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

\+ **ITA No. 364/2013**

Reserved on: 5th August, 2013
% Date of Decision: 22nd August, 2013

SURINDER MADAN ....Appellant
Through Mr. Kedar Nath Tripathy, Advocate.

Versus

ASISTANT COMMISSIONER OF INCOME TAX,
CIRCLE 22(1), NEW DELHI …Respondent
Through Mr. N.P. Sahni, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJIV KHANNA, J.

This appeal under Section 260A of the Income Tax Act 1961 (Act, for short) by the assessee, an individual, relates to assessment year 2007-08.

2. The appellant is engaged in export of garments and had incurred an expenditure of Rs.12,72,564/- in replacing the entire floor measuring about 9000 square feet with marble flooring in his factory and office. This amount represents purchase cost of marble and cost of laying/fixing the marble floor. The Assessing Officer disallowed the said amount holding that it was capital expenditure, since it was renewal or replacement of a profit yielding apparatus of the assessee.

Commissioner of Income Tax (Appeals) upheld the said additior observed that expenditure does not fall under Section 30(a)(ii) vide order dated 11th October, 2010. The Tribunal has upheld the view taken by the lower authorities by the impugned order dated 17th December, 2004.

3. In the appeal, by order dated 5th August, 2013, the following substantial question of law was framed:

> "Whether the Income Tax Appellate Tribunal was right in holding that the expenditure of Rs.12,72,564/- for laying/fixing marble flooring is not covered under 'Current Repairs' as defined in Section 30(a)(ii) of the Income Tax Act, 1961 read with the Explanation?"

4. The contention of the appellant is that the entire floor of the office and factory premises, located at Okhla Industrial area, was in bad shape and, therefore, the appellant had no choice but to replace the flooring. He has submitted that the factory was purchased five years back and, due to wear and tear, repair was necessary.

5. Section 30 of the Act reads as under:

> "**30.** In respect of rent, rates, taxes, repairs and insurance for premises, used for the purposes of the business or profession, the following deductions shall be allowed—
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> (*a*) where the premises are occupied by the assessee—
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> (*i*) as a tenant, the rent paid for such premises ; and further if he has undertaken to bear the cost of repairs to the premises, the amount paid on account of such repairs ;
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> (*ii*) otherwise than as a tenant, the amount paid by him on account of current repairs to the premises ;

(*b*) any sums paid on account of land revenue, local rates or municipal taxes ;

(*c*) the amount of any premium paid in respect of insurance against risk of damage or destruction of the premises.

[*Explanation.*—For the removal of doubts, it is hereby declared that the amount paid on account of the cost of repairs referred to in sub-clause (*i*), and the amount paid on account of current repairs referred to in sub-clause (*ii*), of clause (*a*), shall not include any expenditure in the nature of capital expenditure.]"

6. Explanation to the Section was inserted by Finance Act, 2003 w.e.f. 1st April, 2004 and is applicable to the year under assessment. In present factual position, Section 30(a)(i) is not applicable as it relates to amount spent or paid by a tenant on account of repairs. The appellant is not a tenant. Clause (ii) to Section 30(a) applies to an occupant who is not a tenant i.e. the appellant herein and stipulates that amount spent on current repairs would be allowed as deduction but the explanation states that current repairs should not include expenditure of capital nature. It is, therefore, clear that twin conditions have to be satisfied. Firstly, amount spent should be in nature of current repairs and secondly it should not be in nature of capital expenditure. When twin conditions are satisfied, deduction under Section 30(a)(ii) can be allowed.

7. ***In CIT vs. Saravana Spinning Mills (P) Ltd.*** (2007) 293 ITR 201 (SC), Supreme Court examined the expression current repairs and observed that it denotes repairs which involves renewal. However, the

word ‘repairs’ is not to be read in isolation, since the precise term in the section is “current repairs”. The word repairs means to preserve and maintain an asset i.e. in the present case the premises owned by the assessee. All repairs are not to be treated as current repairs. The expression “current repairs” does not mean and include repairs which result in acquisition a new asset or to obtain a new advantage.

8. Learned counsel for the appellant has submitted that by installing or fixing marble flooring no new asset has come into existence. We feel that learned counsel is not appreciating the context in which the said words explained the principle or ratio. The Supreme Court in the said case was examining Section 31(a)(i) which relates to repair of machinery, plant and furniture. In respect of machinery, plant and furniture, it is of utmost relevance whether or not a new asset comes into existence. Here we are not concerned with machinery, plant or furniture which require constant replacement of old parts with new ones on account of wear and tears, stress and strains etc. Replacement of parts of a machinery normally could qualify for the revenue deduction under the head ‘current repairs’ but, as observed in ***Sarvana Spinning Mills Pvt. Ltd.*** (supra), replacement generally would not fall under the definition “current repairs”, though replacement of old machinery, in use for over 40-50 years or where old parts are not available in the market,

may fall under the expression 'current repairs'. Whether expenc qualifies as "current repairs" depends upon several factors like nature of expenditure, nature of business activity, the asset subject matter of "repair" etc.

9. The Supreme Court in ***CIT vs. Sri Mangayakarasi Mills P. Ltd.*** (2009) 315 ITR 114 (SC), on the question whether the expenditure is 'current repairs' had expounded that the following tests which should be taken into consideration:

> "(i) It is a case of maintaining and preserving the machine.
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> (ii) It is not a case of replacement.
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> (iii) It does not create any new asset.
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> (iv) It only restores the functional efficiency by removing the defect.
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> (v) It does not increase the capacity of production. It only prevents the loss.
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> (vi) It is not an independent unit and cannot be compared with ring frames of a textile mill. It only performed the functions of machining of gears produced in the preceding line of manufacture by performing earlier functions.
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> (vii) Quantum of repairs is not the relevant criterion determinative of the nature of expenditure as to whether it is current repairs or not.
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> (viii) Enduring benefit is no longer a criterion. After current repairs, machine becomes usable for or number of yeaRs. That does not mean that the expenditure on current repairs is in the capital field.
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> (ix) Replacement of worn out parts in the process of current repairs is not the replacement of the plant and machinery itself."

It was further held that:-

> "Moving on to the issue of `current repairs under section 31 of the Act, the decision of this Court in CIT v. Saravana Spinning Mills (P) Ltd. (supra) is again relevant. This court has laid down that in order to determine whether a particular expenditure amounts to `current repairs the test is "whether the expenditure is incurred to `preserve and maintain an already existing asset and not to bring a new asset into existence or to obtain a new advantage. For `current repairs determination, whether expenditure is revenue or capital is not the proper test." It is our opinion that the entire textile mill machinery cannot be regarded as a single asset, replacement of parts of which can be considered to be for mere purpose of `preserving or maintaining this asset. All machines put together constitute the production process and each separate machine is an independent entity. Replacement of such an old machine with a new one would constitute the bringing into existence of a new asset in place of the old one and not repair of the old and existing machine. Also, a new asset in a textile mill is not only for temporary use. Rather it gives the purchaser an enduring benefit of better and more efficient production over a period of time. Thus, replacement of assets as in the instant case cannot amount to `current repairs'. The decision in Saravana Mills (supra) case clearly mentions that replacement of a derelict ring frame by a new one does not amount to `current repairs. Further in Ballimal Naval Kishore (supra) this Court has held that a new asset or new/different advantage cannot amount to `current repairs, which has been subsequently approved in the Saravana Mills (supra) case. For these reasons, the expenditure made by the assessee cannot be allowed as a deduction under section 31 of the Act. The judgment of this Court in the Saravana Mills (supra) case mentions two exceptions in which replacement could amount to current repairs, namely:
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> Where old parts are not available in the market (as seen in the case of CIT v. Mahalakshmi Textile Mills Ltd., AIR 1968 SC 101, or
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> Where old parts have worked for 50-60 years."

10. On the question of current repairs, it would be appropriate to refer to an earlier decision of the Supreme Court in ***Ballimal Naval Kishore &***

Anr. vs. CIT (1997) 224 ITR 414 (SC). In this case referring t decision of the Bombay High Court in ***New Shorrock Spinning & Manufacturing Co. Ltd. vs. CIT*** (1956) 130 ITR 338 (Bom.), it was observed as under:

> "2. The expression used in Section 10(2)(v) is "current repairs" and not mere "repairs". The same expression occurs in Section 30(a)(ii) and in Section 31(i) of the Income-tax Act, 1961. The question is what is the meaning of the expression in the context of Section 10(2). In New Shorrock Spinning and Manufacturing Company Ltd. (supra), speaking for the Division Bench, observed that the expression "current repairs" means expenditure on buildings, machinery, plant or furniture which is not for the purpose of renewal or restoration but which is only for the purpose of preserving or maintaining an already existing asset and which does not bring a new asset into existence or does not give to the assessee a new or different advantage. The learned Chief Justice observed that they are such repairs as are attended to as and when need arises and that the question when a building, machinery etc. requires repairs and when the need arises must be decided not by any academic or theoretical test but by the test of commercial expediency. The learned Chief Justice observed: The simple test that must be constantly borne in mind is that as a result of the expenditure which is claimed as an expenditure or repairs what is really being done is to preserve and maintain an already existing asset. The object of the expenditure is not to bring a new asset into existence, nor is its object the obtaining of a new or fresh advantage. This can be the only definition of 'repairs' because it is only by reason of this definition of repairs that the expenditure is a revenue expenditure. If the amount spent was for the purpose of bringing into existence a new asset or obtaining a new advantage, then obviously such an expenditure would not be an expenditure of a revenue nature but it would be a capital expenditure, and it is clear that the deduction which, the Legislature has permitted under Section 10(2)(v) is a deduction where the expenditure is a revenue expenditure and not a capital expenditure.

> In taking the above view, the Bombay High Court dissented from the view taken by the Allahabad High Court in Ramkrishan Sunderlal v. Comm. of Income-tax, U.P. [1951]19 ITR 324(All) : TC 15R 319 : 17R, 1422, where it was held that the expression "current repairs" in Section 10(2)(v) was restricted to petty repairs only which are carried out periodically. The Learned Judge agreed with the view taken by the Patna High Court in Commr. of Income-tax v. Darbhanga Sugar Co. Ltd [1956] 29 ITR 21(Pat) : TC 15R 323 and by the Madras High Court in Commr. of Income-tax v. Sri Rama Sugar Mills Ltd. [1952] 21 ITR191(Mad) : TC 16R 1068.
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> In Liberty Cinema v. Commissioner of Income-tax, Calcutta [1964] 52 ITR153 (Cal): TC 16R 157, P.B. Mukharji, J., speaking for a Division Bench of the Calcutta High Court, held that an expenditure incurred with a view to bring into existence a new asset or an advantage of enduring nature cannot qualify for deduction under Section 10(2)(v).
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> In our opinion the test involved by Chagla, C.J. in New Shorrock Spinning & Manufacturing Company Limited (supra) is the most appropriate one having regard to the context in which the said expression occurs. It has also been followed by a majority of the High Courts in India. We respectfully accept and adopt the test.
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> Applying the aforesaid test, if we look at the facts of this case, it will be evident that what the assessee did was not mere repairs but a total renovation of the theatre. New machinery, new furniture, new sanitary fittings and new electrical wiring were installed besides extensively repairing the structure of the building. By no stretch of imagination, can it be said that the said repairs qualify as "current repairs" within the meaning of Section 10(2)(v). It was a case of total renovation and has rightly been held by the High Court to be capital in nature. Indeed, the finding of the High Court is that as against the sum of Rs. 17,000/- for which the assessee had purchased the factory in 1937, the expenditure incurred in the relevant accounting year was in the region of Rs. 1,20,000/-."

11. The said observations are most appropriate when we deal with the question of 'current repairs' carried out in a building. We have to

examine whether or not the expenditure are for the purpose of prese g or maintaining the already existing assets i.e. the building and do not bring into existence a new asset or give an assessee new or a different advantage. The expenditure should be in the nature of preserving or maintaining the existing asset and not for bringing a new asset into existence or obtaining a new advantage.

12. This apart, in terms of the legislative edict, w.e.f 1st April, 2004, as noticed above, expenditure of capital in nature has to be excluded and cannot be treated as expenditure incurred on 'current repairs'. In ***Empire Jute co. Ltd. vs. CIT*** [1980] 124 ITR 1 (SC), it has been observed as under:-

> "There may be cases where expenditure, even if incurred for obtaining advantage of enduring benefit, may, nonetheless, be on revenue account and the test of enduring benefit may break down. It is not every advantage of enduring nature acquired by the assessee that brings the cases 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 consist merely in facilitating the assessees trading operations or enabling the management and conduct of the assessees business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future."

13. The following principles were formulated in ***Empire Jute Co. Ltd.'s case (supra)*** :

> "(i) It is not a universally true proposition that what may be a capital receipt in the hands of the payee must necessarily be capital expenditure in relation to the payer. The fact that a certain payment constitutes income or capital receipt in the hands of the recipient is not material in determining whether the payment is revenue or capital disbursement qua the payer.
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> (ii) There may be cases where expenditure, even if incurred for obtaining an 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 assessee 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 assessees trading operations or enabling the management and conduct of the assessees business to be carried on more efficiently or more profitably while 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.
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> (iii) What is an outgoing of capital and what is an outgoing on account of revenue depends on what the expenditure is calculated to effect from a practical and business point of view rather than upon the juristic classification of the legal rights, if any, secured, employed or exhausted in the process. The question must be viewed in the larger context of business necessity or expediency."

14. When we apply the aforesaid tests of "current repairs" and capital expenditure to the present case, we are of the firm view that the expenditure in question was a capital expenditure and even otherwise cannot be classified as 'current repairs'. The earlier flooring was removed and completely replaced by marble flooring in an area of 9000

sq. ft. consisting of basement, ground floor, first and second floor. effect thereof was that an entirely new flooring came into existence. It was not mere 'repair' or 'current repair', as is understood in commercial sense or in terms of the tests specified above. The said expenditure was not necessary for maintaining or preserving the building but was done with the view to make distinct improvement and upgrade the appearance and ambience. The expenditure incurred would have entailed specific benefits and a new advantage. The word 'repair' involves 'renewal' of existing or replacement of a part or a supporting part and not complete replacement or reconstruction. This distinction was drawn by Calcutta High Court in ***Humayun Properties Ltd. vs. Commissioner of Income-tax*** [1962] 44 ITR 73, wherein the following passage was quoted from the speech of Lord Justice Buckley in the case of Lurcott v. Wakely and Wheeler:

> "Repair and renew are not words expressive of a clear contrast. Repair always involves renewal; renewal of a part; of a subordinate part. A skylight leaks; repair is effected by hacking out the putties, putting in new ones, and renewing the paint. A roof falls out of repair; the necessary work is to replace the decayed timbers by sound wood; to substitute sound tiles or slates for those which are cracked, broken, or are missing; to make good the flashings, and the light. Part of a garden wall tumbles down; repair is effected by building it up again with new mortar, and, so far as necessary, new bricks or stone. Repair is restoration by renewal or replacement of subsidiary parts of a whole. Renewal, as distinguished from repair, is reconstruction of the entirety, meaning by the entirety, not necessarily the whole but

> substantially the whole subject-matter under discussion. I agree that if repair of the whole subject-matter has become impossible a covenant to repair does not carry an obligation to renew or replace."

15. Thus, if a section or part of floor cracks and repair is effected, it may qualify for current repairs. Such repairs may be required and carried on the entire building to bring the original flooring into original shape or even marginally improve it. However, it would not be "current repairs" if in place of old flooring a new flooring of different type is laid in the entire structure, entailing a new and distinct advantage. Therefore, renewal and installation of entire flooring of 9000 sq. ft. in the entire building with new flooring is not covered under the expression 'current repairs'. It is a case of complete replacement and change.

16. In ***Commissioner of Income Tax vs. Modi Industries Ltd.*** (2011) 339 ITR 467 (Del.), old cell room was completely demolished and new cell room was constructed, it was held that the expenditure was "capital" in nature. In the said case there is an observation that relaying of worn out flooring of print shop may amount to "current repairs" as was observed in ***CIT vs. Delhi Press Samachar Patra (P) Ltd.*** (2010) 322 ITR 590 (Del.). But the said observations were in context of the facts of the said case, where repairs were made or dilapidated columns, beams, roofs etc. to make them into original position, indicating that repairs which should have been undertaken earlier were delayed and

made subsequently in one go/time. However, the expenditure w preserve and maintain the original structure, which had not undergone a change. In the present case, non-marble flooring was ripped apart and replaced in an area covering 9000 square feet with new type of flooring i.e. marble flooring. The new flooring was of different type and a distinct advantage of permanent character occurred. The petitioner has claimed and stated that the new flooring was attractive and had a distinctive advantage over the earlier flooring. It was done because the factory/office was frequented by foreign buyers. It was not a mere restoration.

17. In case the said expenditure has been incurred at the initial stage, when the assessee had purchased the building or at the time of construction in case the assessee was constructing the building, it would have undoubtedly been capital expenditure. The assessee has in fact averred that enduring benefit has accrued to him as it would help in long term since the foreign clients visit his factory/ office. A new asset of enduring benefit in form of completely new flooring of marble, different and distinct from the earlier flooring, has come into existence. We are aware that test of enduring benefits has its limitations but the said test is not redundant.

18. Caution and caveat must be expressly added. We should n understood and it has not been held that refurbishing or change of flooring in all cases cannot be classified and treated as "current repairs" or is a capital expense. There can be cases of change of flooring or tiles, which qualifies for deduction under Section 30. Replacing old mosaic flooring/wall cover with marble and tiles may in fact result in maintaining and preserving the existing bathroom or structure as mosaic is today practically impossible to refurbish and not viable. Similarly, repair or change of leaking water pipes etc. requires breakage of existing flooring/tiles etc. Each case has to be examined on its own facts and there may be different or contrary final verdicts, but the tests to be applied remain the same.

19. In view of the aforesaid, we answer the question of law in affirmative i.e. uphold the view taken by the Tribunal. The question of law is decided in favour of the Revenue and against the appellant. The appeal is dismissed.

(SANJIV KHANNA)
JUDGE

(SANJEEV SACHDEVA)
JUDGE

AUGUST 22nd, 2013
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