(2007) 03 DEL CK 0085

In the Delhi High Court

Bigjos India Limited APPELLANT

Vs

Commissioner of Income Tax RESPONDENT

Date of Decision : 28-03-2007

Acts Referred:

Citation : (2007) 03 DEL CK 0085

Hon'ble Judges : Vidya Bhushan Gupta, J;Madan B. Lokur, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

V.B. Gupta, J.—Appellant has filed the present appeal u/s 260A of the Income Tax Act, 1961 (hereinafter referred to as Act) against the

order dated 20-1-2006 passed by the Income Tax Appellate Tribunal, Delhi Bench A (hereinafter referred to as Tribunal) in ITA No.

4223/Del/2001 for the asst. yr, 1998-99, whereby the Tribunal upheld the disallowance of Rs. 7 lacs made on account of repair and maintenance,

expenses by the Commissioner (Appeals).

2. The facts in. brief are that the assessed is running its business at its retail departmental store situated at New Delhi South Extension Part-II. The

assessed claimed deduction of Rs. 16.16 lacs on account of repair and maintenance expenditure. In addition, the assessed claimed deduction

amounting to Rs. 2.65 lacs for air-conditioner repair and maintenance. The assessing officer noted from the details filed by the assessed that most

of the expenses related to supply of building material including timber and plywood of Rs. 2,20,000. The assessed stated before the assessing

officer that during the year, various new counters were constructed and other building work had been undertaken. The assessing officer held that this expenditure incurred by the assessed has resulted in enduring benefit for a long period and he assessed a sum of Rs. 10 lacs on estimate as

representing capital expenditure incurred by the assessed.

3. Being dissatisfied, the assessed filed an appeal before CITW who agreed with the findings of the assessing officer that the expenditure incurred

has resulted in the long-term enduring benefit to the assessed. However, the Commissioner (Appeals) held that the estimate of Rs. 10 lacs made by

the assessing officer was on higher side and he sustained the disallowance to the extent of Rs, 7 lacs.

4. Still aggrieved, the assessed filed an appeal before the Tribunal. Vide impugned order, the Tribunal dismissed the appeal filed by the assessed.

5. It has been argued by the learned counsel for the assessed that the assessed is a mere licensee in the showroom and had not made any structural

changes but had merely renovated the existing showroom for the purposes of facilitating the carrying on of its business and the expenditure''

incurred towards shifting of the lift or renovation of showroom is not capital in nature since this expenditure was necessitated by the changes in

design to ensure maximum utilisation of existing floor area and the same was incurred during the ordinary course of business and this expenditure is

in the nature of current repairs, allowable as revenue deduction. Learned counsel for the assessed in support of his contention cited a decision of

Apex Court in Commissioner of Income Tax, Tamil Nadu II, Madras Vs. Madras Auto Service (P) Ltd.,

6. On the other hand, it has been argued by the learned counsel for the revenue that the assessed has incurred huge expenditure which resulted into

long-term benefit to the assessed and such expenditure is not allowable as revenue expenditure and same cannot be passed on as a repair and

maintenance expenditure.

7. In the case of Madras Auto Services (P) Ltd. (supra), the assessed spent huge amount in order to construct a new building after demolishing the

old building. The new building, however, from inception was to belong to the Lesser and not to the assessed. The assessed, however, had the

benefit of the existing lease in respect of the new building at the agreed rent for a period of 39 years. The Tribunal found, as a fact, that the rent as

stipulated in the lease was extremely low. It said that the area of the building was somewhere about 7,000 sq. ft. The rental rate for the area in

which the building was situated was much higher and would be not less than Rs. 12,000 as against which the maximum rent the assessed would be

paying was only Rs. 2,000. This concessional rent was on account of the fact that the new building was constructed by the assessed at its own

cost.

8. It was held by the Apex Court that

In order to decide whether this expenditure is revenue expenditure or capital expenditure, one has to look at the expenditure from a commercial

point of view. What advantage did the assessed get by constructing a building which belonged to somebody else and spending money for such

construction ? The assessed got a long lease of a newly constructed building suitable to its own business at a very concessional rent. The

expenditure, Therefore, was made in order to secure a long lease of new and more suitable business premises at a lower rent. In other words, the

assessed made substantial savings in monthly rent for a period of 39 years by expending these amounts. The saving in expenditure was a saving in

revenue expenditure in the form of rent. Whatever substitutes for revenue expenditure should normally be considered as revenue expenditure.

Moreover, the assessed in the pre I sent case did not get any capital asset by spending the said amounts. The assessed, Therefore, could not have

claimed any depreciation. Looking to the nature of the advantage which the assessed obtained in a commercial sense, the expenditure appears to

be revenue expenditure.

The test for distinguishing between capital expenditure and revenue expenditure in our country was laid down by this Court in Assam Bengal

Cement Co. Ltd. Vs. The Commissioner of Income Tax, West Bengal, . In that case the appellant company had acquired from the Government of

Assam lease of certain limestone quarries for a period of 20 years for the purpose of manufacture of cement. The lessee had, inter alia, agreed to

pay an annual sum during the whole period of the lease as a protection fee and in consideration of that payment, the Lesser undertook not to grant

to any person any lease, permit or prospecting license for limestone. This Court examined tests laid down in various cases for distinguishing

between capital expenditure and revenue expenditure. One of the standard tests now in use was laid down in the case of Atherton v. British

Insulated and Helshy Cables Ltd. (1925) 10. Tax Cases 155. It said (p. 40 of 27 ITR) : ""when an expenditure 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, I think that there is very good reason (in the

absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to

capital."" Whether by spending the money any advantage of an enduring nature has been obtained or not will depend upon the facts of each case.

Moreover, as the above passage itself provides, this test would not apply if there are special circumstances pointing to the contrary. This Court in

the above case summarised the tests as follows (p. 44) :

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.

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.

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 circ wafting capital.

9. Further held, that

Since the asset created by spending the said amounts did not belong to the assessed but the assessed got the business advantage of using modern

premises at a low rent, thus saving considerable revenue expenditure for the next 39 years, both the Tribunal as well as the High Court have rightly

come to the conclusion that the expenditure should be looked upon as revenue expenditure.

10. Keeping in view the above principles laid down by the apex Court, it is to be seen as to whether the expenditure incurred by the assessed in

this case is capital or revenue.

11. As per the license agreement placed on record by the assessed, the licensee (i.e., present assessed) shall not make any structural changes in

the premises without the prior written consent of the licensor. Further, in this agreement, no rate of license fee has been mentioned, as to what

amount, present assessed is paying to the owner nor it is the case of the assessed that by spending large amount of Rs. 7 lacs, the license fee of the

premises has been reduced. As such the facts of the Madras Auto Senlices (P) Ltd. (supra) are clearly distinguishable from the facts of the present

case.

12. It is an admitted fact that structural changes have been made by the assessed in the premises and this is a pure question of fact and there are

concurrent findings to this effect by three statutory authorities- During the course of the assessment proceedings, the assessed himself has admitted

that during the year new counters were erected and this fact has been established from the record since huge expenditure on purchase of timber

and plywood have been incurred by the assessed. Further, the assessed has altogether built a new shaft and shifted old shaft to a new site and has

spent huge amount on the construction of it. So, there is no doubt that these expenditure incurred by the assessed are for fixed capital assets and,

Therefore, the expenditure is in the nature of capital and we are unable to accept this contention of the assessed, that these expenditure are in the

nature of current repairs or the same have been incurred in merely renovating the existing old assets.

13. Since considerable amount has been spent by the assessed for acquiring new assets such as lift shaft and wooden counters, etc., we have no

hesitation in holding that the expenditure is capital in nature and we do not find any reasons to differ with the concurrent findings of facts given by

the three statutory authorities.

14. The above being the position, no fault can be found with the view taken by the Tribunal. Thus, the order of the Tribunal does not give rise to a

question of law, much less a substantial question of law, to fall within the limited purview of Section 260A of the Act, which is confined to entertaining only such appeals against the order which involves a substantial question of law.

15. Accordingly, the present appeal filed by the assessed is, hereby, dismissed.

