

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:-

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN
&
THE HONOURABLE MR. JUSTICE ASHOK MENON

TUESDAY, THE 5TH DAY OF DECEMBER 2017/14TH AGRAHAYANA, 1939

I.T.A.No.4 of 2015

AGAINST THE COMMON ORDER DATED 25-07-2014 IN I.T.A.212/COCH/2014
OF THE INCOME TAX APPELLATE TRIBUNAL, COCHIN BENCH, COCHIN.
ASSESSMENT YEAR 2007-08.

APPELLANT(S) /RESPONDENT:

INDUS MOTOR COMPANY PVT. LTD.,
INDUS HOUSE, WEST HILL, KOZHIKODE,
PAN AAACI 4904J.

BY ADVS.SRI.JOSEPH MARKOSE (SR.)
SRI.V.ABRAHAM MARKOS
SRI.BINU MATHEW
SRI.TOM THOMAS (KAKKUZHIYIL)
SRI.ABRAHAM JOSEPH MARKOS
SRI.ISAAC THOMAS
SRI.NOBY THOMAS CYRIAC

RESPONDENT(S) /APPELLANT:-

THE DEPUTY COMMISSIONER OF INCOME TAX,
CIRCLE-1(1), KOZHIKODE - 673 001.

BY SENIOR COUNSEL FOR GOVERNMENT OF INDIA (TAXES) SRI.P.K.R.MENON
BY STANDING COUNSEL FOR GOVERNMENT OF INDIA (TAXES) SRI.JOSE JOSEPH

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON
05-12-2017, ALONG WITH I.T.A.NOS.14/2015, 15/2015 & 29/2016,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:-

I.T.A.NO.4 OF 2015

APPENDIX

APPELLANT'S ANNEXURES:-

ANNEXURE-A TRUE COPY OF STATEMENT DETAILING THE NATURE AND
BREAK UP OF EXPENSES INCURRED.

ANNEXURE-B TRUE COPY OF ASSESSMENT ORDER DATED 30.12.2009
PASSED BY THE ASSESSING OFFICER.

ANNEXURE-C TRUE COPY OF APPELLATE ORDER DATED 5-2-2014 OF THE
COMMISSIONER OF INCOME TAX (APPEALS), KOZHIKODE IN
ITA-73/R1/CIT/CLT/2009-10.

ANNEXURE-D TRUE COPY OF APPEAL DATED 30.04.2014 FILED BY THE
DEPARTMENT BEFORE THE INCOME TAX APPELLATE TRIBUNAL,
COCHIN.

ANNEXURE-E CERTIFIED COPY OF THE IMPUGNED ORDER DATED 25.07.2014
OF THE INCOME TAX APPELLATE TRIBUNAL, COCHIN IN
I.T.A.NO.212/COCH/2014.

RESPONDENT'S ANNEXURES:-

NIL.

VKU/-

[TRUE COPY]

K. Vinod Chandran & Ashok Menon, JJ.

I.T.A.Nos.4/2015, 14/2015, 15/2015 & 29/2016

Dated, this the 05th day of December, 2017

JUDGMENT

Vinod Chandran,J:

Identical assessee is before this Court raising questions of law from the orders of the Tribunal for the assessment years 2007-08, 2008-09, 2009-10 and 2010-11. The appellant-assessee is a dealer in vehicles, spares and accessories of Maruti Suzuki and an authorized Service Centre for its vehicles. In the present appeals the questions raised are with respect to the expenditure made by the assessee on leasehold buildings for refurbishment of the same as also the constructions made, again on lease hold properties; both to carry on the business of the assessee. Whether the expenses incurred are to be treated as revenue expenditure or capital expenditure, is the issue common to all the assessment years. Two appeals, I.T.A.Nos.15/2015 and 29/2016, raise different questions, which will be dealt with after answering the main questions common to the appeals.

2. The question raised for all the assessments years, for consideration of this Court, as re-framed by us, are the following:

- (i) Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is right in confirming the disallowance of expenses incurred for repairs, refurbishing and making improvements on the buildings taken on lease, treating them as capital expenditure.
- (ii) Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in confirming the disallowance of expenses incurred for construction of buildings in leased out lands as capital expenditure?

3. The issue with respect to expenses made on leased out buildings to refurbish the same for the purpose of carrying on the day-to-day business was considered by a Division Bench of this Court and the questions were answered in favour of the assessee in ***Joy Alukkas India (P) Ltd. v. Assistant Commissioner of Income Tax [(2016) 282 CTR (Ker) 551]***.

4. When the instant appeals came up for hearing before another Division Bench, a doubt was raised as to whether the dictum laid down in ***Joy Alukkas***; was correct or not in the teeth of Explanation 1 to Section 32(1) of the Income Tax Act, 1961 [for

brevity “the Act”]. A reconsideration was directed, upon which a Full Bench of this Court considered the issue and affirmed the earlier Division Bench in **Joy Alukkas**, as per order dated 17.02.2016. We are considering the issue on the basis of the interpretation placed on Explanation 1 to Section 32(1) by the Full Bench.

5. The learned Senior Counsel, Government of India (Taxes) asserts that the matter having been sent back to the Division Bench for consideration, the decision as to whether the expenses are to be treated as capital expenditure or revenue expenditure, is to be arrived at from the facts in the individual cases. Reference is also made to **Arvind Mills Ltd. v. C.I.T. [(1992) 197 ITR 422 (SC)]** to contend that the issue has to be looked at on the basis of the enduring benefit that the assessee obtains by way of the expenditure incurred. Specific reference is made to the observation made in **Arvind Mills**: *“In our view, the learned counsel for the respondent is justified in submitting that the capital expenditure incurred in connection with the business activities ultimately results in efficiently carrying on the business and, by that process, gives aid in the running of the day-to-day business more efficiently but, simply on*

that score, a capital expenditure does not become a revenue expenditure". Therein, the question considered was whether the betterment charges paid to the local authority for a Town Planning Scheme was revenue expenditure or not. The Supreme Court found that it cannot be treated as revenue expenditure since the expenditure has no nexus with the day-to-day business of the assessee. This does not have any application to the present case.

6. The first question raised is as to whether the refurbishing of buildings leased out by the assessee and the expenses incurred could be treated as a capital expenditure. The doubt expressed by another Division Bench, as to the legality of the dictum in **Joy Alukkas**, was based on Explanation 1 to Section 32 (1). Section 32 deals with depreciation as a deduction; the aspects on which, the manner in which and the rates at which it can be claimed. Explanation 1, which is relevant is extracted hereunder:

"Where the business or profession of the assessee is carried on in a building not owned by him but in respect of which the assessee holds a lease or other right of occupancy and any capital expenditure is incurred by the assessee for the purposes of the business or profession and the construction of any structure or doing of any work, in or in relation to, and by way of

renovation or extension of, or improvement to, the building, then, the provisions of this clause shall apply as if the said structure or work is a building owned by the assessee”.

7. We are not called upon to interpret the aforesaid Explanation, since the Full Bench has interpreted it to find that it is only a fiction created insofar as permitting a lessee to claim the capital expenditure made in a building, leased out for its business; just as the owner of the building would claim it, if it were his business that was run in the building. The view expressed by the referring Bench that the introduction of the Explanation manifested the legislative intent to treat all expenditure incurred on a lease hold building as capital expenditure of the assessee was not accepted. The Full Bench specifically found that the Explanation does not create a fiction insofar as any expenditure made in a leased out premises being treated as a capital expenditure. It would be apposite to extract paragraph 28 of the decision of the Full Bench:

“28. The plain reading of the language of Explanation 1 indicates that the legal fiction was created as if the said structure or work is the building owned by the assessee. There is no warrant of reading the Explanation 1 in a manner to read that when assessee who holds a lease or other right of

occupancy incurs any expenditure for purposes of the business or profession on the construction of any structure or doing of any work, in or in relation to and by way of renovation or extension or improvement to the building, then the said expenditure has to be treated as capital expenditure. The legal fiction has not been created to treat the said 'such work' as mentioned therein as capital expenditure rather, the fiction has been created that when such work is carried out, it shall be treated as structure or work owned by the assessee. The words "any capital expenditure" used in Explanation 1 indicate that the legal fiction has to be read when any capital expenditure is incurred. Thus whether any capital expenditure has been incurred is a question which has to be decided on the basis of facts of each case and relevant tests applicable. Explanation 1 cannot be read as to mean that when works mentioned therein are carried out by the assessee, it shall be treated as capital expenditure. Explanation 1 however shall be attracted when expenditure is treated as capital expenditure. The use of word "any" before the capital expenditure emphasises that the provision is attracted when there is any capital expenditure".

8. Whether the expenditure is in the nature of a capital expenditure or a revenue expenditure is not to be decided by the legal fiction in the Explanation. If the expenditure is in the nature of capital expenditure, then the lessee; despite, not being the owner of

the building, can claim depreciation. The Full Bench having interpreted the Explanation in the afore-cited manner, the facts relevant to be noticed in this appeal, with respect to the first question, are only that the assessee had taken out leasehold buildings which were refurbished and improvements made for the purpose of carrying on the day-to-day business.

9. The learned Senior Counsel for the assessee would point out that any item which would revert back to the assessee was treated as a capital and depreciation alone was claimed treating it as a capital expenditure. However, with respect to the other improvements made to the building, like painting and constructions made or alterations carried out, were treated as revenue expenditure since the assessee does not get any enduring benefit out of the same. They are also recurring expenditure since the business of the assessee, to a great extent, depends upon the ambiance provided, which varies with time, consumers and very many factors which are not constant. True the Full Bench has directed the Division Bench, hearing the case, to look into whether on facts the claim is sustainable or not. The Full Bench has affirmed the view taken by

another Division Bench in **Joy Alukkas**, on identical facts. The discussion on facts and law in para 25 applies squarely:

“The appellants-assesseees are conducting their business in rented premises. They claim to have made improvements to the premises taken on lease in order to create good ambience by spending money on interior decoration which has resulted in expenditure on many items. Out of those items, some of them could be retrieved at the end of the lease and could be used by the appellants-assesseees again. Some of the improvements made cannot be taken away along with the lessee assessee at the end of the term of the lease. Though in some of the decisions enduring benefit irrespective of creating an asset or not was alone the criterion and later on the Apex Court, while dealing with the subject exhaustively in Empire Jute Co.Ltd's case (Supra), has held that theory of enduring benefit or advantage may break depending upon the facts and circumstances of the case. Therefore, the stand and argument of the revenue that as long as there is income earning effort by whatever means or name you call it, whether it could be expansion or extension of the business, the same has to be considered as capital investment has to be looked into from the facts of the present case. As a matter of fact, in Empire Jute Co.Ltd's case (Supra) distinguishing the facts from the facts of Maheshwari Devi Jute Mills' case (Supra) it was held, what amounts to capital receipt in the hands of the payee need not be capital expenditure so far as the payer.

Therefore, payment of certain amounts would not be the deciding factor to arrive at a conclusion whether a particular expenditure is revenue or capital. Every advantage of enduring nature acquired by an assessee need not be the criterion. What is relevant is the nature of advantage in a commercial world which is the determining factor. Unless the advantage is in the capital field, such claim cannot be disallowed. If the capital is left untouched in spite of advantage to the assessee for a long duration, the expenditure would be of revenue account. Therefore, enduring benefit cannot be a conclusive test and it cannot be mechanically applied without referring to facts of a particular case. If money is spent to produce extra or additional quantity of goods or augment the income of the assessee, in the absence of the assessee able to retrieve infrastructure or carry the advantage with him at the end of the term of lease irrespective of number of years in which he would be able to earn profits, it cannot amount to capital expenditure. Therefore, though income earning effort that is the expenditure spent on different items would be the basis to ascertain whether it is a capital or revenue expenditure, unless and until it ultimately leads to acquisition of an asset or a right of permanent character irrespective of the possession of the same for a long period, it would not amount to capital expenditure. In the process of renovation and repairs of the premises taken on lease, expenditure may be on different items like flooring, panelling of walls, electrical wiring and fittings, air conditioning, setting up of cupboards,

showcases etc. Though electrical fittings could be removed and taken, so also cupboards, showcases, electrical wiring, painting and flooring cannot be taken away by the assessee. Hence, at the end of the day, it has to be an asset in the hands of the assessee which could be called as capital asset. The fact that assessee with creation of a new ambience would earn more profits in the premises cannot be the criterion to decide the issue. Ultimately, the items on which expenditure was made must be able to come back to the assessee at the end of the day”.

10. The decision of the Division Bench in ***Joy Alukkas*** binds us inexorably with respect to the question raised on expenses incurred for refurbishing and making improvements of a leasehold building. The questions of law raised by the Division Bench admitting the instant appeals as also the reference order indicates that the additions made were on two counts: (i) the expenditure incurred on refurbishment, repairs and improvements and (ii) the superstructures constructed on leased out immovable property. The revenue expenditure made on leased out buildings has to be allowed as a revenue expenditure and not as a capital expenditure. We answer the first question in favour of the assessee and against the

Department.

11. The other question raised is with respect to the lands taken on lease and constructions made thereon. The learned Senior Counsel for the assessee would refer to ***C.I.T. v. Madras Auto Service (P.) Ltd. [(1998) 233 ITR 468 (SC)]***, wherein a similar issue was considered and the expenditure incurred in construction of the buildings was allowed as revenue expenditure. The learned Senior Counsel would also specifically point out that the assessment years were prior to the introduction of Explanation 1 to Section 32(1) of the Act. Reliance also is placed on the decision of the Madras High Court in ***C.I.T. v. TVS Lean Logistics Ltd. [(2007) 293 ITR 432 (Mad)]***.

12. The learned Senior Counsel for Government of India (Taxes) would take us through the Constitution Bench decision in ***Assam Bengal Cement Co. Ltd. v. C.I.T., West Bengal [(1955) 27 ITR 34 (SC)]*** and submit that the two-Judge Bench decision of the Supreme Court in ***Madras Auto Service*** has propounded a principle deviating from that laid down by the Constitution Bench. The learned Senior Counsel specifically referred to the Full Bench judgment and

the reservation in so far as the matter being placed before the appropriate Division Bench to consider the issue on merits.

13. The Full Bench specifically found that whether an expenditure incurred by the assessee is a capital expenditure or revenue expenditure has to be decided on the facts of each case by applying the relevant decisions. Explanation 1 to Section 32(1) of the Act does not intend to lay down that whenever expenditure has been incurred by the assessee in a leased out building, then such expenditure has to be mandatorily treated as capital expenditure. The explanation only meant that in the event of any capital expenditure incurred by the assessee, who is only a lessee, the provisions of Section 32(1) shall be applicable as if the leased out premises is owned by the assessee. The explanation was interpreted as one enabling even a lessee to claim depreciation if capital expenditure is made on a building or in a property, which is leased out from the real owner. It is not to say that the Explanation deemed any expenditure made by the lessee on a leasehold building or on a leasehold property as capital expenditure. Nor does the decision of the Full Bench or the Division Bench in **Joy Alukkas**, hold that such

expenditure would necessarily be a revenue expenditure.

14. We do not see any deviation having been made by the two-Judge Bench of the Supreme Court in **Madras Auto Service**, especially when they had referred to **Assam Bengal Cement Co.** to come to such a finding. The facts in **Madras Auto Service** are relevant and are noticed for clarity. Therein the assessee, again a Company engaged in sale of motor parts, had taken on lease certain lands wherein a building was constructed investing sufficient funds in two years, which were claimed alternatively as capital loss, depreciation on capital investment or as business expenditure, as an extra rent for the lease. Apposite would be reference to the following consideration made by the Hon'ble Supreme Court [at page 472]:

“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 assessee get by constructing a building which belonged to somebody else and spending money for such construction? The assessee 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 assessee 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 assessee in the present case did not get any capital asset by spending the said amounts. The assessee, therefore, could not have claimed any depreciation. Looking to the nature of the advantage which the assessee obtained in a commercial sense, the expenditure appears to be revenue expenditure”.

15. After relying on ***Assam Bengal Cement Co.***, it was found that the issue of whether an expense has to be treated as capital expenditure or revenue expenditure would depend upon the facts of each case. Examining the lease deeds, it was found that the lease rent was minimal, which indicated it as a concession for reason of the construction made in the land with the investment of the lessee themselves. The expenditure having been incurred as compensation, in the form of an enduring construction having been

made on behalf of the lessor, it was found that the expenses, substituted the rent due on the building. When the rents were to be treated as revenue expenditure, any expenses in substitution of such rents would also be treated as revenue expenditure, was the finding. We have to also observe that the finding, the assessee having not acquired any capital, could not have claimed depreciation; stands altered in so far as the introduction of Explanation I. It rectifies the precise anomaly noticed in ***Madras Auto Service***.

16. By virtue of the Explanation, any expenditure incurred by a lessee, which could be treated as capital expenditure in the hands of the owner, would be so entitled to be treated as capital expenditure in the hands of the lessee also. The interpretation given to the Explanation and the decision in ***Madras Auto Service*** read together puts the issue in the correct perspective. The Explanation does not alter the dictum, laid down by ***Madras Auto Service***, on the peculiar facts, but rectifies the anomaly in so far as a lessee being entitled to claim depreciation on capital expenditure made in a leased out building. In ***Madras Auto Service*** lands were taken on lease and investments were made on the said lands by way of

constructions. The Hon'ble Supreme Court found that the lease rent was very minimal and investments were to be deemed as setting off the actual lease rent payable over a period of time. It was in such circumstances that the expenditure made on making constructions in leased out lands were held to be revenue expenditure and not capital expenditure. We are of the opinion that the explanation brought in later to the aforesaid decision would not detract from the above position. If the expenditure could be treated as revenue expenditure, necessarily the lessee, the assessee, would be entitled to show the same as revenue expenditure in its books of accounts. Merely because the property was leased out and constructions carried out, having no enduring benefit to the assessee; would not be the test for finding a revenue expenditure. The test of enduring benefit has been held by the Hon'ble Supreme Court to be not applicable in all cases.

17. In this context we have to refer to the decision in **TVS Lean Logistics Ltd.** of the Madras High Court. Therein, the Division Bench of the Madras High Court had considered the Explanation and found it to be not applicable in the case of landed properties, since only buildings were referred to. The Explanation would not apply in

the case of constructions made on leased out properties, was the specific finding. A corollary to the said finding would be that the construction made on a leased out property cannot be treated as capital expenditure in the hands of the lessee. The said construction, according to us, with due respect, cannot hold good. The Explanation speaks of the business or profession of the assessee, being carried on in a building not owned by him but in respect of which he holds a lease and the capital expenditure incurred by the assessee, *inter alia* of “*construction of any structure*”. This would necessarily bring within its ambit the business being carried on in a building, constructed by the assessee on lease hold landed property.

18. The Explanation, enables any expenditure, which if made by the owner of the property to be capital expenditure in the hands of the owner, to be treated as capital expenditure in the hands of the lessee; if it is the lessee who expended the amounts. The Explanation, in other words enables such consideration of the expenditure made by the lessee on another's property to be capital expenditure. In such circumstances, what would be relevant is the nature and scope of the agreements entered into. To ascertain

whether the principle as laid down by the Hon'ble Supreme Court in ***Madras Auto Service*** would apply or not, necessarily a verification of the agreements would be necessitated. The learned Senior Counsel appearing for the assessee produced a number of agreements, before this Court, to support the case of lease having been taken of properties, in which superstructures were build, on investments made by the assessee themselves. It will not be proper for us to look into the agreements, when the Assessing Officer at the first instance has not done it. The agreements' were also produced before the Assessing Officer as evidence, to substantiate the claim of the assessee.

19. Merely to understand the nature of the lease, we went through one of the agreements, which indicates almost 60cents of property having been taken on lease for Rs.25,000/- per month. The superstructures were also built on the said property the actual plinth area of which is not disclosed. The money invested for making such construction is what is claimed as revenue expenditure. We have to observe that, *prima facie*, considering the extent of property the amount of Rs.25,000/- could be treated as minimal rent, which all the

same would have to be verified with the total plinth area constructed in the property and the period for which the lease is permitted. The going market rent for buildings, in the specified locations, would also have to be looked into by the Assessing Officer to arrive at a proper determination of whether the expenditure is a capital expenditure or revenue expenditure. If the Assessing Officer finds that the investments made in the property spread over the period of lease, together with the lease rent payable as per the agreement, would constitute the ostensible lease rent for the building, then investment made for constructing superstructures, has to be deemed to be revenue expenditure, otherwise it should be treated as capital expenditure and in the latter event allowable as depreciation under the Explanation I to Section 31(1).

20. Before leaving the matter we have to notice that the lease deeds produced before this Court are not registered. The Registration Act, 1908 mandates under Section 17, that any lease from year to year or beyond one year to be compulsorily registrable, failing which it shall not be received in evidence as per Section 49. It has also to be duly stamped under the Kerala Stamp Act, 1959 [for

brevity, the Stamp Act]. The lease deeds; for periods in excess of one year cannot be accepted in evidence unless registered. The lease deeds also have been termed agreements and stamped insufficiently. The deeds have to be considered as not duly stamped and impounded under Section 33 of the Stamp Act. The documents have been produced before the Assessing Officer, as evidence of the lease and we are dealing with an appeal, which is a continuance of the assessment proceeding. The Assessing Officer is one holding a public office, before whom the evidence was produced for supporting the claim of the assessee. The person in charge of a public office is obliged to impound the documents and send it to the District Registrar for proper stamping under Section 33 of the Stamp Act, if it is not duly stamped. The assessee cannot also rely on the documents unless they are properly stamped and registered. Sub-Clause (b) of Section 33(2) empowers the High Court to delegate the function of examining and impounding any instrument under the provision to such Officer as the Court appoints. Hence there shall be a direction to the respondent, the Deputy Commissioner Circle-1(1) Kozhikode to impound the documents produced and refer it to the

District Registrar for proper stamping and the assessee would also be obliged to register the same.

21. Considering the fact that the said procedure before the various District Registrars would result in different orders of penalty being passed and the assessments would also be kept pending for long, we alternatively pass the following orders. The assessee shall produce the lease deeds of period one year or above before the concerned Sub-Registrars, who shall calculate the duty payable under Article 33 of the Stamp Act and levy penalty of Rs.10,000/- each. If the assessee pays up the amounts then the procedure as prescribed in Section 37(1) shall be complied with. The Sub-Registrar shall also register the document *de-hors* Sections 23 and 25 of the Registration Act, but levying registration fees as applicable and an amount of Rs.5,000/- each as penalty. The assessee then shall produce the registered documents before the respondent A.O, who shall finalise the assessment on the principles herein above stated, determining whether the expenditure made by the assessee can be treated as a capital expenditure or revenue expenditure. If the assessee does not comply with the above

directions then the respondent shall impound the documents and send it for stamping under the provisions of Section 33 of the Stamp Act to the respective District Registrars who shall pass orders at their discretion under powers conferred by Section 39 of the Stamp Act, in which event the determination of penalty will be left to the District Registrar. The assessment will also then be without looking into the documents, since the Registration Act does not provide for registration beyond eight months from the execution.

22. Two other questions which arise in the appeals for the assessment years 2009-10 and 2010-11 [I.T.A.Nos.15/2015 and 29/2016] are dealt with separately. For the assessment year 2009-10, the question raised as seen from I.T.A.No.15 of 2015, is as under:

“Whether, on the facts and in the circumstances of the case, the Appellate Tribunal; is right in confirming the disallowance of expenses incurred on show rooms/service stations which was written off/discarded since the requisite permission for commencing the operations could not be obtained?”.

The assessee had incurred expenses on showrooms or service stations leased out by the assessee; but, however, the business

having not been commenced, the said expenses were written off. The Tribunal, on the very same principle with respect to the leased out buildings, found that it is a capital loss and cannot be treated as a revenue loss. We are unable to agree with the Tribunal, since the assessee had spent money and could not get any benefit from the said expenses incurred for reason of the business having not been commenced in the said premises which were also leased out. If at all the business was commenced, then going by the dictum in **Joy Alukkas** it would have to be treated as revenue expenditure. Merely because the assessee could not commence the business it cannot be treated as capital loss. Hence, we answer the aforesaid issue in favour of the assessee and against the Department.

23. The other question raised for the assessment year 2010-11 in I.T.A.No.29 of 2016 is as follows:

“Whether, on the facts and circumstances of the case, the Appellate Tribunal is right in confirming the disallowance of provision for free service expenses amounting to Rs.36,00,000/-”.

The Tribunal has rightly considered the issue in the following manner:

“9. On a query from the bench whether actual expenditure has been incurred or expenditure has been accrued during the year, the Ld.AR could not offer any cogent explanation or reply to the Bench in this regard. In the facts and circumstances of the case, the expenditure claimed by the assessee is only a provision and was not accrued during the year and therefore, cannot be claimed as allowable expenditure u/s.37 of the Act. Accordingly, we find no infirmity in the order of the CIT(A) who has rightly confirmed the action of the Assessing Officer”.

We decline to answer the said question as the same is one purely on facts and not on law. The Tribunals order would stand confirmed on this factual issue.

In the result, the first question raised in all the appeals is answered, in favour of the assessee and against the revenue, reversing the order of the Tribunal; to the extent the question is decided in favour of the assessee. The second question is answered in principle and on the basis of the interpretation placed by the Full Bench, the issue is directed to be considered on merits by the Assessing Officer by examining the nature and scope of the agreements executed between the parties; subject to the assessee complying with the directions hereinabove.. The different question

raised in I.T.A. No.15 of 2015 is answered in favour of the assessee and against the revenue, reversing the contrary view taken by the Tribunal. As to the particular question raised in I.T.A.No.29 of 2016 we decline to answer the same and confirm the order of the Tribunal on that aspect. Both the learned Senior Counsel would point out that there are certain anomalies in the exact amounts which are to be treated as capital expenditure and revenue expenditure. This could be gone into by the Assessing Officer by making rectifications in accordance with the law declared by this Court. Ordered accordingly. Parties are left to suffer their respective costs.

Sd/-
K.Vinod Chandran
Judge

Sd/-
Ashok Menon
Judge

vku/-

[true copy]