% 15.07.2011

Present: Mr. Anupam Tripathi, Sr. Standing Counsel for the Revenue.

+CM APPL. 12337/2011

Exemption allowed subject to just exception.

Application stands disposed of.

ITA 838/2011

Four issues are raised in this appeal.

The first issue relates to the penalty/damages paid by the assessee to NDMC after acquiring the property i.e. Hotel Kanishka under the disinvestment policy of Govt. of India and claim of depreciation thereof has been decided in favour of the assessee and against the Revenue in ITA 837/2011 decided on 14th July, 2011.

The second issue pertains to the depreciation @ 60% as claimed by the assessee as against 25% which according to the Revenue is correct rate. This issue also stands decided against the Revenue by this Court in ***Commissioner of Income Tax*** Vs. ***BSES Yamana power Ltd.***(ITA 1267/2010 decided on 31st August, 2010).

The third issue is in respect of a sum of ₹1,22,255/- disallowed by the Assessing Officer on account of late deposit of PF and of ₹ 13,592/- on account of unpaid bonus disallowed by the Assessing Officer under Section 43B of the Income-Tax Act (hereinafter would

be referred to as 'the Act'). It is not in dispute that the aforesaid payment was made by filing the returns. In such circumstances, as decided by this Court in a number of cases, such an expenditure was allowable expenditure.

The last issue concerns the interest of ₹1,16,201/- earned by the assessee on FDR which the assessee had reduced from pre-operative expenses. The Assessing officer treated the same as "income from other source". The CIT (A) allowed the claim of the assessee which order is upheld by the Tribunal. It has come on record that the assessee company was engaged in renovation of Hotel Kanishka acquired from the ITDC. During this period, the assessee had imported raw material under EPGCG licenses having reduced rate of import duty, for renovation of Hotel. Since the aforesaid material was imported under EPGCG licenses with reduced rate of import duty, the assessee was required to furnish the bank guarantee. The bank guarantee was furnished. It was under these circumstances, the money was to be kept in FDR with the bank.

In view of this, we are of the opinion that the ITAT rightly held that the earning of the said interest on these FDRs was inextricably linked with the setting up of the business and would be treated as a part of the pre-operative expenses.

In these circumstances, the expenses were pre operative expenses incurred by the assessee to reduce the cost of construction.

We thus do not find any merit in any of the issues raised in this appeal and is accordingly dismissed.

+CM APPL. 12340/2011 in ITA 839/2011

Exemption allowed subject to just exception.

Application stands disposed of.

+ITA 839/2011

All the four issues raised in this appeal are identical as raised in appeal pertaining to the assessing year 2004-05 (ITA 838/2011).

This appeal is also dismissed.

+CM APPL. 12343/2011 in ITA 841/2011

Exemption allowed subject to just exception.

Application stands disposed of.

+ITA 841/2011

Apart from the two issues which are covered by the orders passed in ITA 837/2011 on 14th July, 2011 and in the afore mentioned appeals, the additional issue raised in this appeal pertains to the expenditure incurred on landscaping. The assessee had debited a sum of ₹33,20,417/- on this account and had claimed the depreciation thereon. The question was as to whether this

expenditure can be treated as part of building and can be capitalized for the purpose of depreciation. The answer given by the ITAT is in affirmative with the following discussion:-

> "We have carefully considered the rival contentions and gone through the record including the discussion in the impugned order. The term 'building' has not been defined in the Act. The mature of the asses has to be ascertained and we have to understand the meaning of the term 'building'. depending upon the context to which a reference has been made. Here the assessee is in a Hotel business. His building is not merely a structure of four walls nut includes all such things as are necessary to give the building a better look and is a matter of attraction for the customers to use it. Having regard to the assessee's nature of business it cannot be said the landscaping done by the assessee cannot be considered as a building. After all the assessee has given a better look to this building by provision of this landscaping which has become an integral part of the building to be used as a Hotel. In order to acquire a Star category, all these artistic looks are very much necessary. The Commissioner, in our view, has correctly applied the principal laid down by the jurisdictional High Court in the case of CIT Vs. Delhi Airport Service 255 ITR 90 and also the decision of the Supreme Court in CIT Vs. Gwalior Rayon Silk Mfg. Co. Ltd. 196 ITR 149 and the decision of the Madras High Court I CIT Vs. Solution Petro Chemicals Industries Corporation Ltd. 233 ITR 391 to give an extend and more meaningful definition of the term 'building'. We agree his view and decline to interfere on this aspect of the matter. Moreover it must be appreciated the revenue has accepted the order of the CIT (A) for the assessment year 2006-07 and it has only challenged that issues in the assessment year 2007-08 which is second year which is the year of consequence of the decision in the first year which remains unchallenged. In other words, the department having accepted

> the finding of the CIT (A) for the assessment year 2006-07, cannot question the same while giving effects to that in the assessment year 2007-08. Even on this ground we decline to interfere with the order of the CIT (Appeals) for the assessment year 2007-08 on the disputed matter."

As noted by the ITAT, the CIT (A) had accepted the plea of the assessee in respect of the assessment year 2006-07 as well and allowed the depreciation by inclusion of the aforesaid sum in the cost of building. The Revenue had not challenged this issue in the said assessment year. Once the amount is spent and allowed to be cost of building depreciation allowed in the year 2006-07, there is no reason to disallow the depreciation in the subsequent year.

We find no merit in this appeal which is accordingly dismissed.

CM APPL. 12344/2011 in ITA 841/2011

Exemption allowed subject to just exception.

Application stands disposed of.

ITA 841/2011

One additional issue which is raised in this appeal by the assessee relating to assessment year 2007-08 relates to the addition made by the Assessing Officer invoking the provisions of Section 41 (1) read with Section 28 of the Income-Tax Act. The Assessing Officer had noticed that certain creditors who had to take the money from the assessee had not made their claims for more

than three years and those accounts have become non-operative. On this basis, he concluded that the liability had ceased to exist and, therefore, it was a gain to the assessee and made additions on this ground. The Tribunal has deleted the addition taking note of the fact that merely because three years have passed the liability is not seized to exist, moreso, when the assessee was still showing that liability in its books of accounts.

We do not find any infirmity in the order of the Tribunal. This appeal is also dismissed.

A.K. SIKRI, J.

M.L.MEHTA, J.

July 15, 2011
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