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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO.1169 OF 2013

The Commissioner of Income Tax-LTU

..Appellant

-Versus-

Indian Petrochemicals Corporation Ltd.

..Respondent

.....

Mr. Suresh Kumar a/w Ms. Padma Divakar for the Appellant.

Mr. J. D. Mistri, Senior Counsel, a/w Raj Darak & P. C. Tripathi for the Respondent.

.....

**CORAM: S. C. DHARMADHIKARI AND
A. K. MENON, JJ.**

DATE :- 8th APRIL, 2015.

PC.:

This Appeal of the revenue challenges the order passed by the Income Tax Appellate Tribunal, Bench at Mumbai, dated 29th June, 2012.

2] The Tribunal was dealing with four Appeals and out of which two were filed by the assessee and two were filed by the revenue. They pertain to two assessment years 2003-04 and 2004-05.

3] Mr. Suresh Kumar appearing for the revenue in support of this Appeal submits that the substantial questions of law as proposed and from

page 7 of the paper book arise for determination and consideration in the admitted factual backdrop. He would submit that the company is engaged in the business of manufacturing and selling petrochemicals. It filed a return of income on 29th November, 2003 declaring gross total income of Nil and which was revised later declaring a total loss of Rs.17,56,66,329/-.

4] The Assessing Officer noticed that the assessee company had treated Rs.38,62,33,200/- as a capital receipt on account of sales tax exemption granted by the Government of Gujarat, for establishing industries in the backward area of the Gandhar. The Assessing Officer did not accept the contention of the assessee company that the sales tax exemption was a capital receipt not chargeable to tax and determined this amount as a revenue receipt.

5] We need not advert to the rival contentions on this point or issue because in all fairness both sides have pointed out that one of the substantial question of law as proposed in the present Appeal is already admitted by this Court in Income Tax Appeal No.4157/2009 and between the same parties. In such circumstances, there is no difficulty in admitting this Appeal on question no.4(A).

6] Mr. Suresh Kumar, however would submit that all the questions as proposed are substantial questions of law and the Appeal, therefore, be admitted on the same.

7] However, Mr. Mistri, the learned Senior Counsel, appearing on behalf of the assessee company would submit that it is not necessary to admit this Appeal as all these questions other than the one admitted above are arising from pure factual findings. In relation to the question no. (B) Mr. Mistri would invite our attention to the discussion in the Tribunal's order. He would submit that the Tribunal in relation to this question has done nothing except relying upon the earlier orders and for assessment years 2000-01, 2001-02 and 2002-03. Therefore, the factual findings in earlier orders bind the revenue. There is no distinction or difference pointed out either before the Tribunal or this Court. In such circumstances, question no.(B) be not admitted.

8] Mr. Suresh Kumar, however, would submit that the contribution to various Associations has been made by the assessee company, even though the expenditure in relation thereto was not for the business of the assessee and, therefore, question no.(B) is also a substantial question of law.

9] What we have noted from the Tribunal's order and on this point is that the contribution which was made to various industries came to be computed. There was a chart placed before the Tribunal giving details of the donation/contribution. Similar contribution was made for earlier assessment years. The Tribunal relied upon certain decisions rendered by it and the High Court of Karnataka. This expenditure was held to be revenue in nature. In that regard, at paragraph 14 of the Tribunal's order (running page 109 and 111) we find that the Tribunal has merely followed and applied its earlier orders for prior assessment years in case of this very assessee and on the same question. Therefore, such factual findings cannot be termed as perverse and do not rise to any substantial questions of law. The Appeal is, therefore, dismissed. More so, when the factual position is identical to earlier assessment years and has not undergone any change.

10] Then, Mr. Suresh Kumar addressed us on the question no.(C). He submits that the factual position is not in dispute. However what the assessee company did was to terminate the build, own, operate, transfer contract with M/s. Dodsall Ltd. for its Dahej to Vadodra Pipeline Project by making one time payment of Rs.102,03,43,311/-, then, the assessee company had purchased a commercial right to operate and maintain the

pipeline. Therefore, such asset was clearly capital in nature. Mr. Suresh Kumar submits that even the question no. (D) is a substantial question of law because the Tribunal erred in allowing the entire expenditure of Rs.1,07,02,2000/- incurred by the assessee company in respect of registration fees and stamp duty paid on the lease transactions entered by it with ICICI Ltd. This could not have been allowed in the first year itself and the Assessing Officer had rightly apportioned it. It was spread over the entire lease period of 25 years.

11] In relation to these questions, Mr. Mistri would submit that the factual findings of the Tribunal are in consonance with the law laid down and repeatedly by the Hon'ble Supreme Court. He relies upon the judgment of the Hon'ble Supreme Court in case of ***Commissioner of Income Tax v/s. Madras Auto Service(P) Ltd. reported in (1998) 233 ITR 468***. He submits that the Hon'ble Supreme Court has earlier laid down the principle as to when an expenditure could be said to be capital or revenue in nature. There is no substance in the argument of the revenue because the assessee has not acquired any such right on one-time payment and distinguished from the contract which was earlier in force and executed with M/s. Dodsall Ltd. All that has transpired is that a pipeline in which the appellant claims a right to use and for its project was

the subject matter of the agreement earlier with M/s. Dodsall Ltd. Subsequently, M/s. ICICI Bank has stepped in. The assessee has paid a minimum agreed amount. This very sum, if paid in terms of the earlier contractual stipulation can be treated as revenue expenditure. The pipeline is not owned by the assessee company. The pipeline is laid by other legal entity and what the assessee obtained for itself is a right to use it. For that purpose, the agreement was executed and one of the terms pertain to payment. The payment was to be made monthly. Now, the Assessee has derived some benefit by making lump sum payment and for the entire contractual period. There is no distinction in the factual position. Neither the nature of the rights have been altered nor the underlying contract. Therefore, there is no substance in the contentions of the revenue and the judgment of the Hon'ble supreme Court is fully applicable. That has been rightly applied and the point is, thus, covered against the revenue.

12] In relation to the question No.(C), we find from the Tribunals' order that the arguments of the parties have been noted. The question was in relation to the assessee's agreement with M/s. Dodsall Ltd. The Assessing Officer was of the view that the expenditure on payment of lease rent and maintenance of the pipeline as per the original BOOT agreement with

Dodsal Ltd. has resulted in commercial advantage or benefit of enduring nature to the assessee in the form of operation and maintenance of the pipeline. The Assessing Officer was of the view that after termination of the agreement with M/s. Dodsal Ltd. and making one time payment of Rs.102,03,43,311/-, the rights which are vital for operation and functioning have been acquired.

13] The matter was, therefore, carried by the assessee and aggrieved by such a view of the Assessing Officer. The assessee was held to be entitled to only benefit of depreciation at half of the eligible rate. The balance sum was added back to the total income of the assessee. The Commissioner of Income Tax (Appeals) confirmed the order of the assessing officer.

14] The aggrieved assessee, therefore, approached the Tribunal and the Tribunal's attention was invited to the judgments of the Hon'ble Supreme Court right from the case of Assam Bengal Cement Co. V/s. CIT (1955) 27 ITR 34 and equally the judgment in the case of Madras Auto Service (supra) where very extensive arguments were canvassed. The Tribunal found that the contract with M/s. Dodsal Ltd. was of December 1995. Pursuant thereto, Dodsal built, maintained and operated the Dahej

Gandhar Vadodara pipeline for an approximate distance of 107 kms. The said pipeline was commissioned in May 1997. The assessee company, as per the agreement was obliged to pay Rs.2.47 crores per month minimum guaranteed amount to Dodsai as the charges in terms of the agreement. The agreement could have been terminated in ordinary course after 15 years from the date of commissioning. It can also be terminated if there was a breach of the contract or taking over of the assets after 5 years of commissioning based on a mutual understanding. Nothing of this nature transpired and the agreement continued. The pipeline was vital for the operations and functions of the assessee and, hence, when the present assessee company stepped in it decided to take a commercial decision. It made a lump sum payment of the above sum. This payment was made in the 3 years, namely, financial year ending 31st March, 2001, 31st March, 2002 and 31st March, 2003. The Tribunal held that there is no dispute that the payments were allowed as revenue expenditure in respect of these assessment years. However, the assessee pointed out to the Assessing Officer as also the Commissioner that over a period of 9 years from 2003-04 to 2011-12, the assessee was obliged to pay in terms of the earlier agreement, minimum Rs.266.76 crores to M/s. Dodsai. However, the payment as per the reconstructed agreement comes to Rs.104.45 crores. The Tribunal found that even when the earlier agreement with M/s.

Dodsal was in force, the assessee had never claimed ownership of the pipeline. Even after reconstructing of the agreement, the ICICI Ltd. stepped in. The other position has not changed. Now the ICICI Ltd. claimed the ownership rights and the assessee only got control of the operation and maintenance of the pipeline which is stated to be vital for its operation and functioning.

15] We find that the Tribunal's discussion and reasoning in paras 24 to 26 of the impugned judgment rightly follows the principles laid down in the case of M/s. Madras Auto Service(P) Ltd. We are in agreement with Mr. Mistri that the Tribunal's view cannot be termed as perverse. The following observations from the decision of the Hon'ble Supreme Court in M/s. Madras Auto (supra) would reveal as to how the Tribunal's reliance thereon cannot be termed as misplaced:-

“Under an agreement of lease dated 1-2-1966, the assessee obtained from M/s Hajira Comer and Mrs Rabia Bai Razack a lease of premises Nos 64 and 64/1 situated at Sri Narasimharaja Road, Bangalore for a period of 39 years commencing from 1-1-1966. Under the terms and conditions of the lease, the lessee (that is to say the assessee), had the right to demolish at its own expense the existing premises and appropriate to itself all the material thereof without paying to the lessors any compensation and construct a new building thereon to suit the purpose of their business as per the plan approved by the lessors Under clause 2 of the lease deed, the lessee was required to pay a rent of Rs.1,000 per month for the first fifteen years, Rs.1,500 per month for the next ten years, Rs.1,650 per month for the next ten years and Rs.2,000 per month for the remaining years. The lease deed further provided that the new

construction shall, right from the commencement of the work, be the property of the lessors; and upon completion of the work of construction the lessee will have only the right to be a tenant for a period of 39 years under the existing lease subject to the payment of rent and observation of other terms and conditions of the lease. The lessee shall not be entitled under any circumstances for any compensation whatsoever on account of its putting up the new construction in the place of the old.

Acting under the lease agreement the assessee invested a sum of Rs. 1,62,835 in the previous year relevant to the assessment year 1968-69 and Rs. 50,937 during the succeeding year in constructing a new building on the said land. The assessee claimed before the Income Tax Officer the expenditure of the said sums of Rs.1,62,835 and Rs.50,937 in the relevant assessment years as capital loss. In the alternative, the assessee claimed depreciation on capital investment; in the alternative, the assessee claimed deduction of the payments as business expenditure or as extra rent for the lease.

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, 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.

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 expenses chargeable against revenue, the lump sum payment should equally be regarded as a business expenses, but if the lump sum payment brings in a capital asset, then, that puts the

business on another footing altogether.

Relying upon the second test enumerated above, learned counsel for the appellant has submitted that the assessee got enduring benefit of a capital nature by spending the amount because the assessee obtained a new building for a period of 39 years. The difficulty, however, in the present case, arises from the fact that this building was never to belong to the assessee. Right from inception, the building was of the ownership of the lessor. Therefore, by spending this money, the assessee did not acquire any capital asset. The only advantage which the assessee derived by spending the money was that it got the lease of a new building at a low rent. From the business point of view, therefore, the assessee got the benefit of reduced rent. The High Court has, therefore, rightly considered this as obtaining a business advantage. The expenditure is, therefore, to be treated as revenue expenditure.

All these cases have looked upon expenditure which did bring about some kind of an enduring benefit to the company as a revenue expenditure when the expenditure did not bring into existence any capital asset for the company. The asset which was created belonged to somebody else and the company derived an enduring business advantage by expending the amount. In all these cases, the expense has been looked upon as having been made for the purpose of conducting the business of the assessee more profitably or more successfully. In the present case also, since the asset created by spending the said amounts did not belong to the assessee but the assessee 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.”

16] In the circumstances, therefore, we do not find that merely making a lump sum payment and in the above sum alters the factual position. Once the undisputed facts and the legal principles which have been consistently applied and followed, are being relied upon by the Tribunal, then, this question can neither be termed as perverse nor vitiated by any

error of law apparent on the face of the record. We do not think that this Appeal deserves to be dismissed on this point or question.

17] Then, we have the question of the payment of registration charges and stamp duty. We think that it was difficult for the Tribunal to have sustained the revenue's view point. If the registration fees and stamp duty are nothing but a duty on the instrument and not on the transaction covered by the instrument, then, there was no necessity to apportion the expenditure in that behalf. The registration fees and stamp duty are on the lease transactions entered by the assessee with M/s. ICICI Ltd. The expenditure in that regard has been allowed in the first year itself and we do not think that the Tribunal has in any manner deviated from the settled principles. The Tribunal's discussion in that regard from paras 34 to 38 and finally holding that this expenditure is revenue in nature and could have been, therefore, allowed in the first year itself raises no question of law. The Appeal is, therefore, dismissed even on question no.(D).

18] In relation to question no.(E) is concerned, Mr. Suresh Kumar submits that this is also substantial question of law simply because the assessee company relocated the reactor in the factory premises and, therefore, acquired a new and different advantage and which is of

optimum user and expenditure of relocating and to the tune of Rs.24.87 lakhs was capital in nature.

19] We are unable to agree with Mr. Suresh Kumar. In paras 40 to 45 of the impugned order, the Tribunal found that there is absolutely no change in the position and which it noted in para 45. It held that the reactor which was installed at a new place is the existing one. It was procured by the assessee in the year 1999. The revenue has not disputed the fact that the reactor was located at a place where it was originally installed. But it was not functioning for some time. Hence, the same reactor was relocated within the factory premises for optimum use. This Court had in the case of CIT V/s. Abbott Laboratories (I) Pvt. Ltd. reported in (1993) 202 ITR 818, the judgment which has been relied upon had dealt with such an issue. That when the expenditure is incurred by the assessee for rationalizing, better administration and modernization of its machinery with a view to obtain maximum benefit out of the existing resources, even that expenditure is allowable in nature. It could not be treated to be a capital one. The expenditure was incurred to improve the production of the existing project, to improve the facilities and obtain increase in profitability by the use of existing assets and resources. In these circumstances, the Tribunal's conclusion while reversing that of the

Assessing Officer cannot be termed as perverse or vitiated by any error of law apparent on the face of the record. We do not think that the Appeal raises any substantial question of law in relation to this issue.

20] Then, question no.(F) pertains to a deduction. That is a contribution of Rs.40,25,388/- made by the assessee company to various clubs ran by and meant for the staff and their family at various places. Mr. Suresh Kumar placed reliance upon section 40A(9) of the Income Tax Act, 1961. He would submit that every expenditure of this nature is not deductible. The only expenditure which could be claimed is the one which is stipulated by section 36(1) clause (v) and (va) of the Income Tax Act, 1961. Admittedly, making a contribution towards a club or association of the staff members is not a permissible expenditure and on basis of which a deduction can be claimed. Therefore, and since an identical question has been admitted by the High Court of Gujarat, then, this Court should proceed to admit this Appeal. Reliance is placed specifically on the language of the two provisions.

21] Mr. Mistri would not dispute that the High Court of Gujarat at Ahmedabad has admitted a similar question and in the assessee in case. However, Mr. Mistri relied upon a judgment of the Division Bench of this

Court in the case of ***Commissioner of Income Tax V/s. Bharat Petroleum Corporation Ltd. (2001) 252 ITR 43.*** Mr. Mistri submits that a distinction will have to be made when the expenditure is in the nature of reimbursement of certain expenses incurred. He would submit that the view taken by the Division Bench of this Court in Bharat Petroleum Corporation Ltd. binds us. This is nothing but a claim for deduction towards staff sports and welfare expenses. The staff has incurred these expenses and for a avowed object. The employees of the Corporation and companies like assessee take part in various tournaments and cultural or sports activities. Therefore, this is a matter completely covered by the view taken in the Division Bench judgment. The Tribunal, therefore, did not err in following it. This question is not substantial question of law.

22] In relation to this question, we find that it is the assessee company which raised the issue and of deduction. The deduction was of certain expenses incurred. The assessee submitted before the Tribunal that these are not matters where it could be said to be incurring any expenses but merely reimbursing the staff association. In that regard, what the Tribunal has relied upon is the contribution of Rs.40,25,388/- to various clubs ran by and meant for the employees at Dodsai and other stations and sums were paid as an employer and which are not allowable. The

stand of the assessee was that this expenditure was incurred to facilitate the management of various activities of employees or their family. The Tribunal considered the arguments and particularly that in the earlier assessment years the very issue was considered by it and that the Commissioner merely relied upon this view in allowing the assessee's claim. The Tribunal has not rendered any independent conclusion but followed and applied its earlier view. It held that there is no difference in the facts and circumstances.

23] However, we are of the prima facie view that once the two legal provisions having been pointed out to us, this view taken by the Tribunal and on facts will not bind the revenue. It would not definitely bind this Court in not entertaining and admitting this Appeal on the said point. In the light of the rival contentions, the Appeal deserves admission even on this point. It is therefore, admitted.

24] As far as question no.(G) is concerned, we are of the considered view that bearing in mind, the tax effect and only in the sum of Rs.2.66 lakhs that this question does not deserve to be admitted. The negligible and in any event minimal tax effect, thus, would prevail over this Court in not entertaining the Appeal and admitting on question no.(G).

25] As a result of the above discussion, the Appeal is admitted on the following two questions:

“(1) Whether on the facts and in the circumstances of the case and in law, the ITAT was right in holding that notional sales tax exemption amount of Rs.38,62,33,200/- is a capital receipt not liable to income tax?

(2) Whether on the facts and in the circumstances of the case and in law, the ITAT was right in allowing as a revenue deduction the contribution of Rs.40,25,388/- made by the Assessee Company to various clubs ran by and meant for the staff and their families at various places even though such expenditure was not allowable under section 40A(9) of the Income Tax Act?”

26] The Assessee waives service.

27] The Registrar (Judicial)/Registrar, High Court, Original Side, Bombay to ensure that the original record in relation to this Appeal is summoned from the Tribunal and offered for inspection of the parties. This paper book is treated sufficient for the purpose of admission of this Appeal. However, the Registry must further ensure preparation of complete paper book in accordance with the Rules. The Registry in the first instance must send intimation of admission of this Appeal enclosing

therewith a copy of this order so as to enable the Tribunal to act accordingly.

(A. K. MENON, J.)

(S. C. DHARMADHIKARI, J.)