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

\+ **INCOME TAX APPEAL No. 132/2009**

Date of decision: 10th January, 2019

M/S ICS SYSTEMS PRIVATE LIMITED ..... Appellant
Through Mr. A.P. Sinha, Advocate.

versus

COMMISSIONER OF INCOME TAX ..... Respondent

Through Mr. Ashok K. Manchanda, Sr. Standing Counsel for the Revenue.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

SANJIV KHANNA, J. (ORAL):

M/s ICS Systems Private Limited has filed the present appeal under Section 260A of the Income Tax Act, 1961 (Act, for short), which relates to Assessment Year 2001-02 and arises from the order dated 30th March, 2007 passed by the Income Tax Appellate Tribunal (Tribunal, for short).

2. The appeal was admitted for hearing on the following substantial question of law:-

> "Whether on the facts and in the circumstances of the case the Income Tax Appellate Tribunal was justified in holding that the loss of money of the appellant caused by forfeiture of advance/deposit towards proposed purchase

> of plot, unilaterally deducted by HSIDC is a capital loss and not deductible as a Revenue loss incurred in the course of the assessee's running business as no capital asset was acquired or transferred by the Appellant."

3. Facts are not in dispute and are only required to be noted in brief.

4. The appellant-assessee is a company and was carrying on manufacturing activities from its factory at A-13, Industrial Area, Phase-I, Mayapuri, New Delhi.

5. For the Assessment Year 2001-02, the appellant-assessee had filed return on 29th October, 2001 declaring income of Rs.10,81,790/-. This return was taken up for limited scrutiny vide issue of notice under Section 143(2) of the Act on the question whether Rs.3,93,327/- deducted by Haryana State Industrial Development Corporation (HSIDC) on surrender of industrial plot can be treated as revenue expenditure as was claimed in the return.

6. The appellant-assessee had applied for allotment of an industrial plot in Phase-IV, Gurgaon and had deposited Rs.10.87 lacs with HSIDC being 25% of the cost of the plot admeasuring 500 square metres. A plot admeasuring 452.10 square metres was allotted to the appellant, which plot, the appellant did not accept as it was not admeasuring 500 square metres. Appellant; had then asked for a refund of Rs.10.87 lacs. HSIDC had

refunded Rs.6,94,173/- and the balance amount of Rs.3,93,327/- was forfeited.

7. The Assessing Officer held that the amount deposited with HSIDC was for acquiring a capital asset, and hence the amount deducted by HSIDC on surrender of the industrial plot would be capital loss and not revenue expenditure. Addition of Rs.3,93,327/- was made by disallowing the claim as revenue expenditure.

8. The Commissioner of Income Tax (Appeals), however, allowed the appeal preferred by the appellant-assessee, primarily relying upon decision of the Rajasthan High Court in ***Commissioner of Income Tax versus Anjani Kumar Company Limited,*** (2003) 259 ITR 114 (Raj.), observing that deposit of money while bidding for the industrial plot did not partake character of a capital asset and, therefore, forfeiture of earnest money cannot be treated as a capital loss. The appellant-assessee had neither acquired any capital asset nor the assessee had obtained any benefit of enduring nature. Forfeiture of earnest money was incidental to the business of the appellant-assessee and hence in the nature of a revenue loss.

9. However, the appeal preferred by the Revenue has been accepted by the impugned order passed by the Tribunal, which holds that the expenditure/payment made was for acquiring a capital asset and, therefore,

the forfeiture of Rs.3,93,327/- would be a capital loss, as the appellant's attempt to acquire a new capital asset had failed. Reliance was placed on decision of the Allahabad High Court in ***Commissioner of Income Tax versus Bazpur Cooperative Sugar Factory Limited***, (1983) 142 ITR 1 and Bombay High Court in ***Fancy Corporation Limited versus Commissioner of Income Tax***, (1986) 162 ITR 827 (Bom.). Cases relied upon by the appellant-assessee were distinguished on the ground that in these cases expenditure had been incurred for obtaining a 'contract' thereby expanding the existing business by purchase of raw material etc. and hence the expenditure/loss would be revenue loss/expenditure. Specifically referring to ***Anjani Kumar Company Limited*** (supra), the Tribunal preferred to follow decisions of the Allahabad High Court and Bombay High Court in ***Bazpur Cooperative Sugar Factory Limited*** (supra) and ***Fancy Corporation Limited*** (supra).

10. The principle as laid down in ***Empire Jute Company Limited versus Commissioner of Income Tax,*** (1980) 4 SCC 25 reads as under:-

> "**11.** When dealing with cases of this kind where the question is whether expenditure incurred by an assessee is capital or revenue expenditure, it is necessary to bear in mind what Dixon, J., said in *Hallstrom's Property Ltd.* v. *Federal Commissioner of Taxation* [72 CLR 634] :
>
> "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 is the process."

The question must be viewed in the larger context of business necessity or expediency. If the outgoing expenditure is so related to the carrying on or the conduct of the business that it may be regarded as an integral part of the profit-earning process and not for acquisition of an asset or a right of a permanent character, the possession of which is a condition of the carrying on of the business, the expenditure may be regarded as revenue expenditure. See *Bombay Steam Navigation Co.* (*1953*) *Pvt. Ltd.* v. *CIT* [AIR 1965 SC 1201 : (1965) 1 SCR 770 : (1965) 56 ITR 52] . The same test was formulated by Lord Clyde in *Robert Addie and Son's Collieries Ltd.* v. *I. R* [8 TC 671 : 1924 SC 231 : 1924 SLT 346] in these words:

> "Is it part of the company's working expenses, is it expenditure laid out as part of the process of profit-earning? — or, on the other hand, is it a capital outlay, is it expenditure necessary for the acquisition of property or of rights of a permanent character, the possession of which is a condition of carrying on its trade at all?"

It is clear from the above discussion that the payment made by the assessee for purchase of loom hours was expenditure laid out as part of the process of profit-earning. It was, to use Lord Soumnar's words, an outlay of a business "in order to carry it on and to earn a profit out of this expense as an expense of carrying it on". It was part of the cost of operating the profit-earning apparatus and was clearly in the nature of revenue expenditure."

11. On the application of the said principle, forfeiture of Rs.3,93,327/- would be a capital expenditure or loss as it was a loss incurred not for the

purpose of, or as an integral part of the profit-earning process, but for acquisition of an asset or a right of permanent character.

12. The principle was also explained in ***Travancore Rubber and Tea Company Limited versus Commissioner of Income Tax,Trivandrum,*** **[**2000] 243 ITR 158 (SC), after referring to the rule formulated by Diplock, L.J. in ***London and Thames Haven Oil Wharves Limited versus Attwooll (Inspector of Taxes),*** **[**1968] 70 ITR 460 (CA) in the following words:-

> "Where, pursuant to a legal right, a trader receives from another person compensation for the trader's failure to receive a sum of money which, if it had been received, would have been credited to the amount of profits (if any) arising in any year from the trade carried on by him at the time when the compensation is so received, the compensation is to be treated for income tax purposes in the same way as that sum of money would have been treated if it had been received, instead of the compensation."

13. Following the above dictum in ***Commissioner of Income Tax versus State Trading Corporation of India Limited,*** [2001] 247 ITR 114 it was held that amounts received by State Trading Corporation on forfeiture of security deposits, as the buyers had failed to pay the price of car(s) or had asked for refund of the price paid, would be revenue income and not capital income. The reason was that the cars in question were stock-in-trade and not a capital asset.

14. In ***State Trading Corporation of India Limited*** (supra), reference was made to the decision of the Supreme Court in ***Oberoi Hotels Private Limited versus Commissioner of Income Tax,*** [1999] 236 ITR 903 (SC) wherein it has been held that the amount received by the assessee for giving up its right to purchase and/or to operate the property or for getting it on lease, before it was transferred and let out to other persons, was in the nature of a consideration. It would not be for settlement of rights under a trading contract. The injury inflicted was on the capital asset of the assessee. Giving up a contractual right on the basis of the agreement that had resulted in loss of source of assessee's income would be a capital receipt. When payment is made as compensation for termination of an agency, its character as revenue or capital expenditure would depend upon whether the agency was in the nature of a capital asset in the hands of the assessee or it was only a part of stock-in-trade. The said principle would be equally applicable in the reverse or in the opposite manner in the present case.

15. Equally, relevant decision to the facts of the present case would be ***Travancore Rubber and Tea Company Limited*** (supra) in which the assessee had entered into agreement for sale of old rubber trees but the vendee after paying earnest money and advance had defaulted in payment of the balance amount. It was held that the amounts received by the assessee

from the vendor would be a capital receipt. Similar view was expressed by the Madras High Court in ***K.R. Srinath versus Assistant Commissioner of Income Tax,*** [2004] 268 ITR 436 (Mad.) wherein on cancellation of agreement to sell of an immovable property, which was held as a capital asset, amount received on giving up the right for specific performance was held to be a capital receipt. Madhya Pradesh High Court in ***Commissioner of Income Tax versus Smt. Laxmidevi Ratani and Others,*** [2008] 296 ITR 363 (MP) had observed that consideration received for giving up right to claim specific performance of the contract of immovable property was a capital receipt. The reason was that the immovable property was a capital asset. In ***New Central Jute Mills Limited versus Commissioner of Income Tax,Central-I,*** [1982] 136 ITR 742 (Cal.) the assessee had paid damages and interest as he was not able to pay the principal amount for purchase of land under agreement to sell. It was held that as the damages were related to the capital asset of the assessee, the amount paid cannot be allowed as a revenue expenditure.

16. In ***Anjani Kumar Company Limited*** (supra), the assessee had paid advance for acquiring agricultural land for setting up a boiler factory. As the land was not acquired, it was held and treated as revenue expenditure. We with respect cannot subscribe the view. The Rajasthan High Court in an

earlier judgment in ***Commissioner of Income Tax versus Jaipur Mineral Development Syndicate***, [1995] 216 ITR 469 (Raj.) had examined whether Rs.20,000/- paid as compensation for failure to fulfill an agreement for purchase of a cinema building with accessories would be revenue or capital expenditure. It was held that the compensation paid would be capital expenditure as it relates to expenditure, which was of permanent nature or for acquiring tangible or intangible property, corporeal or incorporeal rights or enduring benefit to business. Once and for all, fixed capital or an enduring benefit test should be applied to differentiate between purchase of capital asset and stock-in-trade, which demarcate the distinction between capital and revenue expenditure. In the said case, as capital asset was not capable of being exploited as a business asset, payment of compensation in respect thereof for not executing the agreement was considered as capital expenditure. We agree with the aforesaid reasoning.

17. In the present case the loss incurred was in the transaction relating to and for acquisition of a capital asset. For some reason, the attempt made by the appellant-assessee to acquire land/plot as a capital asset did not fructify. Hence, the appellant-assessee had asked for refund of the amount, which was paid for acquisition of the capital asset. Forfeiture or deduction made

by the HSIDC while refunding the amount would be a capital loss and not a revenue expenditure.

18. The substantial question of law is accordingly answered in favour of the respondent-Revenue and against the appellant-assessee. The appeal is dismissed without any order as to costs.

SANJIV KHANNA, J.

ANUP JAIRAM BHAMBHANI, J.

JANUARY 10, 2019
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