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

Reserved on : 03.07.2012
Decided on :12.07.2012

ITA No. 205/2010

KRISHAK BHARATI COOPERATIVE LTD. ..... Appellant

Through: Mr. S.Ganesh, Sr. Advocate with Ms. Surekha Raman and Mr. Anuj Sharma, Advocates

Versus

DEPUTY CIT ..... Respondent

Through: Mr.Sanjeev Sabharwal, Sr. Standing Counsel with Mr. Puneet Gupta, Jr. Standing Counsel

ITA 163/2011, ITA 1215/2011 & ITA 1216/2011

KRISHAK BHARATI COOPERATIVE LTD. ….. Appellant

Through: Mr. S.Ganesh, Sr. Advocate with Ms. Surekha Raman and Mr. Anuj Sharma, Advocates

Versus

ADDITIONAL COMMISSIONER OF INCOME TAX …… Respondent

Through: Mr.Sanjeev Sabharwal, Sr. Standing Counsel with Mr. Puneet Gupta, Jr. Standing Counsel

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.V. EASWAR

MR. JUSTICE S. RAVINDRA BHAT

%

1. The following question of law was framed for consideration by this Court:

"*Did not the Tribunal commit a patent error of law in holding that t amortization of lease premium paid by the appellant was capital expenditure and not revenue expenditure?"*

2. The facts necessary to decide this case are that this appeal pertains to the assessment year 2004-05 for which the order of assessment was framed by the Deputy Commissioner of Income Tax, Circle 24(1), New Delhi, in terms of Section 143 (3) of the Income-tax Act, 1961 ("the Act") on 26.12.2006. The assesse claimed a deduction of ₹ 2,75,045/-, being the amount written off towards premium paid to the NOIDA. It was urged that the expenditure did not confer any ownership right to the assesse, and allowed it to use the land for the purpose of construction of its office. The assesse contended that the expenditure was revenue in character. The assesse also urged that similar amounts were allowed in earlier years – right from inception of the lease, i.e. 1989 and, argued that it should have been allowed in the relevant year too following the principle of consistency.

3. The assesse had entered into a lease agreement with NOIDA on 06.01.1989 for by which the land in question was demised for a period of 90 years. The assesse was entitled to construct an office complex on the land. The assesse was required to pay premium of ₹ 2,53,96,993/- to NOIDA at the time of the allotment, or demise. In addition, under the lease deed, the assesse had to pay annual lease rent @ 2.5 per cent of the premium. The lease rent could be enhanced after 12 years. The assesse amortized the expenditure by way of premium over the period of lease, and claimed deduction of ₹. 2,75,045/- in the assessment year. The land had been earlier acquired by the NOIDA under Land Acquisition Act, 1896, for setting up an urban and industrial township. In terms of the lease, the assesse

was not entitled to transfer the land before erection of the building witho the permission of the NOIDA. There were other restrictions on the lessee's right to transfer, assign or alienate the land. The assesse could borrow, by mortgaging the land. In case of non-fulfilment or violation of terms and conditions of the lease agreement, building rules or any other rules prescribed by the authority, the lease could be cancelled and possession of the premises could be taken over by NOIDA.

4. The assessee was required to show cause as to why this expenditure may not be considered to be capital in nature, particularly in the light of the definition of the expression "immovable property" furnished in section 269UA(d)(i). The assessee relied on the decision of Madras High Court in the case of *CIT vs. Gemini Arts (P) Ltd.* (2002) 254 ITR 201, and contended that the expenditure was revenue in nature. The Assessing Officer did not accept the submissions and found that the facts of the said case were distinguishable. It was held that lease of land for 90 years conferred a benefit of enduring nature to the assesse and, consequently, it was in the nature of capital expenditure. This amount was, as a result not allowed as deduction.

5. The assesse appealed to the CIT (Appeals) before whom assesse relied on the decision of the Supreme Court in the case of *CIT vs. Madras Auto Service (P) Ltd.* (1998) 233 ITR 468. The CIT(Appeals) considered the facts of the case and submissions made before him. The order of the CIT (A) mentions that a similar issue was considered by a Special Bench of the Mumbai Tribunal in *Mukund Limited* (2007) 291 ITR (AT) 249. There, the assessee entered into an agreement with Maharastra Industrial Development Corporation (MIDC) to set up its factory. The lease period was 99 years; the assessee had paid a sum of ₹ 2.04 crores as premium to the

MIDC. It was allowed to construct a factory building on the land and utili it for 99 years. Apart from the premium, the assesse also had to pay rent at Re. 1/- per annum. The premium was non-refundable. The Court concluded that the premium was not advance payment of rent and there was no material on record to show that the payment was made for securing reduction in rent payable in coming years. The expenditure was treated to be capital in nature. The CIT (Appeals) relied on the judgments of this Court in *Dabur India Ltd. vs. CIT* (2008) 13 DTR (Del) 34 and *CIT vs. Jyoti Apparels* (2007) 209 CTR (Del) 288 to say that the principle of consistency was inapplicable. Therefore, it was held that the expenditure was capital in nature not deductible in computing the income.

6. The assesse appealed to the Income Tax Appellate Tribunal, and reiterated its contentions, citing all the judgments it had relied on before the CIT (Appeals). After analyzing them, and also considering the terms of the lease with NOIDA the ITAT rejected the assesse's appeal. It was held, *inter alia,* in the impugned order, that:

> *"4. We have considered the facts of the case and rival submissions. We may briefly state the terms and conditions of the lease deed dated 06.01.1989 entered into between the NOIDA and the assessee. The assessee was required to pay premium of Rs. 2,53,96,993/- and annual rent @ 2.5 per cent of the premium amount. The lease commenced w.e.f. 06.01.1989 and it was for a period 90 years. The assessee was entitled to set up an office complex on the land and make arrangements to lay water main and electricity wiring. The lease rent could be enhanced after a period of 12 years. The assessee was not entitled to transfer the plot of land before erection of the building except with prior permission of the NOIDA. In case of transfer, 50 per cent of the unearned income was to be paid to the NOIDA. The assessee was entitled to mortgage the property and NOIDA had pre-emptive right to purchase the mortgaged property subject to deduction of a part of unearned increase. The lessee was entitled to*

all that lay below the land. It is clear from the agreement that t advantage obtained by the assessee was for a very long period. The assessee was to pay premium as well as rent. On this basis alone, the decision of Hon'ble Madras High Court in the case of Gemini Arts (P) Ltd.(supra) is distinguishable as in that case, it was held that the lump sum payment constituted rent paid for the whole period of lease. The decision in the case of Madras Industrial Investment Corporation Ltd. (supra) was in relation to the expenditure incurred for borrowing money for the purpose of business. The expenditure incurred for raising a loan is obviously revenue in nature, which does not confer any advantage of enduring nature on the assessee. Thus, the facts of this case are also distinguishable. Coming to the decision in the case of Empire Jute Co. Ltd. vs. CIT (1980) 124 ITR 1, relied upon by the learned counsel, the facts are that a time arrangement was entered into between members and the association to restrict the number of working hours per week. The members were entitled to transfer wholly or partly their allotted hours to any other member for a consideration. The question was whether the expenditure was of capital nature or revenue nature. The Hon'ble Court held that the allotment of loom hours was not any right conferred on any mill, but it was only a contractual limitation on the use of loom hours, so that the transferee mill could work its looms for longer period. The expenditure was incurred for removing the restriction with a view to increase its profits. No new asset was created and there was no expansion or addition to the profit making apparatus of the assessee. Thus, the expenditure was revenue in nature. The Court also held that there may be instances where the expenditure may be incurred for obtaining an advantage of enduring nature, but nonetheless the expenditure is on revenue account and this test may fail. It is not every advantage of enduring nature which leads to an advantage in the capital field. If the advantage is merely for facilitating the trading operation, the same is in the revenue field. We are of the view that the ratio of that decision is also not applicable to the facts of this case. There are many reasons for the same. First of all, in this case, the land was taken on a long-term lease for setting up the business of the assessee. It had nothing to do with the number of hours for which the assessee could work its office. The expenditure not only brought a benefit of enduring nature but also conferred proprietary rights on the assessee as the land could be transferred to a third party with the

payment of 50 per cent of unearned increase to NOIDA. The lan could also be mortgaged for raising loan. In such an eventuality the pre-emptive right to purchase was vested in NOIDA. The payment was not by way of rent as the rent was to be paid separately, which could also be increased. Thus, the payment of premium was separate and distinct from rent, and for the purpose of securing the land, a capital asset, for use of the assessee for a long period with certain proprietary right including the right over any asset found under the land. In the aforesaid case, the Hon'ble Court held that the test of enduring benefit may fail in some cases when advantage is only in the revenue field. Such is not the case here, as the advantage is also there in the capital field. We find that the facts are quite nearer to the facts in the case of Mukund Ltd. (supra), in which a premium was paid for taking lease of land for 99 years. The amount was not refundable as in this case and, therefore, the same could not be considered to be advance payment of rent. The Hon'ble Tribunal considered the case of Gemini Arts (P) Ltd. (supra), relied upon by the learned counsel, and distinguished the facts of that case. It also considered the decision in the case of Madras Industrial Investment Corporation Ltd. (supra) and came to the conclusion that the expenditure is capital in nature. Finally, coming to the decision in the case of Madras Auto Service (P) Ltd. (supra), the findings of the Hon'ble Supreme Court were that the expenditure was incurred with a view to secure the lease at a much lower rent. The rent, being a revenue expenditure, the expenditure was also in the nature of revenue expenditure. We find that in this case, payment of rent was over and above the payment of premium. The assessee also obtained certain ownership rights in land. Thus, it is held that the expenditure is revenue in nature.

4.1 Coming to the issue of consistency, it may be mentioned that the same is not applicable in every case, more so when the point of view of the Revenue was contrary to law in earlier year, although in favour of the assessee. In the case of Jyoti Apparels (supra), the jurisdictional High Court did not accept this argument as it was found contrary to its own decision in the case of Shri Ram Honda Power Equip & Ors. (2007) 207 CTR (Del) 689. Therefore, the principle of consistency cannot be taken to be of universal applicability and it may fail where the earlier decision taken by the Revenue was not correct in law.

4.2 In the result, these grounds are dismissed."

7. Mr. S. Ganesh, learned senior counsel for the assesse relied on t terms of the lease deed between NOIDA and the assesse. The agreement stipulated payment of premium of ₹.2,53,96,993/-. The assesse also had to pay annual lease rent @ 2.5 per cent of the total premium amount payable, which was subject to enhancement every 12 years; however that the rent could not exceed 50 per cent of the rent last fixed. The assesse was entitled to construct an office complex, but had limitations in respect of the right to lay water mains, drainage sewerage and electrical wire under or above the premises. It did not have title to all mines and minerals in and under the demised premises or any part thereof. The assesse was not entitled to transfer the plot of land before erection of building without prior permission of the NOIDA. In case of transfer, 50 per cent of the difference between the premium paid and market value thereof at the time of transfer was payable to NOIDA. The assesse could borrow monies by mortgaging the land. NOIDA had pre-emptive right to purchase the mortgaged property after deducting such percentage (as decided by it) as unearned increase. NOIDA was also entitled to determine the lease if any of the conditions stipulated in the lease, or the prevailing bye-laws, regulations, etc were violated. Counsel argued that the lease agreement stipulated payment of premium and rent. The premium was amortized over the period of lease. The amortized amount was claimed in past for over 15 years and consistently accepted by the assessing authorities. The learned counsel urged that the assesse did not acquire ownership of the land, as was evident from the nature of restrictions on transfer as well as the serious limitations on the right to enjoyment of property.

8. Mr. Ganesh relied on the decision in *Gemini Arts (P) Ltd. (supra)*. The assesse had leased the land for 48 years. A lump sum amount was paid at the outset, upfront. The terms of lease did not permit increase in rent during the period of lease. The assesse acquired the advantage (by the lump sum payment) of making annual payment during the period of lease. The Revenue had argued in that case that the assesse received an advantage of enduring nature by making the lump sum payment. The High Court relied on the decision of the Supreme Court in *Madras Auto Service (P) Ltd.* (supra), where it was held that to decide the nature of expenditure, one has to look at it from a commercial point of view. Learned counsel relied on the following observations of the Supreme Court:

> *"In order to decide whether this expenditure is revenue expenditure or capital expenditure, one has to look at the expenditure from a commercial point of view. What advantage did the assessee get by constructing a building which belonged to somebody else and spending money for such construction? The assessee got a long lease of a newly constructed building suitable to its own business at a very concessional rent. The expenditure, therefore, was made in order to secure a long lease of new and more suitable business premises at a lower rent. In other words, the assessee made substantial savings in monthly rent for a period of 39 years by expending these amounts. The saving in expenditure was saving in revenue expenditure in the form of rent. Whatever substitutes for revenue expenditure should normally be considered as revenue expenditure. Moreover, assessee in the present case did not get any capital asset by spending the said amounts. The assessee, therefore, could not have claimed any depreciation. Looking to the nature of the advantage which the assessee obtained in a commercial sense, the expenditure appears to be revenue expenditure."*

It was argued that the test for distinguishing between capital expenditure and revenue expenditure had been evolved in *Assam Bengal Cement Co. Ltd. v*

Commissioner of Income Tax, West Bengal [1955] 27 ITR 34(SC), decision noticed and applied in *Madras Auto* .

9. Counsel argued that the initial lease premium was in reality towards advance rent, and the amount payable as annual rent every year, having regard to the totality of circumstances, was a pittance. The said annual amount was highly depressed, because the advance lease amount had been paid up front, in 1989. Such expenditure therefore would have to be treated as revenue expenditure. If the payment is made in lump sum for the entire period of lease, the nature of the payment does not change and it remains revenue expenditure. Learned counsel also relied on the judgment reported as *Madras Industrial Investment Corporation Ltd. vs. CIT* (1997) 225 ITR 802. There the assesse raised debentures at discount which amounted to ₹3.00 lakhs. The assesse wrote off a proportionate amount (of the discount in its books of account) and claimed it as revenue expenditure. The court held that the liability to pay the discounted amount over and above the amount received was incurred for generating funds for the business of the assesse. This expenditure was revenue in nature. However, the benefit of the expenditure inured over the period of debentures. Therefore, proportionate write off constituted an admissible expenditure. It was lastly urged that the rule of consistency, which had been relied upon, based on the decision in *Radasaomi Satsang Beas v Commissioner of Income Tax* AIR 1992 SC 377 is applicable, and could not have been distinguished by the ITAT. Learned counsel also relied on the judgment of the Gujarat High Court, reported as *Dy. Commissioner of Income Tax v Sun Pharma* 2010 (329) ITR 479

10. Counsel for the revenue urged that there was no error of law in the findings of the ITAT. As far as reliance on the judgments in *Madras Auto*,

Gemini Arts (P) Ltd and Madras Industrial Investment Corporation Ltd l
the assesse are concerned, counsel submitted that the facts in each case are distinguishable. It was submitted that the terms of the lease in this case would show that interest in property (i.e the plot) had vested in the assesse for ninety years, and the restrictions on enjoyment were more in the nature of regulatory conditions to ensure orderly use of the land and premises, according to the layout plans, rather than interfering with the enjoyment of property. So long as the lessee/ assesse held the property, it had the right to put up constructions, and use it in accordance with the land use, i.e. industrial/commercial purpose. If it desired to transfer its rights, the conditions precedent were minimal, and in accord with state policies uniformly applied to all. The counsel for revenue submitted that the annual amounts sought to be amortized could not be permitted, as the lump sum lease premium secured an asset of enduring value. Counsel submitted that as regards the argument that the Tribunal should have followed the rule of consistency is concerned, the decision in *Radhasaomi Satsang* itself is authority that there is no *res judicata* in tax matters. The rule indicated in that case, would have extremely limited application, and cannot be relied on in this case. Counsel relied on the judgment of the Special Bench of the ITAT in *Jt. Commissioner of IT* v *Mukund Ltd* 2007 (291) ITR 249 (Mum) and urged that payment of lease premium creates an asset of enduring value, which cannot be amortized as the assesse seeks to do in this case.

11. In the earliest decision of the Supreme Court, i.e. *Assam Bengal Cement Co. Ltd (supra)* the proper test applicable in such cases, to determine whether an expenditure is capital or revenue in nature, was described as follows:

> *"If the expenditure is made for acquiring or bringing into existen 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."*

In *Commissioner of Income Tax v. Panbari Tea Co. Ltd*. (1965) 57 ITR 422 (SC), the Supreme Court had occasion to consider precisely a question of the kind sought to be urged in this case. The assesse had acquired, by a registered lease deed two tea estates with machinery and buildings for a period of 10 years. The lease was executed in consideration of a sum of ₹. 2,25,000 as and by way of premium and an annual rent of ₹. 54,000 to be paid by the lessee to the lessor. The premium was payable in ₹. 45,000 as one lump sum at the time of the execution of the lease deed and the balance of ₹. 1,80,000 in 16 half yearly installments of ₹. 11,250 on or before January 31 and July 31 of each year. The annual rent of ₹. 54,000 was payable both in monthly amounts of ₹.1,000 and the balance of ₹ 42,000 on or before December 31 of each year. The court noticed that leases created interest in immovable property, and that often the parties would, by devices, in the documents, seek to mask the real nature of the transaction:

> *"Under section 105 of the Transfer of Property Act, a lease of immovable property is a transfer of a right to enjoy the property made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms. The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent. The section, therefore, brings out the distinction between a price*

paid for a transfer of a right to enjoy the property and the rent to be paid periodically to the lessor. When the interest of the lessor is parted with for a price, the price paid is premium or salami. But the periodical payments made for the continuous enjoyment of the benefits under the lease are in the nature of rent. The former is a capital income and the latter a revenue receipt. There may be circumstances where the parties may camouflage the real nature of the transaction by using clever phraseology. In some cases, the so-called premium is in fact advance rent and in others rent is deferred price. It is not the form but the substance of the transaction that matters. The nomenclature used may not be decisive or conclusive but it helps the court, having regard to the other circumstances, to ascertain the intention of the parties.

Bearing the said principles in mind let us scrutinize the lease deed dated March 31, 1950. Under that document interest in two large tea estates comprising 320 acres and 305 acres respectively under tea, along with the bungalows, factory buildings, houses, godowns, cooly lines and other erections and structures, was parted by the lessor to the lessee for a period of 10 years; and during that period the lessee could enjoy the said tea estates in the manner prescribed in the document. Under the document, therefore, there was a transfer of substantive interest of the lessor in the estates to the lessee and a conferment of a right on the lessee to use the said estates by exploiting the same. Under clause 4 of the lease deed for the transfer of the right a premium of Rs. 2,25,000 had to be paid to the lessor and for using the estates the lessee had to pay an annual rent of Rs. 54,000. Both the premium and the rent were payable in installments in the manner provided in the document. The parties were businessmen presumably wellversed in the working of tea estates. They must be assumed to have known the difference between the two expressions "premium" and "rent"; and they had designedly used those two expressions to connote two different payments. The annual rent fixed was a considerable sum of Rs. 54,000 and the premium, when spread over 10 years, would work out to Rs. 22,500 a year. There is no reason, therefore, to assume that the parties camouflaged their real intention and fixed a part of the rent in the shape of premium. The mere fact that the premium was made payable in installments cannot obviously

be decisive of the question, for that might have been to accommoda the lessee."

12. The decision of the Supreme Court in *Madras Auto Service (supra)* in this Court's opinion, cannot be applied to the facts of this case. There, the court had noticed that the existing construction on the leased land was dilapidated and the assesse could not have carried on business on the old structure; in terms of the lease the existing structure was agreed to be demolished. The demolition was at the cost of the assesse; it put up a new construction at its own cost. Most importantly, under the lease deed, the lessee had no right, title and interest in the new construction. Thus, the amount paid towards lease, coupled with the benefits it enjoyed – which included depressed rent, - and the liability to not remove or demolish the new structure, put up by it were all taken into consideration to conclude that the amount paid at the commencement of the lease period was advance rent, which could be amortized.

13. In another decision of the Supreme Court, i.e. *Durga Das Khanna v CIT* 1969 (72) ITR 796, the assessee took premises on lease for 99 years. In terms of the deed, it could assign the lease (with consent of lessor) and similarly, alter the structure of the premises. The assesse entered into lease with three persons and building was demised for 30 years. The lessees agreed to pay ₹. 55,200 towards cost of erecting cinema and also pay monthly rent. The Income tax authorities treated the amount as assessee's income, since the lease was not permanent and the premium (salami) had been fixed as advance payment of rent and therefore, was treated as revenue receipt. The Supreme Court reversed the findings, holding that there was no material to show that the amount was paid by way of advance rent and that

decision of departmental authorities was based on conjectures a circumstances of case disclosed that the amount in question had all characteristics of capital payment and was not revenue. It was held that:

> *"5. It seems to us that the departmental authorities as well as the High Court were in error in treating the amount of Rs. 55,200/- as advance payment of rent. The lease by which the cinema house was demised did not contain any condition or stipulation from which it could be inferred that the aforesaid amount had been paid by way of advance rent. The transaction embodied in the indenture of lease was clearly business-like. The lessees wanted the building for running it as a cinema house and the lessor agreed to give it to them but apparently represented that he did not have enough money to complete it in accordance with' the suggestions and requirement of the lessees. The lessees agreed to pay him the aforesaid amount by way of a lump sum without making any provision for its adjustment towards the rent or re-payment by the lessor. The essential question, however, is whether on the terms of the lease and in the absence of any other material or evidence could it be held that the sum of Rs. 55,200/-was paid by way of advance rental ? The view which has been expressed by the Tribunal as also the High Court that the lease was for a comparatively short period of thirty years and that the aforesaid amount had to be spread over that period by way of rent in addition to a rental of Rs. 2,100/- per month cannot be sustained as no foundation was laid for it by any cogent evidence. The departmental authorities can well be said to have based their decision on mere conjectures as there was nothing whatsoever to substantiate the suggestion that the real rental value of the cinema house was in the region of Rs. 2,250/- per month and not Rs. 2,100/- which was the agreed rent.*
>
> *6. It can equally well be said that the payment of the amount in question to the appellant was in the nature of a premium (salami). In the words of Lord Greene M. R. in Henriksen **v**. Grafton Hotel Ltd. 24 T.C.453 "A payment of this character appears to me to fall into the same class as the payment of a premium of a lease, which is admittedly not deductible. In the case of such a premium it is nothing to the point to say that the parties if they had chosen, might have suppressed the premium and made a corresponding increase in the*

rent. No doubt they might have done so, but they did not do so fact." Fazl Ali J., (as he then was) in Commissioner of Income Tax, Bihar & Orissa v. Visweshwar Singh [1939] 7 ITR 536(Patna) referred to the distinction between a single payment made at the time of the settlement of the demised property and recurring payments made during the period of its enjoyment by the lessee. This distinction according to the learned Judge is clearly recognised in Section 105 of the Transfer of Property Act which defines both premium and rent. This is what was observed at page 545 :

> *'It is obvious that if the premium represents the whole or part of the price of the land it cannot be income. As pointed out by Sir George Lowndes in the Commissioner of Income Tax, Bengal v. Messrs. Shaw Wallace & Company, income in the Indian Income tax Act connotes a periodical monetary return, coming in with some sort of regularity or expected regularity from definite sources. The premium of salami which is paid once for all and is not recurring payment hardly satisfies this test. I concede that in some cases where the rent is ridiculously low and the premium abnormally high, it may be possible to argue that the premium includes advance rent....'*

It has not been even remotely suggested in the present case that the rent of Rs. 2100 per month was ridiculously low as compared with the amount of Rs. 55,200 paid in lump sum. It is true that the question whether premium is a capital or a revenue receipt cannot be decided as a pure question of law. Its decision necessarily depends upon the facts and circumstances of each case. It would not, however, be wrong to say that prima facie premium or salami is not income and it would be for the income tax authorities to show that facts exist which would make it a revenue receipt. There is another factor which is of substantial importance in the present case. According to the terms of the lease the payment of rent was to commence not from the date of the lease which was February 23, 1946, but with effect from June 1, 1946. It is also not disputed that the lessees entered into possession after the cinema house had been completed which was subsequent to the date of the lease. These facts coupled with the payment of a lump sum which was of a non-recurring nature showed that the amount in question had all the characteristics of a capital payment and was not revenue. This would be in accord with the principles laid down by this

Court in Member for the Board of Agricultural Income tax Sindhurani Chaudhurani and Ors. [1957] 32 ITR 169 (SC) which was a case of settlement of agricultural land but in which the principles governing the payment of premium or salami have been fully discussed.

7. For the reasons given above we hold that the question which was referred to the High Court ought to have been answered in the negative and in favour of the assessee. The appeal is accordingly allowed with costs in this Court…"

13. This court is of opinion that all the decisions cited by the assesse, apart from *Madras Auto* are fact dependent. The concerned High Courts were able to discern some elements from the conduct of parties, or surrounding circumstances, and conclude that the lease or premium amount paid, was advance rent, which could be amortized and treated as revenue payments over the succeeding years. Some advantage in the form of token, or highly depressed rent coupled with other benefit or liability conferred to the lessee was present in each of those cases. In *Sun Pharma*, for instance, the assessee, claimed deduction of ₹. 48,02,616,- payment to the Gujarat Industrial Development Corporation (GIDC). The assesse was able to show that the annual lease rent was extremely nominal, i.e., at ₹ 40/- and claimed it is as revenue expenditure. After considering the terms of the lease agreement, which stipulated the lease term as 99 years, the High Court affirmed the following findings of the Tribunal:

"It is not disputed that the land which has been leased out to the assessee did not cease to be belonging to GIDC, the lessor. The lease deed was registered because as per the Registration Act it is compulsorily registrable, but it has not changed the ownership. It is not also disputed that the lease rent is very nominal and by obtaining this land by lease the capital structure of the company has not been changed. . .

> *. . . Thus, by this payment the assets of the assessee-company had n been increased because the land continued to be the land of GIDC. The benefit the assessee got is only of an advantage of carrying on the business more profitably by paying nominal rent on the land. The issue can be considered in another angle. It cannot be disputed that if the land is not obtained by the assessee it would not be possible for it to carry on the business . . "*

Facially, the High Court's judgment discloses that the reasoning of the Tribunal was affirmed. The Court held that:

> *"By obtaining the land on lease the capital structure of the assessee did not undergo any change. The assessee only acquired a facility to carry on business profitably by paying nominal lease rent. In the light of the aforesaid findings of fact and the ratio of the apex court decisions, the court does not find this to be a case which warrants interference. Even the Assessing Officer has recorded that the payment was for use of land. There is no legal infirmity committed by the Tribunal."*

The above extracts bear out the previous observation of this Court that the reasoning in the judgments cited by the assesse were fact dependent, and contextual.

14. In the present case, what is apparent is that the lessee (assesse) paid a substantial amount (₹. 2.53 crores) in 1989 at the time of entering into the transaction. It was a precondition for securing possession; the amount was one-time consideration in terms of the lease condition. In addition, the lessee has to pay 2.5% of the said amount as annual rent, which is subject to increase periodically. No doubt, the assesse argues that the annual rent is depressed, and does not reflect the market rent. However, there is no material to support this submission. Nor is there any material to support the argument that the amount of ₹. 2.53 crore paid over 23 years ago did not

constitute the true and real consideration for creating an interest in t property. We also notice that the terms of the lease agreement stipulated that the registration and stamp duty and charges were borne by the lessee (assesse). In this background, the restrictions imposed on the lessee, i.e. enjoining it not to transfer for a particular period, and granting liberty to transfer the right subject to certain conditions, and other restrictions regarding land use, are consistent with the nature of interest created, i.e. lease hold rights. The court is also conscious of the fact that the tenure of the lease is quite substantial, and virtually creates ownership rights in favour of the lessee, who is at liberty to construct upon the plot. Exclusive possession was handed over to the assessee at the time of creation of the lease. Having regard to all these factors this Court is un-persuaded by the assesses' submission that the amount of ₹. 2.53 crores paid in 1989 had to be treated as advance rent, which could be amortized annually, in equal instalments, as is urged on its behalf.

15. It is now necessary to take up the submission that the Tribunal erred in departing from the "consistency" rule. This is based on the fact that for the period of about 15 years, the income tax authorities had accepted the assesse's submissions and permitted annual amortization of the initial lease consideration, as advance rent. The assesse here relied on the "consistency" rule enunciated in *Radhasaomi Satsang* (supra). The Supreme Court observed, in that case that*:*

> *"…where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.*

> *19. On these reasonings in the absence of any material change justifying the Revenue to take a different view of the matter-and if there was not change it was in support of the assesses-we do not think the question should have been reopened and contrary to what had been decided by the Commissioner of Income-Tax in the earlier proceedings, a different and contradictory stand should have been taken."*

This Court notices that there cannot be a wide application of the rule of consistency. In *Radhasaomi* itself, the Supreme Court acknowledged that there is no *res judicata*, as regards assessment orders, and assessments for one year may not bind the officer for the next year. This is consistent with the view of the Supreme Court that *"there is no such thing as res judicata in income-tax matters"* (*Visheshwara Smgh v. Commissioner of Income Tax* AIR 1961 SC 1062). Similarly, erroneous or mistaken views cannot fetter the authorities into repeating them, by application of a rule such as estoppel, for the reason that being an equitable principle, it has to yield to the mandate of law. A deeper reflection would show that blind adherence to the rule of consistency would lead to anomalous results, for the reason that it would engender the unequal application of laws, and direct the tax authorities to adopt varied interpretations, to suit individual assesses, subjective to their convenience, - a result at once debilitating and destructive of the rule of law. A previous Division Bench of this Court, in *Rohitasava Chand v Commissioner of Income Tax* 2008 (306) ITR 242(Del) had held that the rule of consistency cannot be of inflexible application.

16. In view of the above reasons, this court is of opinion that the reasoning and conclusions of the Tribunal do not call for interference. The

question of law framed is answered accordingly, against the appellant, and favour of the revenue. The appeals are dismissed, with no order as to costs.

S. RAVINDRA BHAT
(JUDGE)

July 12, 2012

R.V. EASWAR
(JUDGE)