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

+ **INCOME TAX APPEAL No. 1067/2018**

Date of decision: 5th October, 2018

THE PR. COMMISSIONER OF INCOME TAX -4 ... Appellant
Through Mr. Ruchir Bhatia, Advocate.
versus

GREEN DELHI BQS LTD. Respondent
Through Mr. Aniket D. Agrawal, Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J. (ORAL):

This appeal by the Revenue under Section 260A of the Income Tax Act, 1961 (Act, for short) assails the order dated 7th May, 2018 passed by the Income Tax Appellate Tribunal (Tribunal, for short) in the case of M/s Green Delhi BQS Limited (respondent-assessee, for short). The appeal pertains to the Assessment Year 2009-10.

2. The respondent-assessee, who was primarily engaged in the business of developing, maintaining and operating of Bus-Q-Shelters (BQS), metro stations, highways etc., in its return of income filed on 29th September, 2009 had declared net loss of Rs.8,11,91,801/-.

3. The Assessing Officer, however, vide assessment order dated 29th December, 2010 disallowed expenditure of Rs.2,08,92,603/- as capital loss

suffered by the respondent-assessee for failure to perform its part of the concessionaire agreement with the Delhi Transport Corporation.

4. The disallowance was upheld by the Commissioner of Income Tax (Appeals) vide order dated 28th February, 2014.

5. The Tribunal by the impugned order has reversed the findings and held that the addition was not justified as it was revenue expenditure.

6. Learned counsel for the Revenue relying upon the assessment order submits that Rs.2,08,92,603/- paid by the respondent-assessee on encashment of bank guarantee and interest on late payment, was capital expenditure and not revenue expenditure. He submits that the Assessing Officer had relied upon judgment of the Supreme Court in ***CIT versus Saurashtra Cement Limited***, (2010) 325 ITR 422 (SC).

7. Without prejudice to the aforesaid contention, learned counsel for the Revenue submits that even if the expenditure incurred is taken as revenue expenditure, it would not qualify for deduction in the Assessment Year 2009-10 as payment was actually made after 1st April, 2009.

8. The respondent-assessee had entered into a concessionaire agreement dated 26th July, 2007 with the Delhi Transport Corporation for setting up 400 bus shelters on build, operate and transfer basis (BOT basis). The respondent-assessee was to construct, operate and maintain the shelters for ten years, after which the shelters were to be handed over to the Delhi Transport Corporation. As per the agreement, the appellant had to pay the Delhi Transport Corporation Rs.4.09 crores per month. In return, the respondent-assessee was free to earn revenue through advertising, etc. to be displayed on the bus shelters.

9. The respondent-assessee was required to furnish two bank guarantee of Rs. 1 crore and Rs. 1.5 crores to the Delhi Transport Corporation as performance security for construction; and for operation and maintenance of the bus shelters and payment of concessionaire fee, respectively. The first bank guarantee was to be returned 60 days after completion/construction of all shelters and second bank guarantee was to be returned 90 days after shelters were handed over to the Delhi Transport Corporation. The agreement had also stipulated and required the respondent-assessee to furnish fresh performance security if the original bank guarantees were encashed.

10. It is an undisputed position that the respondent-assessee had furnished bank guarantee of Rs.2 crores to the Delhi Transport Corporation as performance security. On the Delhi Transport Corporation invoking bank guarantee, the respondent-assessee had approached the Delhi High Court and a stay/restraint order against encashment was passed. However, by the order dated 26th March, 2009 the stay order was vacated and the Delhi Transport Corporation was permitted and allowed to encash the bank guarantee. As the respondent-assessee had obtained stay, they were directed to pay interest @9% per annum from 18th November, 2008 till the date of payment.

11. The respondent-assessee was to construct, operate and maintain bus shelters. The respondent-assessee was also under an obligation to pay Rs.4.09 crores per month to the Delhi Transport Corporation. The shelters were not owned by the respondent-assessee. The Central Board of Direct Taxes vide Circular No. 9/2014 has inter alia observed that under the BOT schemes the assesseees are not entitled to depreciation as they are not owners

of the project, which is only constructed by them. Ownership is vested with the Government or its agencies. Therefore, the respondent-assessee was entitled to amortize the amounts spent on construction over the tenure of the agreement.

12. Whether expenditure is capital or revenue in nature has to be looked at from a commercial point of view. In the present case as noticed there was failure on the part of respondent-assessee to perform its part of the agreement including operation and maintenance of bus shelters and pay concessionaire fee of Rs.4.09 crores per month. Any expenditure or payment of the said nature would necessarily be revenue in character. Even construction cost of the shelters had to be amortized over a period of 10 years. These would, therefore, not be expenditure of capital nature. In view of the aforesaid, decision in **Saurashtra Cement** (supra) would not be applicable to the present case as in **Saurashtra Cement** (supra) the assessee had received liquidated damages on account of failure to supply plant and machinery, a fixed asset. There are a number of cases holding that where the property constructed is not owned by the assessee but by third party, the expenditure incurred by the assessee would not be capital expenditure but revenue expenditure [see **Lakshmi Sugar Mills Co.(P) Ltd. versus CIT**, (1971) 3 SCC 526, **CIT versus Bombay Dyeing and Manufacturing Co. Ltd.**, (1996) 3 SCC 496].

13. The test distinguishing capital and revenue expenditure as laid down in **Atherton versus British Insulated and Helsby Cables Ltd.**, (1925) 10 TC 155, reads as under:-

“But there remains the question, which I have found more difficult, whether apart from the express

prohibitions, the sum in question is (in the words used by Lord Sumner in Usher case [(1914) 6 TC 399] a proper debit item to be charged against incomings of the trade when computing the profits of it; or, in other words, whether it is in substance a revenue or a capital expenditure. This appears to me to be a question of fact which is proper to be decided by the Commissioners upon the evidence brought before them in each case; but where, as in the present case, there is no express finding by the Commissioners upon the point, it must be determined by the Courts upon the materials which are available and with due regard to the principles which have been laid down in the authorities. Now, in *Vallambrosa Rubber Company v. Farmer* [(1910) SC 519 : 5 TC 529] Lord Dunedin, as Lord President of the Court of Session, expressed the opinion that “in a rough way” it was “not a bad criterion of what is capital expenditure as against what is income expenditure to say that capital expenditure is a thing that is going to be spent once and for all and income expenditure is a thing which is going to recur every year”; and no doubt this is often a material consideration. But the criterion suggested is not, and was obviously not intended by Lord Dunedin to be, a decisive one in every case; for it is easy to imagine many cases in which a payment, though made “once and for all”, would be properly chargeable against the receipts for the year.... But 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.”

14. Referring to the said test, Lahore High Court in ***Benarsidas Jagannath, In re***, 15 ITR 185 had held :-

“It is not easy to define the term ‘capital expenditure’ in the abstract or to lay down any general and satisfactory test to discriminate between a capital and a revenue expenditure. Nor is it easy to reconcile all the decisions that were cited before us for each case has been decided on its peculiar facts. Some broad principles can, however, be deduced from what the learned Judges have laid down from time to time. They are as follows:

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: vide Lord Sands in *Commissioners of Inland Revenue v. Granite City Steamship Company* [(1927) 13 TC 1, at p. 14] . In *City of London Contract Corporation v. Styles* [(1887) 2 TC 239 at p. 243] , Bowen L.J. observed as to the capital expenditure as follows:

“You do not use it ‘for the purpose of’ your concern, which means, for the purpose of carrying on your concern, but you use it to acquire the concern.”

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: vide Viscount Cave, L.C., in *Atherton v. British Insulated and Helsby Cables Ltd.* [(1926) 10 TC 155] 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. Thus, if labour saving machinery was

acquired, the cost of such acquisition cannot be deducted out of the profits by claiming that it relieves the annual labour bill, the business has acquired a new asset, that is, machinery.

The expressions 'enduring benefit' or 'of a permanent character' were introduced to make it clear that the asset or the right acquired must have enough durability to justify its being treated as a capital asset.

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. Fixed capital is what the owner turns to profit by keeping it in his own possession. Circulating or floating capital is what he makes profit of by parting with it or letting it change masters. Circulating capital is capital which is turned over and in the process of being turned over yields profit or loss. Fixed capital, on the other hand, is not involved directly in that process and remains unaffected by it."

15. The Assessment Order does not refer to the enduring or permanent benefit acquired by the respondent-assessee and therefore on default and failure to abide by the terms, the expenditure or loss incurred by the respondent-assessee was capital expenditure/loss. Cost of construction as recorded and held above was not capital expenditure. Further, the respondent-assessee was liable to pay monthly fee of Rs.4.09 crores to the Delhi Transport Corporation, which is certainly revenue expenditure. Additionally, the respondent-assessee was under obligation to maintain and operate shelters which again would be revenue expenditure.

16. Having examined the case from all angles, we observe and hold that the Tribunal had rightly held that Rs.2,08,92,603/- was revenue expenditure and not capital expenditure. The Tribunal has also directed that if the respondent-assessee were to succeed in the Arbitration case initiated, the amount refunded would be taxed in the said year. This finding takes care of concern, if any, of the Revenue.

17. With regard to the second contention it must be noticed that in the present case, the Delhi High Court had dismissed the objections raised by the respondent-assessee and had permitted encashment of bank guarantee vide order dated 26th March, 2009. Accordingly, the Delhi Transport Corporation were entitled to encashment of the bank guarantee. Consequently, the respondent-assessee became liable to pay to the bank the said amount and this liability had accrued the day the Delhi High Court gave its decision permitting encashment. The factum that the payment was to be made subsequently would not make a difference. The respondent-assessee was held liable to pay interest from the date interim order was passed till payment was made. The second contention is accordingly rejected.

18. In view of the aforesaid discussion, we do not find any merit in the present appeal. The appeal is dismissed.

SANJIV KHANNA, J.

CHANDER SHEKHAR, J.

**OCTOBER 05, 2018
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