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

\+ ITA 930/2010

COMMISSIONER OF INCOME TAX ..... Appellant
Through: Ms. Prem Lata Bansal, Advocate.

versus

BHARAT ALUMINIUM COMPANY LTD ..... Respondent
Through: Mr. M.S. Syali, Senior Advocate
with Ms. Mahua Kalra, Advocate.

% Reserved on 26th July, 2010
Date of Decision: 06th August, 2010

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE MANMOHAN

1. Whether the Reporters of local papers may be allowed to see the judgment? No
2. To be referred to the Reporter or not? No
3. Whether the judgment should be reported in the Digest? No

J U D G M E N T

MANMOHAN, J

CM No. 12543/2010

This is an application for condonation of delay of 124 days in refiling the appeal.

We have heard Ms. Prem Lata Bansal, learned counsel for the appellant and Mr. M.S. Syali, learnd senior counsel for the respondent-assessee. Regard being had to the averments made in the application, we find sufficient cause for condonation of delay and accordingly,

delay of 124 days in re-filing the appeal is condoned.

Accordingly, application stands disposed of.

ITA 930/2010

1. The present appeal has been filed under Section 260A of Income Tax Act, 1961 (for brevity "Act, 1961") challenging the order dated 12th June, 2009 passed by the Income Tax Appellate Tribunal (in short "ITAT") in ITA No. 2175/Del/2009, for the Assessment Year 2005-2006.

2. Briefly stated the relevant facts of this case are that respondent-assessee is involved in production of Aluminium from Bauxite. The respondent-assessee has set up a power plant in the premises of NTPC for its own captive consumption. Since the expenditure for creating some facilities such as coal handling, water treatment etc. was very substantial, respondent-assessee decided to use NTPC facilities for these purposes. Rs. 22.62 crores was paid by the respondent-assessee to the NTPC for this and capitalized in its books, on which depreciation was claimed.

3. The Assessing Officer observed that since the effective ownership and control belonged to NTPC, depreciation could not be allowed to the respondent-assessee. However, Commissioner of Income Tax (Appeals) (in short, "CIT(A)") and ITAT deleted the said disallowance following the earlier judgments passed by ITAT in assesse's own case for assessment years 1995-1996, 1996-1997, 1997-

1998, 1999-2000, 2000-2001 and 2001-2002.

4. Ms. Prem Lata Bansal, learned counsel for appellant submitted that ITAT had erred in law in allowing depreciation of Rs. 21,20,219/- to the respondent-assessee on the Captive Power Plan owned by the NTPC. Ms. Bansal further submitted that condition of ownership as mandated under Section 32(1) of the Act, 1961 was not satisfied as the asset namely, the Captive Power Plan was not owned by the respondent-assessee.

5. On the other hand, Mr. M.S. Syali, learned senior counsel for respondent-assessee submitted that the issue involved in the present appeal was no longer res integra as appeals filed by the Revenue for different assessment years on the same issue had been dismissed even by a Division Bench of this court vide judgment and order dated 15th October, 2009 in ITA No. 532/2006. The relevant portion of the Division Bench order is reproduced hereinbelow:-

> *"15. Thus, once we hold that expenditure in question was of revenue nature, the moot question would be as to whether it could be allowed over a period of five years. That has been permitted in the aforesaid judgment of the Supreme Court. We are, thus, of the opinion that no doubt till 1991-92, the part of the expenditure was allowed every year. It was loosely called as depreciation. What can be said is that the revenue expenditure was allowed every year at the rates on which depreciation is allowed. Since this was wrong practice adopted, the C&AG rightly advised the assessee to change the accounting method to bring it in tune with ICAI guidelines. What is done now from the Assessment Year in question is that it is the correct step as it should have been taken in accordance with law…..We thus answer the question in favour of the assessee and against the Revenue and therefore, dismiss this appeal."*

6. The test to determine whether an expenditure is capital or revenue one has been outlined out in a number of judgments. The Supreme Court in ***Commissioner of Income Tax Vs. Madras Auto Service (P.) Ltd. (1998) 233 ITR 468*** has laid down general principles applicable for determining whether a particular expenditure is capital or revenue one. The general principles outlined by the Supreme Court in the aforesaid case are as under:-

> *"(1) Outlay is deemed to be capital when it is made for the initiation of a business, for extension of a business or for a substantial replacement of equipment;*
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> *(2) Expenditure may be treated as properly attributable to capital when it is made not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade. If what is got rid of by a lump sum payment is an annual business expense chargeable against revenue, the lump sum payment should equally be regarded as a business expense, but if the lump sum payment brings in a capital asset, then that puts the business on another footing altogether;*
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> *(3) Whether for the purpose of the expenditure, any capital was withdrawn, or, in other words, whether the object of incurring the expenditure was to employ what was taken in as capital of the business. Again, it is to be seen whether the expenditure incurred was part of the fixed capital of the business or part of its circulating capital."*

7. The Supreme Court in ***Commissioner of Income Tax, Bombay City-I Vs. Associated Cement Companies Ltd. (1988) 172 ITR 257*** has held as under:-

> *"……The first contention was that, since, as a result of the expenditure incurred, certain water pipelines were laid*

which could be regarded as capital assets, the expenditure could only be regarded as capital expenditure. In our view, there is no substance in this contention. It is true that certain water supply lines did come to be laid as a result of the expenditure incurred, but the facts on record, which we have referred to above, clearly show that these water pipelines on which the expenditure in question was incurred were not assets of the assessee, but assets of the Shahabad Municipality and hence it was not as if the expenditure resulted in bringing into existence any capital asset for the company. The only advantage derived by the assessee by incurring the expenditure was that it obtained an absolution or immunity, under normal conditions, from levy of certain municipal rates and taxes and charges. In view of this, the first contention of Mr. Manchanda must be rejected."

8. A Division Bench of this Court in ***Hindustan Times Ltd. Vs. Commissioner of Income Tax, New Delhi (1980) 122 ITR 977*** has held that the word "enduring" has a special significance and that what matters is the nature of advantage in a commercial sense. The Court clarified that it is only where the advantage is in the capital field that the expenditure would be capital in nature.

9. In the present case, we are of the view that as the Captive Power Plan is not owned by the respondent-assessee, no fixed capital of enduring nature has come into existence. It is pertinent to mention that expenses were incurred wholly and exclusively for the purposes of business. Moreover, as pointed out by the CIT(A), had the respondent-assessee not incurred the expenditure in question, it would have to pay for use of the facilities and such payment would have been allowed as revenue expenditure. In the present case, the advantage consists in

facilitating the assessee's business and trading operations leaving the fixed capital untouched. Consequently, in our view, the expenditure will be on revenue account even though the advantage may endure for an indefinite future. Even this Court while dismissing the Revenue's appeal being ITA No.532/2006 for the assessment years 1995-1996, 1996-1997, 1997-1998, 1998-1999, 1999-2000, 2000-2001, 2001-2002, 2002-2003 and 2003-2004 had pointed out that though the expenditure had been loosely termed as depreciation it was revenue expenditure which was allowed every year at the rates on which depreciation had been allowed.

10. Consequently, no substantial question of law arises in the present appeal. Accordingly, the same is dismissed without any order as to costs.

MANMOHAN, J

CHIEF JUSTICE

AUGUST 06, 2010
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