IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ **ITA 1974/2010**
ITA 01/2011,ITA 05/2011

% JUDGMENT RESERVED ON:22.03.2011
JUDGMENT DELIVERED ON:30.03.2011

ITA 1974/2010

THE COMMISSIONER OF INCOME TAX-V ....APPELLANT
Through: Mr. Prem Lata Bansal, Sr. Advocate with Mr. Deepak Anand, Jr. Standing Counsel

VERSUS

CITI FINANCIALCONSUMER FIN.LTD ....RESPONDENT
Through: Mr. C.S. Aggarwal, Sr. Advocate with Mr. Prakash Kumar, Advocate.

ITA 01/2011

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CORAM:

HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M.L. MEHTA

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. For orders see, ITA 1820/2010.

(A.K. SIKRI)
JUDGE

(M.L. MEHTA)
JUDGE

MARCH 30, 2011
skb

IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ **ITA 1820/2010,ITA 1974/2010**
ITA 01/2011,ITA 05/2011

% JUDGMENT RESERVED ON:22.03.2011
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ITA 1820/2010

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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?

Yes

A.K. SIKRI, J.

1. These four appeals are directed against the common order passed by the Income Tax Appellate Tribunal in respect of same assessee and pertain to the assessment years 2001-02 and 2002-03. The ITA 1974/2010 and ITA 5/2011 relate to the assessment year 2001-02 in which the following two questions of law are proposed:-

> "(a) Whether ITAT was correct in law in allowing entire expenditure incurred by the assessee on advertisement u/s 37 (1) of the Act?
>
> (b) Whether ITAT was correct in law in allowing entire expenditure incurred by the assessee on commission, stamping fee and directing selling expenses to the assessee. "

2. In ITA 1820/2010 and 01/2011 one question relating to expenditure incurred on advertisement is common. Additional question of law which is raised is in the following terms:

> "Whether ITAT was correct in law in allowing a sum of ₹ 1,52,24,029/- claimed by the assessee as lease hold improvements treating the same as revenue in nature."

3. Final arguments were heard on these three aforesaid questions at the admission stage itself. We proceed to decide these questions now.

Re: Expenditure on Advertisement and Publicity; nature of:

4. In the assessment year 2001-02, the assessee company claimed an expenditure of Rs. 3.93 crores on account of advertisement and publicity expenditure as revenue expenditure and the same had been debited to the profit and loss account. The AO was of the view that this expenditure cannot be termed as expenditure relevant exclusively for the period of 12 months under consideration during the said assessment year. Such advertisement and publicity expenses had bearing on the period which spreads over a period of five years and, therefore, the assessee could not claim the benefit in the year in which the expenditure was incurred. Thus, opining that the benefit was of enduring nature, he was of the view that it is to be spread over a period of five years and thus allowed 1/5th of the aforesaid amount in the year in question. In the next year, the total expenditure incurred on publicity and advertisement was ₹ 6.35 crores and giving identical reason, the Assessing Officer allowed 1/5th thereof in that year. Before the CIT (A), the assessee argued that the calculation made by the AO was based on his surmises and conjectures and without asking the assessee to respond with the factual information. According to the assessee, this infringed its right of natural justice. The assessee also submitted that expenditure incurred on advertisement, publicity and sales

promotion was revenue expenditure and whole of it was to be allowed in the year in which it was incurred. Some judgments in supports of this contention were cited by the assessee. Argument of the assessee did not convince the CIT (A) who reiterated the view taken by the AO namely the expenditure incurred needed to be amortized under Section 35 D (2) of the Act. The CIT (A) referred to and relied upon the judgment of the Madras High Court in ***Madras Fertilizers Ltd.*** *Vs.* ***Commissioner of Income Tax***, 209 ITR 174 and dismissed this ground taken by the assessee in its appeal.

5. In further appeal to the Tribunal, the assessee has succeeded. The Tribunal has held that Section 35 D of the Act was wrongly invoked as it had no applicability. Reason was simple, viz., the nature of expenditure does not fall under the ambit of preliminary expenditure as envisaged under Section 35 D of the Act. The Tribunal further opined that the advertisement expenditure had actually been incurred during the year and there is a nexus between the expenditure of the assessee business and, therefore, this expenditure was allowable under Section 37 of the Act having regard to the principle laid down by this Court in the case of ***CIT*** Vs. ***Salora International Ltd.*** 308 ITR 199. The Tribunal further took the view that judgment of the Madras High

Court in ***Madras Fertilizers Ltd.*** (supra) had no application to the facts of this case.

6. Before us, Mrs. Bansal, learned Senior Counsel appearing for the Revenue did not make any attempt to justify the amortization of the aforesaid expenditure predicated on the provisions of Section 35D of the Act. Her arguments rested on the premise that the expenditure on publicity and advertisement was of enduring nature and benefit accrued from the same could not be confined to the year in question when the expenditure was incurred. She relied upon the judgment of ***Madras Industrial Investment Corporation Ltd.*** *Vs.* ***Commissioner of Income Tax,*** 225 ITR 802 wherein it was held as under:-

> "The Tribunal, however, held that since the entire liability to pay the discount had been incurred in the accounting year in question, the assessee was entitled to deduct the entire amount of Rs. 3,00,000 in that accounting year. This conclusion does not appear to be justified looking to the nature of the liability. It is true that the liability has been incurred in the accounting year. But the liability is a continuing liability which stretches over a period of 12 years. It is, therefore, a liability spread over a period of 12 years., Ordinarily, revenue expenditure which is incurred wholly and exclusively for the purpose of business must be allowed in its entirely in the year in which it is incurred. It cannot be spread over a number of years even if the assessee has written it off in his books over a period of years. However, the facts may justify an assessee who has incurred expenditure in a particular year to spread and

> claim it over a period of ensuing years. In fact, allowing the entire expenditure in one year might give a very distorted picture of the profits of a particular year. Thus in the case of Hindustan Aluminium Corporation Ltd. v. Commissioner of Income-Tax, Calcutta-I [1983]144ITR474(Cal) the Calcutta High Court upheld the claim of the assessee to spread out a lump sum payment to secure technical assistance and training over a number of years and allowed a proportionate deduction in the accounting year in question.
>
> Issuing debentures at a discount is another such instance where, although the assessee has incurred the liability to pay the discount in the year of issue of debentures, the payment is to secure a benefit over a number of years. There is a continuing benefit to the business of the company over the entire period. The liability should, therefore, be spread over the period of the debentures.
>
> The appellant, therefore, had, in its return, correctly claimed a deduction only in respect of the proportionate part of discount of Rs. 12,500 over the relevant accounting period in question. In this connection, we agree with the reasoning and conclusion of the Madhya Pradesh High Court in the case of M.P. Financial Corporation v. Commissioner of Income-tax (supra). The view that we have taken is also in conformity with accounting practice of showing the discount in "discount on debentures account" which is written off over the period of the debentures."

She thus submitted that there may be circumstances when the expenditure incurred in a particular year can be spread over a period of enduring years. More particularly, when allowing the expenditure in one year may give a distorted picture of the profits of a particular year. She bolstered this submission in the present

case on the ground that the assessee on the leasing business was itself spreading the income over the years keeping in view the period covered by the lease agreement, in such circumstances, argued the learned Senior Counsel, allowing the entire expenditure in one year would give distorted picture and the 'matching concept' of income and expenditure would clearly be attracted.

7. Mr. C.S. Aggarwal, learned Senior Counsel appearing for the assessee refuted the aforesaid submissions and sought to justify the approach of the Tribunal allowing the expenditure as revenue expenditure. His submission was that in order to allow the expenditure as revenue expenditure, the relevant factor to be seen was that the expenditure was incurred in the year in question and the same was for business purposes. The question of such an expenditure of enduring benefit would not be of any relevance, in such circumstances, having regard to the judgment of the Supreme Court in ***Empire Jute Co. Ltd.*** *Vs.* ***Commissioner of Income Tax,*** 124 ITR 01. He further submitted that accrual of income and incurring of expenditure were entirely two different aspects and he also submitted that 'matching concept' would not apply in the instant case as held in ***Commissioner of Income Tax*** *Vs.* ***Industrial Finance Corporation of India Ltd.*** 185 Taxman 296. He further

submitted that the judgment in ***Madras Industrial Investment Corporation Ltd.****(supra)* relied upon by the Revenue was duly considered and explained by this Court in the same judgment i.e. ***IFCI*** (supra).

8. From the facts noted above and on the basis of submissions of learned counsel for the parties, following aspects clearly emerge as undisputable: -

(a) The expenditure in question is incurred by the assessee in the relevant assessment years in which the assessee is claiming deduction thereof under Section 37 of the Act. Thus there is no dispute that the expenditure is in fact incurred.

(b) It is also not in dispute that the expenditure in question is business expenditure incurred wholly for the purpose of the business of the assessee.

(c) The expenditure incurred in the nature of advertisement and publicity is incurred forever and in no manner any portion thereof reverts back to the assessee.

9. The aforesaid facts would demonstrate that the ingredients of Section 37 of the Act stand satisfied. Therefore, normally the

expenditure is to be allowed as business expenditure in the year in question in which the same is incurred. In this backdrop, we have to consider the arguments of the Revenue predicated on the so called enduring benefit which is the expenditure on account of advertisement and publicity confers. This argument is based on the judgment of the Apex Court in ***Madras Industrial Investment Corporation Ltd.****(supra)*. In that case, the Supreme Court had referred to this 'matching concept'. It was held that ordinarily revenue expenditure incurred wholly or exclusively for the purpose of business, can be applied in the year in which it is incurred. However, the facts may justify spreading the expenditure and claiming it over a period of ensuing years, where allowing the entire expenditure in one year could give a very distorted picture of the profits of a particular year. One such instance was issuing debentures at discount. The Supreme Court was of the opinion that though in such cases the assessee had incurred the liability to pay the discount in the year of issue of debentures, the payment is to secure the benefit over a number of years. There was a continuing benefit to the assessee of the company over the entire period and, therefore, the liability was to be spread over the period of debentures.

10. We are unable to persuade ourselves by the aforesaid submission of the learned counsel for the Revenue. Identical

argument was taken by the Revenue in ***IFCI*** (supra). Explaining the ratio of Supreme Court in ***Madras Industrial Investment Corpn. Ltd.*** *(supra)*, the argument of the Revenue was rejected in the following manner:-

> "The judgments on which reliance is placed by the learned Counsel for the Revenue would be of no avail in the instant case. The learned Counsel for the Revenue had strongly argued that matching concept is to be applied, as per which part of the expenditure had to be deferred and claimed in the subsequent years and, therefore, approach of the AO was correct. However, this argument overlooks that even in Madras Industrial Investment Corporation (supra), on which the reliance was placed by Ms. Bansal, the general principle stated was that ordinarily revenue expenditure incurred wholly and exclusively for the purpose of business can be allowed in the year in which it is incurred. Some exceptional cases can justify spreading the expenditure and claiming it over a period of ensuing years. It is important to note that in that judgment, it was the assessee who wanted spreading the expenditure over a period of time as was justifying such spread. It was a case of issuing debentures at discount; whereas the assessee had actually incurred the liability to pay the discount in the year of issue of debentures itself. The Court found that the assessee could still be allowed to spread the said expenditure over the entire period of five years, at the end of which the debentures were to be redeemed. By raising the money collected under the said debentures, the assessee could utilize the said amount and secure the benefit over number of years. This is discernible from the following passage in that judgment on which reliance was placed by the learned Counsel for the Revenue herself:

"The Tribunal, however, held that since the entire liability to pay the discount had been incurred in the accounting year in question, the assessee was entitled to deduct the entire amount of Rs. 3,00,000 in that accounting year. This conclusion does not appear to be justified looking to the nature of the liability. It is true that the liability has been incurred in the accounting year. But the liability is a continuing liability which stretches over a period of 12 years. It is, therefore, a liability spread over a period of 12 years. Ordinarily, revenue expenditure which is incurred wholly and exclusively for the purpose of business must be allowed in its entirely in the year in which it is incurred. It cannot be spread over a number of years even if the assessee has written it off in his books over a period of years. However, the facts may justify an assessee who has incurred expenditure in a particular year to spread and claim it over a period of ensuing years. In fact, allowing the entire expenditure in one year might give a very distorted picture of the profits of a particular year. Thus in the case of Hindustan Aluminium Corporation Ltd. v. Commissioner of Income-Tax, Calcutta-I (1983) 144 ITR 474, the Calcutta High Court upheld the claim of the assessee to spread out a lump sum payment to secure technical assistance and training over a number of years and allowed a proportionate deduction in the accounting year in question.

Issuing debentures at a discount is another such instance where, although the assessee has incurred the liability to pay the discount in the year of issue of debentures, the payment is to secure a benefit over a number of years. There is a continuing benefit to the business of the company over the entire period. The liability should, therefore, be spread over the period of the debentures."

Thus, the first thing which is to be noticed is that though the entire expenditure was incurred in that year, it was the assessee who

> wanted the spread over. The Court was conscious of the principle that normally revenue expenditure is to be allowed in the same year in which it is incurred, but at the instance of the assessee, who wanted spreading over, the Court agreed to allow the assessee that benefit when it was found that there was a continuing benefit to the business of the company over the entire period."

11. This Court, thus, explained in no uncertain terms that the normal rule accepted by the Supreme Court in the said judgment was that the expenditure is to be allowed in the year in which it was incurred. Only at the instance of the assessee who wanted to spread over, the court had agreed to allow the assessee the benefit after finding that there was a continuing benefit to the company over the entire period. The ratio of this judgment was thus summarized in the following manner:-

> "What follows from the above is that normally the ordinary rule is to be applied, namely, revenue expenditure incurred in a particular year is to be allowed in that year. Thus, if the assessee claims that expenditure in that year, the Income Tax department cannot deny the same. However, in those cases where the assessee himself wants to spread the expenditure over a period of ensuing years, it can be allowed only if the principle of matching concept is satisfied, which upto now has been restricted to the cases of debentures.'

12. At this stage, it would be of advantage to discuss the judgment of Supreme Court in ***Empire Jute*** (supra) which repelled the theory of expenditure of enduring nature, in a great

measure. In that case, the Supreme Court noted that by decided cases, the courts evolved various tests for distinguishing between the capital and revenue expenditure but no test is paramount or conclusive. Every case has to be decided on its facts keeping in mind the broad picture of whole operation in respect of which the expenditure has been incurred. At the same time, few tests formulated by the Courts were taken note of. One such test which was specifically spelled-out and may be relevant for our purpose was "when an expenditure is made not only once and for all, but with a view to bringing into existence of an advantage for which enduring benefit of a trade, the expenditure can be treated as capital in nature and not attributable to revenue". However, cautioned the Court, it would be misleading to suppose that in all cases securing a benefit for business expenditure would be capital expenditure. The Court added the caution in the following words:-

> "There may be cases where expenditure, even if incurred for obtaining advantage, of enduring benefit, may, none-the-less, be on revenue account and the test of enduring benefit may break down. It is not every advantage of enduring nature acquired by an assesses that brings the case within the principle laid down in this test. **What is material to consider is the nature of the advantage in a commercial sense and it is only where the advantage is in the capital field that the expenditure would be disallowable on an application of this test**. 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 white leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future. The test of enduring benefit is therefore not a certain or conclusive test and it cannot be applied blindly and mechanically without regard to the particular facts and circumstances of a given case."

13. Applying the aforesaid principle to the facts of this case, it clearly emerges that the expenditure on publicity and advertisement is to be treated as revenue in nature allowable fully in the year in which it was incurred. Concededly, there is no advantage which has accrued to the assessee in the capital field. The expenditure was incurred to facilitate the assessee's trading operations. No fixed capital was created by this expenditure. We may also add here that in the Income-Tax laws, there is no concept of deferred revenue expenditure. Once the assessee claims the deduction for whole amount of such expenditure, even in the year in which it is incurred, and the expenditure fulfills the test laid down under Section 37 of the Act, it has to be allowed. Only in exceptional cases, the nature mentioned in ***Madras Industrial Corporation*** (supra), the expenditure can be allowed to be spread over, that too, when the assessee chooses to do so.

14. We thus are of the opinion that the aforesaid question of law as formulated by the Revenue has to be answered in favour of the assessee.

Re: Expenditure on account of stamping fee, direct selling expenditure and commission payment.

15. As per the Assessing Officer, the assessee had been financing the hire purchase of vehicles and homes etc. and the period of such financing were ranging from less than one year to upto 5 years. On such transactions, direct selling expenses, stamping fee and commission paid to the selling agents could not be treated as expense relating to the year in which the transaction took place as the period of financing was normally more than one year. On this premise, the Assessing Officer took the view that these expenses could not be termed as having the chargeability in which they were incurred. He took average of three years for such agreements and spread the expense over a period of three years thereby allowing 1/3rd expenditure incurred in that particular year. The matter was taken up in appeal and before the CIT (A), the assessee questioned the aforesaid approach of the Assessing Officer by contending that in the course of its business, the assessee enters in the loan agreements of hire purchase which agreements are required to be stamped in accordance with the provisions of Indian Stamps Act. The stamp

duty paid by the assessee is debited to agreement stamping fee under the major head of 'rates and taxes' and is claimed as revenue expenditure. This entire process of getting stamped the agreements had been outsourced by the assessee to the Contract Processing Associates (CPA) and who are paid remuneration as well. Therefore, the expense towards stamping as well as commission paid to the agents is debited in whole in the year in which it is incurred and could not be treated as advertisement expense.

16. The CIT (A) was unimpressed with this argument and found that the assessee was spreading over the income during the number of years that the financing is spread over and, therefore, expenditure on the aforesaid counts was required to be spread over. The ITAT, however, denounced this reasoning of the CIT (A) and accepted the plea that the expenditure incurred had nothing to do with the period of length of time and had no linkage, whatsoever, to any period, the entire expenditure was allowable in the year in which it was incurred. The Tribunal has further held that the expenditure is incurred once for all in the form of stamping duty as well as commission paid to the direct selling agents for procuring the loan assignments and it is not dependent upon the working out of the agreements ultimately entered into between the assessee and the customers. Since the commission

is paid to the direct selling agents, for their services in sourcing hire in the year in which the loan is disbursed, it is to be allowed as business expenditure. The Tribunal, to arrive at this finding took into consideration the clauses of the agreement relating to mode of payment of consideration as well as 'termination' clause in the agreement. Thus, as the entire expenditure was incurred which admittedly have nexus with the business of the assessee, it was treated as business expenditure allowable under Section 37 of the Act. The Tribunal also relied upon the judgment of Supreme Court in the cases of ***Calcutta Company Ltd.*** Vs. ***CIT,*** 37 ITR 1, ***CIT*** Vs. ***Associated Cement Companies Ltd,*** 172 ITR 257, ***Empire Jute Company Ltd.*** *Vs.* ***CIT,*** *124 ITR 01* and judgment of this Court in ***CIT*** Vs. ***Salora International Ltd.*** *308 ITR 199*.

17. We are in agreement with the aforesaid view taken by the Tribunal and hold that the expenditure was required to be allowed as revenue/business expenditure incurred in that year. The reasons given by us while allowing the advertisement and publicity expenditure will apply here as well.

Re: Expenditure on lease hold improvements.

18. In the assessment year 2002-03, the assessee had claimed revenue expenditure amounting to Rs. 1,52,24,029/- on account of

lease hold improvements. The Assessing Officer took the view that the lease improvements were on account of renovation carried out in the lease premises and, therefore, had to be capitalized. More so, when in the earlier year also, the assessee had capitalized the same and claimed depreciation @ 10% on it. He thus treated the aforesaid expenditure of lease hold improvements as capital expenditure and allowed depreciation @ 10%. We may note here that the said expenditure of Rs. 1,52,24,029 was incurred by the respondent on account of laying of cables, electrical connections, installation OVC conduits, CATS, Sanitary fittings, partitions & pin boards, civil works, brickwork, water proofing, flooring, false ceiling, wall finishes, toilet furnishings, paints on walls and ceilings, earthling, switches and receptacles, glazing on ventilators etc.

19. The CIT (A) went into the expenses incurred on the aforesaid items details thereof were furnished at pages 282 to 336 in the paper book filed before him. He noted that the gross amount as per the bills was Rs 1,92,01,959/-. Out of this, the assessee had himself capitalized ₹ 39,77,930/- as furniture and claimed the balance amount of ₹ 1,52,24,028/- as leasehold improvements which were revenue in nature. After verifying the nature of expenses from the bills and details produced by the assessee, the CIT (A) was convinced with the justification provided by the

assessee that the expenditure of Rs. 1.52 crores was revenue in nature and holding that disallowance by the AO was not justified, deleted the addition by allowing the entire expenditure as revenue. The Tribunal has upheld this order of the CIT (A).

20. The argument of Mrs. Bansal was that the nomenclature of items of expenditure namely sanitary, fittings, civil works, brickworks, flooring etc. would clearly show that this expenditure could be capital in nature. Her grievance was that the CIT (A) or the Tribunal did not go into this question at all and simply accepted the bifurcation given by the assessee in capitalizing the portion of the expenditure and treating the part of the expenditure as revenue. Her plea, therefore, was that the matter be remitted back to the AO. She conceded, at the same time, that even the AO had not done this exercise. It is clear that the Assessing Officer had not gone into the question as to whether the expenditure incurred on leasehold improvements was capital or revenue in nature. A large number of premises are taken on lease by the assessee throughout the country and expenditure on improvements of these lease premises was incurred by the assessee. The assessee has treated part of the said expenditure as capital in nature and depreciation thereon. In so far as expenditure to the extent of Rs. 1.52 crores is concerned, the same is treated as revenue in nature.

21. Mrs. Bansal may not be correct in her submission that the CIT (A) simply accepted the assertion of the assessee. The order of the CIT reveals that the plethora of documents in respect of expenditure incurred on leasehold improvements to the extent of Rs. 1.52 crores was filed at pages 282 to 336 of the paper book. The order of the CIT(A) clearly reveals that he had "perused the bills filed by the appellant and also verified its various assertions". Thus the CIT (A) accepted the stand of the assessee only after verification of the records and arriving at a finding of fact that the expenditure on the aforesaid account was revenue in nature. In this backdrop, the ITAT has observed that the CIT (A) had verified the details produced by the assessee and gave his categorical finding based thereupon. This would, thus, be a mere question of fact and no question of law arises thereupon.

22. The upshot of the aforesaid discussion would be to uphold the order of the Tribunal and dismiss all these appeals.

23. We order accordingly.

(A.K. SIKRI)
JUDGE

(M.L. MEHTA)
JUDGE

MARCH 30, 2011
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