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

\+ **ITA 676/2005**

Reserved on: 17th January, 2018

% **Date of Decision**:15th February, 2018

M/S ABHIPRA CAPITAL LTD. ..... Appellant
Through Dr. Rakesh Gupta, Mr. Ashwani Taneja and Mr. Rohit Kumar Gupta, Advocates.

versus

DEPUTY COMMISSIONER OF INCOME TAX (INVESTIGATION) ..... Respondent
Through Ms. Lakshmi, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J.

The present appeal by M/s Abhipra Capital Ltd. under Section 260A of the Income Tax Act, 1961 (Act, for short) relates to assessment year 1996-97 and arises from the order of the Income Tax Appellate Tribunal ('Tribunal' for short) dated 28th January, 2005 in ITA No.5352/Del/1998.

2. The appeal was admitted for hearing vide order dated 7th March, 2006, on the following substantial question of law:-

> "Whether in the facts and circumstances of the case, the ITAT was correct in law in holding that members' fee of Rs.5 Lacs paid by the appellant to the National

Stock Exchange was in the nature of a capital expenditure?"

3. The appellant-assessee, a company, was incorporated on 28th September, 1994 with the main objective to deal in shares in stock markets, merchant banking and other financial services.

4. During the period relevant to the assessment year 1996-97, the appellant had acquired membership of the National Stock Exchange, and as per the rules had paid an amount of Rs.5,00,000/- to the said Exchange as a non-adjustable deposit for acquisition of membership. In addition to the said payment, the appellant had also paid amounts towards interest free security deposit, annual subscription for the first year and as margin deposit.

5. The substantial question of law which arises for consideration, is whether the said payment of Rs. 5,00,000/- was capital or revenue expenditure in the hands of the appellant-assessee.

6. The appellant-assessee had treated the payment of Rs.5,00,000/- as revenue expenditure. However, this was not accepted by the Assessing Officer, who held that the payment was non-recurring in nature and had given rise to an enduring benefit, as it was the initial payment for membership of National Stock Exchange, without which the applicant could not be given membership. Payment was to enable the appellant to acquire membership, and since the acquisition gave rise to an enduring benefit, it would qualify as capital expenditure. However, the Assessing Officer held that the aforesaid expenditure could be allowed as a deduction equal to 1/10th of the total expenditure, in 10 equal annual installments, and accordingly, Rs.50,000/- was allowed as deduction and the balance amount of Rs.4, 50,000/- was disallowed and added to the computation of income.

7. The Commissioner of Income Tax (Appeals), accepted the appellant's contention that the aforesaid expenditure was in the nature of revenue expenditure. He referred to circulars issued by the Central Board of Direct Taxes (Board) on payments/deposits made under the Own Your Telephone (OYT) scheme. Appellant company, he observed, had completed first year of business in the year ending 31st March, 1995, i.e. assessment year 1995-96, and accordingly the year in question, i.e. 1996-97, was the second year of business. Expenditure, it was held, was for expansion of business in the same line. Rs. 5,00,000/- was like subscription fee paid to the National Stock Exchange, which should not be treated as capital expenditure.

8. The Tribunal, however, reversed the said finding and restored the order passed by the Assessing Officer, after referring to earlier decisions. The expenditure, it was observed, was for addition to the capital assets held by the assessee. It was incurred to acquire full right to trade as a member, as without acquiring membership of the National Stock Exchange, the assessee could not have acted as a broker.

9. Counsel for the appellant had drawn our attention to different instructions/circulars issued by the Board on the question of deductibility of security deposits with the postal department under OYT schemes or other schemes to state that the said deposits have been treated as revenue expenditure under Section 37 of the Act. We do not perceive and believe that the said circulars postulate and hold that all cases where security or other deposit is made, they have to be treated as revenue expenditure and not capital in nature. Similarly, the circular to treat the membership subscription paid to the Indian Institute of Packaging as revenue in nature, would not imply and mean that all subscriptions and membership fees have

to be treated as revenue, not withstanding nature of benefit and other aspects. The circular in question states that the members of the Institute were already in manufacturing and trading business and would derive continuous benefits from the activities of the Institute, and therefore, expenditure by way of membership fee was wholly and exclusively for the purpose of business of the members.

10. Supreme Court in ***Techno Shares and Stocks Limited Vs. Commissioner of Income Tax IV***, (2010) 327 ITR 323 (SC) has held that membership of a stock exchange was a business or commercial right conferred by the rules of the exchange. The membership right could be said to be owned by the member and used for the purpose of business. It was similar to a licence or franchise and was to be treated as an intangible asset. Assessee was entitled to claim depreciation on the same being the owner and as the said asset was used for the purpose of business. Counsel for the appellant has submitted that this decision did not examine the issue whether expenditure incurred to acquire the membership was capital or revenue expenditure. We would only observe that the Supreme Court in the said case had examined the nature and character of membership card, which enables an assessee to trade on the floor or as a broker of the stock exchange. It was held that this membership was a business or a commercial right in the nature of licence under Section 32(1)(ii) of the Act. It was a right or a licence owned by the assessee and was used by him as an asset, i.e., the capital asset.

11. It is an accepted and admitted position that Rs.5,00,000/- was paid by the appellant-assessee to acquire membership of the National Stock Exchange. This was a fixed amount, which was paid at one time and is not

an annual subscription fee. Without payment of the said amount, the appellant-assessee could not have acquired membership of the National Stock Exchange. On acquisition of membership, the appellant acquired right to trade in shares and act as a broker. Deposit of this amount was *sine-qua-non* for issue of and entitlement to the broker's card. With the said card and having acquired membership, the assessee could enjoy benefits and privileges of a member which would enable it to carry on trade in said capacity.

12. Section 2 (14) of the Act defines "capital asset" as property of any kind held by the assessee, whether or not connected with the business or profession, but does not include any stock-in-trade, consumable stores or raw materials held for the purpose of business or profession. It is not the case of the appellant-assessee that the membership deposit was stock-in-trade, consumable or raw material for the purchase of business. The membership card was an asset or a property which the petitioner had acquired on non-refundable payment of Rs.5,00,000/-. It was on acquisition of the said card/membership that the appellant could carry on business as a stock-broker, subject to other compliances including annual fee payment.

13. The appellant submits that the card/membership was non-transferable. Respondent-revenue, on the other hand, submits that the card/membership could be transferred as was held by the Supreme Court in ***Premium Global Securities Pvt. Ltd. & Ors. Vs. Securities & Exchange Board of India & Anr***. (2015) 16 SCC 83. Right to transfer in the present facts, according to us, would not be the determinative test, for there can be capital assets on which there is restriction on transfer. Expenditure to acquire a capital asset would not become a revenue expense or consumable material because there

are restrictions or strict stipulations on when transfer of capital asset can be made. There cannot be any doubt that one-time and lump-sum payment made to acquire membership right by a company or person engaged in business of trading in stocks, brings into existence an asset or an advantage of enduring nature. Membership card is not an addition to the stock-in-trade or consumable stock. This expenditure enabled the assessee to acquire an asset to earn income in that year and in future. It was a payment by the appellant assessee to acquire a source which enabled the appellant-assessee to do business. Membership brought into existence an advantage for all times. In the context in question, Rs 5,00,000/- represents money paid to procure a permanent right in the form of a license to carry on trade. This expenditure would not be revenue but capital in nature.

14. Even if it is accepted that the appellant was earlier a sub-broker it would not make any difference. Business as a broker is different from that of a sub-broker. The payment made was an expense incurred to acquire a new right and source of earning. By becoming a broker, the appellant had acquired a different right and new asset with acquisition of the membership ticket. This cannot be treated as mere "improvement" of the earlier business. Business can also be extended and expanded by making additional capital investment.

15. This is not a case of upgradation of existing and in use "technical" know-how as was the position in ***Commissioner of Income Tax, Bombay Vs. Ciba of India Ltd.*** (1968) 69 ITR 692 (SC). In the said case, the license, which was for a limited period, had given access to the assessee to better technical know-how in running operations. The assessee had not acquired ownership rights in the technical know-how and thus, acquisition

of a fresh asset or advantage of enduring nature was missing. Technical knowledge was not acquired by the assessee absolutely and for all times.

16. In ***Honda Siel Cars India Limited Vs. Commissioner of Income Tax, Ghaziabad***, (2017) 8 SCC 170, Supreme Court upheld the decision of the Allahabad High Court that consideration/lump-sum fee payable in five yearly equal instalments from third year from commencement of commercial production, was capital expenditure. This expense, it was observed, was for bringing business into existence and then for running and sustaining it, for there was no existing business. Further, the Technical Collaboration Agreement was not only for transfer of technical information but for complete assistance, actual, factual and on the spot, for establishment of plant and machinery and continuous assistance at every stage. It was, therefore, expenditure to bring business into existence. It was observed that the aim and object of the expenditure determines character of the expenditure.

17. ***Alembic Chemical Works Co. Ltd. Vs. Commissioner of Income Tax, Gujarat*** (1989) 3 SCC 329, elucidates and affirms that a "once and for all payment", when it brings into existence an asset or advantage of enduring benefit, in the absence of special circumstances leading to an opposite conclusion, is capital expenditure and not attributable to revenue. This is the primary and basic test. The appellant-assessee has not been able to show and establish any special circumstances for an opposite conclusion in the present matter. Further, the expenditure made was for acquiring and bringing into existence an asset or advantage of enduring benefit and not for running business to produce more profits. The question raised, it was

observed, should be answered by adopting common sense and not legalistic and theoretical approach.

18. In the context of the present case, "enduring benefit" test and "once and for all" payment test would be the most appropriate and proper tests to apply, though we would accept that there are exceptions to the said principles and these tests might break down in a given case. The expenditure incurred was for acquisition of property and rights of a permanent character. The enduring advantage was in the capital field.

19. In view of the aforesaid discussion, we answer the substantial question of law against the appellant-assessee and in favour of the Revenue. The appeal is disposed of, affirming the decision of the Tribunal on the substantial question of law. In the facts of the present case there would be no order as to costs.

(SANJIV KHANNA)
JUDGE

(CHANDER SHEKHAR)
JUDGE

FEBRUARY 15, 2018
NA/VKR