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

+ ITA No.65 of 2011

with

ITA No.66/2011

% Decision Delivered On: JANUARY 20, 2011.

1) ITA No.65 of 2011

COMMISSIONER OF INCOME TAX . . . Appellant

through : Mr. Anupam Tripathi, Sr. Standing Cousnel.

VERSUS

ORIENT CERAMICS & INDS. LTD. . . .Respondent

through: Mr. Salil Aggarwal, Advocate with Mr. Anil Makhija, Advocate.

2) ITA No.66 of 2011

COMMISSIONER OF INCOME TAX . . . Appellant

through : Mr. Anupam Tripathi, Sr. Standing Cousnel.

VERSUS

ORIENT CERAMICS & INDS. LTD. . . .Respondent

through: Mr. Salil Aggarwal, Advocate with Mr. Anil Makhija, Advocate.

CORAM :-
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M.L. MEHTA

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J. (***ORAL***)

1. CM No.643 of 2011 in ITA No.66 of 2011

Exemption is allowed, subject to just exceptions.

CM stands disposed of.

2. In both these appeals, which pertain to the same assessee and relate to two different Assessment Years, three additions of identical nature were made by the Assessing Officer, which were deleted by the CIT (A) and the order of the CIT (A) has been confirmed by the Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal') vide common judgment dated 11.02.2010. Additions were of the following nature:

(a) Depreciation on custom duty payment;

(b) Expenditure on the glow sign board; and

(c) Depreciation on UPS.

3. Insofar as the first item of addition is concerned, the background of the facts is that the assessee company had imported machinery under duty exemption certificate issued by the Ministry of Finance. Because of this certificate issued in favour of the assessee, the assessee did not pay any custom duty on the import of the said machinery. However, in the Assessment Year 2004-05, the Custom Department disputed the said certificate and issued Show Cause Notice to the assessee and called upon the assessee to pay the differential amount of custom duty and demand of ₹4,25,34,028 was made in this behalf. The assessee paid this amount without prejudice to its contention that the certificate issued by the Ministry of Finance was valid, legal and proper and no such custom duty was paid. While paying the custom duty, the assessee has contested the show cause notice issued by the Custom Department and these proceedings are still pending. Since the amount of ₹4,25,34,028 was paid by the assessee in the aforesaid manner, the assessee capitalized the cost of machinery by adding the said payment to the cost of machinery and on that

basis, depreciation @ 25% on the said addition was claimed to the cost of machinery as well. The Assessing Officer (AO) disallowed the depreciation on the aforesaid addition.

4. The question, in these circumstances, arose as to whether the assessee who had made the payment in the meantime would be entitled to add the same to the cost of plant and machinery and claim depreciation thereon.

5. The CIT (A) as well as the Tribunal while accepting the course of action taken by the assessee in claiming depreciation on the said amount as well relied upon the judgments, i.e., ***Commissioner Of Income-tax, Bombay City I*** Vs. ***Messrs. Shoorji Vallabhdas And Co.*** 46, ITR 144 (SC); ***Tuticorin Alkali Chemicals & Fertilizers Ltd.*** Vs. ***Commissioner of Income Tax*** 227 ITR 172 (SC); ***Kedarnath Jute Manufacturing Co. Ltd.*** Vs. ***Commissioner of Income Tax*** 82 ITR 363 and ***Sutlej Cotton Mills Ltd.*** Vs. ***Commissioner of Income Tax*** 116 ITR 1 (SC) wherein it is held that even if the liability is challenged and the legal proceedings are pending, once the amount has gone out of the coffers of the assessee, the assessee would be entitled to capitalize the same. The Tribunal while dealing with these judgments held as under:

> "At the outset we are convinced with the arguments made by Shri Salil Aggarwal, advocate, that mere book entries are not decisive of any income. The question is whether a receipt of money is taxable or not, whether certain deductions from that receipt are permissible in law or not, the question has to be decided according to the principles of law and not in accordance with the book entries for the accounting practice since the accounting practice cannot override the provisions of the Act. These views are fortified by the judgment of various courts of law in the cases of Tuticorin Alkali Chemicals and Fertilizers Ltd. v. CIT (1997) 227 ITR 172 (SC), Kedarnath Jute Manufacturing Co. Ltd. v. CIT (1971) 82 ITR 363 (SC), Sutlej Cotton Mills Ltd. v. CIT (1979) 116 ITR 1 (SC) and CIT v. Shoorji Vallabhdas and Co. (1962) 46 ITR 144 (SC). There is nothing on record placed by the departmental representative to establish that the

> appeal has been filed by the Assessee against any order of the Customs Department. The explanation, therefore, appears to be satisfactory that on the directions issued by the Customs Department, the payment of customs duty has been made though the same has been shown as advance or a note has been appended in the accounts for contingent liability. Therefore, in our view the Assessee has made the payment of customs duty only when the liability has accrued on it. Since the customs duty has been paid to acquire the plant and machinery and therefore, it has to be capitalised, moreover, there is no dispute to the fact that such expenditure cannot be capitalised as observed by the assessing officer in his order in paragraph 2.3. The obligation to pay the excise duty arose during the impugned year and therefore, the liability to pay the amount had accrued to the Assessee during the year itself and the said liability cannot be said to be contingent and cannot be said to be an advance payment. The order of the learned Commissioner (Appeals) is a reasoned order, who has rightly accepted the contention and explanation of the Assessee and has rightly allowed the claim of the Assessee for capitalisation of the payment of excise duty amounting to Rs. 4,25,34,027 and has rightly directed the assessing officer to allow the depreciation on the said amount. We find no infirmity in the order of the learned Commissioner (Appeals). Thus ground No. 1 of the revenue is dismissed."

6. We are in agreement with the aforesaid approach of the Tribunal which is in consonance with the law laid down by the Supreme Court and therefore, are of the opinion that no substantial question of law arises insofar as this issue is concerned.

7. Coming to the expenditure on glow sign boards incurred by the assessee, the issue was as to whether the said expenditure is revenue or capital in nature. The plea of the assessee was that these glow sing boards are of perishable nature, which the assessee had displayed at the various outlets of its dealers and therefore, the entire amount should be treated as revenue expenditure and was allowable under Section 37 of the Act as business expenditure. The AO, however, did not accept the submission of the assessee holding as under:

> "4.3 Glow Sing Boards are made of materials like steel/aluminum frames and plastic sheets and display the information for long periods subject to minor repairs. Considering the useful life of the boards, Assessee

> Company was rightly treating the expenditure as capital expenditure in the earlier years i.e. prior to A Yr 05-06. There is no change in circumstances for changing the treatment of expenditure from capital to revenue. During the A Yr 2005-06 the Assessing Officer had concluded that the assessee company cannot be allowed to change the accounting treatment of particular item without any basis."

8. Thus, only on the ground that the frames of these glow sing boards are made of steal/aluminum, the AO came to the conclusion that the expenditure incurred thereupon was capital in nature. He was also influenced by the fact that till the previous year, the assessee had itself capitalized the expenditure and only from the Assessment Year 2005-06, accounting policy in regard to incurring on expenditure on glow sing boards was changed by the assessee.

9. The CIT (A) deleted this addition holding it to be expenditure of Revenue in nature.

10. The order of the CIT (A) has been upheld by the Tribunal and in arriving at the conclusion that the expenditure was of revenue nature, the Tribunal has followed the judgment of the Punjab & Haryana High Court in the case of ***Commissioner of Income Tax*** Vs. ***Liberty Group Marketing Division*** **[(2009) 315 ITR 125]**.

11. We have gone through the said judgment rendered by the Punjab & Haryana High Court. The Court dealt with the same issue, viz., expenditure on glow sing boards and held the expenditure to be revenue in nature in the following manner:

> "14. Considering the above principle of law, in the present case, it is to be seen as to whether the expenditure incurred by the assessee on glow sign boards was with a view to bringing into existence an asset or an advantage for the enduring benefit of the business. In our opinion, the expenditure incurred by the assessee on glow sign boards does not bring into existence an asset or advantage for the enduring benefit of the business, which is attributable to the capital. The glow sign board is not an asset of permanent nature. It has a short life. The materials used in the glow sign boards decay with the effect of weather. Therefore, it requires frequent replacement. The Tribunal

> has also recorded a finding that the assessee has to incur expenditure on glow sign boards regularly in almost each year. This fact itself shows that the advantage accrued from the use of the glow sign boards is not of enduring nature. Thus, the expenditure by the assessee on these glow sign boards did not bring into existence any asset or advantage for the enduring benefit of the business. The assessee has spent the expenditure on the glow sign boards with an object to facilitate the business operation and not with an object to acquire asset of enduring nature. Therefore, the said expenditure was of revenue nature and the Tribunal has rightly treated the same as of revenue nature."

12. Agreeing with the aforesaid view taken by the Punjab & Haryana High Court, we hold that no question of law arises on this aspect as well.

13. The third issue pertaining to depreciation on UPS arises only in the Assessment Year 2005-06. The assessee had claimed depreciation on UPS @ 60% whereas the AO had allowed it @ 25% and on this basis, disallowance of ₹1,470 was made. The issue now stands covered by the judgment of this Court in the case of ***Commissioner of Income Tax*** Vs. ***BSES Yamuna Powers Ltd.*** (in ITA No.1267 decided on 31.08.2010) wherein it was held that the depreciation @ 60% on such items shall be allowed.

14. Therefore, we are of the opinion that these appeals are without any merit, which are accordingly dismissed.

(A.K. SIKRI)
JUDGE

(M.L. MEHTA)
JUDGE

JANUARY 20, 2011
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