> (i) Preparation of feasibility report;
>
> (ii) Preparation of project report;
>
> (iii) Conducting market survey or any other survey necessary for the business of the assessee;
>
> (iv) Engineering services relating to the business of the assessee :

Provided that the work in connection with the preparation of the feasibility report or the project report or the conducting of market survey or of any other survey or the engineering services referred to in this clause is carried out by the assessee himself or by a concern which is for the time being approved in this behalf by the Board;

(b) Legal charges for drafting any agreement between the assessee and any other person for any purpose relating to the setting up or conduct of the business of the assessee;

(c) Where the assessee is a company, also expenditure –

(i) By way of legal charges for drafting the Memorandum and Articles of Association of the company;

(ii) On printing of the Memorandum and Articles of Association;

(iii) By way of fees for registering the company under the provisions of the Companies Act, 1956 (1 of 1956);

(iv) In connection with the issue, for public subscription, of shares in or debentures of the company, being underwriting commission, brokerage and charges for drafting, typing, printing and advertisement of the prospectus;

(d) Such other items of expenditure (not being expenditure eligible for any allowance or deduction under any other provision of this Act) as may be prescribed.

(3) Where the aggregate amount of the expenditure referred to in sub-section (2) exceeds an amount calculated at two and one-half per cent –

(a) Of the cost of the project, or

(b) Where the assessee is an Indian company, at the option of the company, of the capital employed in the business of the company, the excess shall be ignored for the purpose of computing the deduction allowable under sub-section (1).

Provided that where the aggregate amount of expenditure referred to in sub-section (2) is incurred after the 31st day

of March, 1998, the provisions of this sub-section shall have effect as if for the words "two and one-half per cent", the words "five per cent" had been substituted.

Explanation : In this sub-section, -

(a) "Cost of the project" means –

(i) In a case referred to in clause (i) of sub-section (1), the actual cost of the fixed assets, being land, buildings, leaseholds, plant, machinery, furniture, fittings and railway sidings (including expenditure on development of land and buildings), which are shown in the books of the assessee as on the last day of the previous year in which the business of the assessee commences;

(ii) In a case referred to in clause (ii) of sub-section (1), the actual cost of the fixed assets, being land, buildings, leaseholds, plant, machinery, furniture, fittings and railway sidings (including expenditure on development of land and buildings), which are shown in the books of the assessee as on the last day of the previous year in which the extension of the industrial undertaking is completed or, as the case may be, the new industrial unit commences production or operation, in so far as such fixed assets have been acquired or developed in connection with the extension of the industrial undertaking or the setting up of the new industrial unit of the assessee;

(b) "Capital employed in the business of the company" means –

(i) In a case referred to in clause (i) of sub-section (1), the aggregate of the issued share capital, debentures and long-term borrowings as on the last day of the previous year in which the business of the company commences;

(ii) In a case referred to in clause (ii) of sub-section (1), the aggregate of the issued share capital, debentures and long-term borrowings as on the last day of the previous year in which the extension of the industrial undertaking is completed, or, as the case may be, the new industrial unit commences production or operation, in so far as such capital,

debentures and long-term borrowings have been issued or obtained in connection with the extension of the industrial undertaking or setting up of the new industrial unit of the company;

(c) "Long-term borrowings" means –

(i) Any moneys borrowed by the company from the Government or the Industrial Finance Corporation of India or the Industrial Credit and Investment Corporation of India or any other financial institution [which is for the time being approved by the Central Government for the purposes of clause (viii) of sub-section (1) of section 36] or any banking institution (not being a financial institution referred to above), or

(ii) Any moneys borrowed or debt incurred by it in a foreign country in respect of the purchase outside India of capital plant and machinery, where the terms under which such moneys are borrowed or the debt is incurred provide for the repayment thereof during a period of not less than seven years.

(4) Where the assessee is a person other than a company or a co-operative society, no deduction shall be admissible under sub-section (1) unless the accounts of the assessee for the year or years in which the expenditure specified in sub-section (2) is incurred have been audited by an accountant as defined in the Explanation below sub-section (2) of section 288, and the assessee furnishes, along with his return of income for the first year in which the deduction under this section is claimed, the report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed.

(5) Where the undertaking of an Indian company which is entitled to the deduction under sub-section (1) is transferred, before the expiry of the period of ten years specified in sub-section (1), to another Indian company in a scheme of amalgamation, -

(i) No deduction shall be admissible under sub-section (1) in the case of the amalgamating company for the previous year in which the amalgamation takes place; and

(ii) The provisions of this section shall, as far as may be, apply to the amalgamated company as they would have applied to the amalgamating company if the amalgamation had not taken place.

[(5A) Where the undertaking of an Indian company which is entitled to the deduction under sub-section (1) is transferred, before the expiry of the period specified in sub-section (1), to another company in a scheme of demerger, -

(i) No deduction shall be admissible under sub-section (1) in the case of the demerged company for the previous year in which the demerger takes place; and
(ii) The provisions of this section shall, as far as may be, apply to the resulting company, as they would have applied to the demerged company, if the demerger had not taken place.]

(6) Where a deduction under this section is claimed and allowed for any assessment year in respect of any expenditure specified in sub-section (2), the expenditure in respect of which deduction is so allowed shall not qualify for deduction under any other provision of this Act for the same or any other assessment year."

3. It is noticeable that sub-section (2) stipulates and specifies the expenditure covered by sub-section (1), in clauses (a) to (d). Therefore, to claim benefit of Section 35D, the authorities have to examine each and every expenditure and hold that it is covered by clauses (a) to (d) of sub-section (2) of Section 35D.

4. The expenditure which was under challenge before the tribunal was as under :

(i) Bank charges for collection of the public subscription Rs.1.32 lacs.

(ii) Various fees to Managers to the issue & legal consulta expenses for public issue Rs.22.73 lacs.

(iii) Stock Exchange listing fees & Sebi fees Rs.4.65 lacs.

(iv) Registrar to the issue Rs.10.54 lacs.

(v) Telephone, telex and fax for the issue Rs.2.92 lacs.

(vi) Travelling expenses for the issue Rs.10.04 lacs.

(vii) Misc. Expenses Rs.0.60 lacs."

5. The tribunal while dealing with the said aspect in para 7 has held as under :

> "7. We have gone through the records including the details furnished by the assessee in the paper book about the exact nature of these expenses. The expenditure, are mainly in connection with the issue of prospectus, legal consultancy charges in connection with the same and payments made to the Registrar to the issue and also travelling expenses incurred by the assessee in connection with the issue, all these expenses are really in the nature of expenditure that fall for amortization u/s 35D(1) of the Act. We, therefore, direct the AO to allow the amortization of the expenses as claimed by the assessee and in our view, the restriction to 1/5th of Rs.79.78 lakhs is not in accordance with the provisions of Section 35D(2) of the Act. The disallowance made in this regard is, therefore, deleted. The alternative claim of the assessee that the same should be allowed as a revenue expenditure accordingly stands rejected."

6. In the aforesaid reasoning, the tribunal has not examined the nature and character of expenses and whether they are covered by clauses (a) to (d) of Section 35D(2). The order is cryptic and

without reasons. In view of the above, the question of law is answered in favour of the Revenue and against the respondent-assessee. The matter is remitted to the tribunal for a fresh decision. It is clarified that we have not expressed any opinion, whether or not the expenses are covered under Section 35D(2). Ld. counsel for the respondent-assessee states that they are entitled to urge and argue that the aforesaid expenses are covered under Section 37 of the Act. The said aspect can be raised before the tribunal, if permissible, and in accordance with law.

Second Issue

7. The second question which arises in this appeal was examined and answered in ITA No.1314/2009 titled as '***The Commissioner of Income Tax Vs. SQL Star International Ltd.***'. For the sake of convenience the said order is reproduced below :

> "After hearing learned counsel for the parties, the following question of law if framed:-
> (i) Whether the Special Bench of ITAT ought to have remanded the matter to be decided on merits by the regular Bench of ITAT?
> Learned counsel for the parties agree that the aforesaid question is covered by the decision of this Court dated 9th September, 2011 in ITA 624/2011 in the case of Amway India Enterprises (supra). The operative portion of the order reads as under:-
> "We also note that in the operative part (i.e., para 60) the Tribunal has directed that in view of the criteria laid down in the foregoing part of their judgment, the matter is restored to the file of the A.O. for re-examination as to whether the expenditure incurred by assessee on computer

software is on capital or revenue account after giving due opportunity to the assessee. The relevant part of the directions issued by the Tribunal as contained in paragraph 60 of the impugned judgment is extracted hereinbelow for the sake of convenience:

"60. Having laid down the criteria for determining the nature of expenditure incurred on acquisition of software, whether capital or revenue, we are of the view that these criteria need to be applied to determine the exact nature of expenditure incurred by the assessees in the present cases for acquiring different softwares. Since this exercise is required to be done in respect of each and every software independently having regard to the criteria laid down above, we are o the view that the matter needs to b restored back to the file of the Assessing Officer for doing such exercise. The AO shall examine the question whether expenditure on computer software is capital or revenue in the light of the criteria laid down above after giving an opportunity of being heard to the assessees."

Upon consideration of the matter we are of the view that the special bench of the Tribunal ought to have placed the matter(s) before a regular bench, i.e., the Division Bench for dealing with the matter(s) in accordance with the law, after they had answered the reference. There was, in our view, no occasion to restore the matter to the file of the A.O.

Mr Syali, who appears for the assessee, is satisfied if a direction is issued by us whereby the operative part of the judgment of the Tribunal (i.e., para 60) is substituted by our direction to the Tribunal to place the captioned appeal before a regular bench of the Tribunal.

We direct accordingly. The appeal is disposed of with the aforesaid directions."

The aforesaid question is answered in terms of the aforesaid observations of this Court in ITA 624/2011 and the appeal is accordingly disposed of. The parties will appear before the Assistant Registrar of ITAT on 21st November, 2011, when a date of hearing will be fixed."

Accordingly, the following substantial question of law is framed:-

> "Whether the Special Bench of ITAT ought to have remanded the matter to be decided on merits by the regular Bench of ITAT?"

The said question is answered in terms of our earlier order in ITA No.1314/2009 and the appeal is accordingly disposed of. The parties will appear before the Assistant Registrar of ITAT on 21st November, 2011, when a date of hearing will be fixed.

SANJIV KHANNA,J

R.V.EASWAR, J

NOVEMBER 02, 2011
vld

(Disposed of Case)

From CM 6172/12 (for rectification of order dtd 1/11/11 & 2/11/11)