आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

'A' BENCH, CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं श्री इंटूरी रामा राव, लेखा सदस्य केसमक्ष

BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA Nos.1676 & 1677/Chny/2019**

निर्धारण वर्ष /Assessment Years : 2013-14 & 2016-17

The Joint Commissioner of Income Tax, (OSD), Circle – 1, No.121, Adam's Plaza, 60 Feet Road, Nagar South, Tiruppur – 641 602.	v.	M/s Eastman Exports Global Clothing Pvt. Ltd., No.1012, 2nd Street, Kumar Nagar South, Tirupur – 641 603. PAN : AACCC 0952 E
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by : Shri AR.V. Sreenivasan, JCIT

प्रत्यर्थी की ओर से/Respondent by : Sh. T. Banusekar, CA

सुनवाई की तारीख/Date of Hearing : 31.07.2019

घोषणा की तारीख/Date of Pronouncement : 12.09.2019

आदेश /O R D E R

PER N.R.S. GANESAN, JUDICIAL MEMBER:

Both the appeals of the Revenue are directed against the respective orders of the Commissioner of Income Tax (Appeals) -3, Coimbatore, dated 12.03.2019 and pertain to assessment years 2013-14 and 2016-17. We heard both the appeals together and disposing the same by this common order.

2. Let's first take assessment year 2013-14. The only issue arises for consideration is disallowance of cost of construction of the building on the leasehold land.

3. Shri AR.V. Sreenivasan, the Ld. Departmental Representative, submitted that this is the second round of litigation before this Tribunal. In the first round of litigation, this Tribunal by an order dated 09.11.2017, remitted back the matter to the file of the Assessing Officer to consider the judgment of Madras High Court in CIT v. TVS Lean Logistics Ltd. (2007) 293 ITR 432 and the judgment of Supreme Court in CIT v. Madras Auto Service (P.) Ltd. (1998) 233 ITR 468. According to the Ld. D.R., the Assessing Officer, consequent to the order of this Tribunal remitting back for re-examination, found that the expenditure incurred by the assessee is capital in nature. According to the Ld. D.R., the judgment of Madras High Court and the Apex Court may not be applicable to the facts of the case. The Assessing Officer distinguished the case as that of the cases before the Madras High Court and Apex Court. Therefore, according to the Ld. D.R., the CIT(Appeals) is not justified in allowing the claim of the assessee as revenue in nature.

4. On the contrary, Sh. T. Banusekar, the Ld. representative for the assessee, referring to the order of the Assessing Officer, more particularly at page 5, submitted that the distinction made by the Assessing Officer with regard to the case of the assessee and that of the

case before the Apex Court and Madras High Court in Madras Auto Service (P.) Ltd. and TVS Lean Logistics Ltd. (supra) respectively is not correct. As in the case of the assessee, the assessee before the High Court as well as the Apex Court, took the vacant land and constructed the building. After expiry of lease period, the assessee in both the cases either had to demolish the building or leave the building as such and handed over the possession to the lessor. According to the Ld. representative, since the construction was made by the assessee and nominal rent was paid comparable to the market rate, the distinction made by the Assessing Officer with regard to the case of the assessee and that of the case before the Apex Court and Madras High Court is factually not correct. Hence, in view of the judgment of Madras High Court as well as the Apex Court, according to the Ld. representative, the expenditure incurred by the assessee has to be allowed as revenue in nature.

5. We have considered the rival submissions on either side and perused the relevant material available on record. In the earlier round of litigation, this Tribunal in I.T.A. No.291/Mds/2017, examined this issue and remitted back the matter to the file of the Assessing Officer with a direction to re-examine the matter in the light of the judgment of Apex Court in Madras Auto Service (P.) Ltd. (supra) and the judgment of Madras High Court in TVS Lean Logistics Ltd. (supra). Now, the

Assessing Officer has made a distinction between the cases before the Apex Court and Madras High Court on the one hand and the case of the assessee on the other hand. This distinction made by the Assessing Officer, according to the Ld. representative, is not correct. We have gone through the orders of the Assessing Officer and both the cases before the Apex Court and the High Court. In the case of the assessee before the High Court and Apex Court, the vacant property was taken on lease and the cost of construction was claimed by incurring heavy expenditure. In both the cases, the assessee was paying a nominal rate of rent when compared to the market rate of lease. We may say that the rent paid by the assessee may pertain to the land since the superstructure belongs to the assessee. After expiry of lease, the assessee has to demolish or may leave the construction as such and vacate the premises. In both the cases, the assessee has to lose the investment made for construction. Therefore, as rightly submitted by the Ld. representative for the assessee, the distinction made by the Assessing Officer between the case of the assessee and the cases before the Apex Court and the Madras High Court is not correct. This Tribunal is of the considered opinion that the facts of the case are identical to that of the Madras High Court and Apex Court.

6. We have carefully gone through the judgment of Apex Court in the case of Madras Auto Service (P) Ltd. (supra). The Apex Court at para 6 of its judgment observed as follows:-

> "6. 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. v. CIT [1955] 27 ITR 34 . 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 lessor undertook not to grant to any person any lease, permit or prospecting licence 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 Helsby Cables Ltd. [1925] 10 TC 155. It said (page 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 (page 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 circulating capital." (underlining ours)
>
> Relying upon the second test enumerated above, learned counsel for the appellant had 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."

7. We have gone through the judgment of Madras High Court in TVS Lean Logistics Ltd. (supra). The Madras High Court after considering Explanation 1 to Section 32(1) of the Act and the judgments of Apex Court in Nasiruddin v. Sita Ram Agarwal (2003) 2 SCC 577 and Raghunath Rai Bareja v. Punjab National Bank (2007) 2 SCC 230, found that similar expenditure is revenue in nature. In fact, the Madras High Court has observed as follows:-

"7. Similarly, there should be a literal rule of interpretation of a statute, which is the first and foremost principle of interpretation and where the words of a statute are absolutely clear and unambiguous, recourse cannot be had to the principles of interpretation other than the literal rule and even if the literal interpretation results in hardship or inconvenience, it has to be followed. The language employed in a statute is the determinative factor of the legislative event and even assuming there is a defect or any omission in the words used in the legislation, the court cannot correct or make up the deficiency, especially when a literal reading thereof produces an intelligible result and any departure from the literal rule would really be amending the law in the garb of interpretation, which is not permissible and which would be destructive of judicial discipline, vide Raghunath Rai Bareja v. Punjab National Bank [2007] 135 Comp Cas 163 (SC) ; [2007] 2 SCC 230.

8. What constitutes a capital expenditure and what does not, to attract Explanation 1 to section 32(1) of the Act depends upon the construction of any structure or doing any work or in relation to and by way of renovation, extension or improvement to the building which is put up in a building taken on lease by him for carrying on his business and profession of the assessee, but not in a case of construction of any structure or doing any work or relation to where such building is put up/constructed for the purpose of business or the profession of the assessee in a land taken on lease by the assessee. Because the assessee did not acquire a capital asset, viz., the land in the instant case, but has put up a construction of the building only for the business advantage, with the result the entire construction cost is admissible as the revenue expenditure.

9. The apex court in L. H. Sugar Factory and Oil Mills P. Ltd. v. CIT [1980] 125 ITR 293 held that the construction of roads in the case of sugar mill is revenue expenditure. Similarly, contribution to the State Housing Board for construction of tenements for the workers was also held to be revenue expenditure by the apex court in the case of CIT v. Bombay Dyeing and Manufacturing Co. Ltd. [1996] 219 ITR 521."

8. In view of the above judgment of Apex Court and the judgment of Madras High Court, this Tribunal do not find any reason to interfere with the order of the lower authority and accordingly the same is confirmed.

9. Now coming to assessment year 2016-17. The only issue arises for consideration is whether the incentive received from the Government for exploring new market is capital receipt or revenue receipt.

10. We heard the Ld. D.R. and the Ld. representative for the assessee. Admittedly, this issue was examined by this Tribunal in the assessee's own case for the assessment years 2011-12 and 2012-13 in I.T.A. Nos.47 & 48/Mds/2016 by order dated 17.05.2016. This Tribunal after considering the very same facts and circular issued by the CBDT in Circular No.564 dated 05.07.1990, observed as follows at para 9 of its order:-

> "9. We have considered the rival submissions on either side and also perused the relevant material available on record. The Market Linked Focus Product Scheme is a scheme promoted by the Director General of Foreign Trade wherein incentive @ 2% on the FOB value of the total export was allowed. As per the Scheme, the incentive was given to export products in a specified market. The export of products which are covered under FPS list would be given incentive of 2% on FOB value of the export. In other words, it is an incentive given by the Government for exploring the new markets across the globe. The question arises for consideration is when the assessee was given incentive for exploring the new markets across the globe, whether such incentive would be a capital receipt or revenue receipt? The Apex Court in the case of Ponni Sugars & Chemicals Ltd. (supra) had an occasion to examine an

identical situation and observed that if the object of the subsidy was to enable the assessee to carry on the business more profitably, then the receipt is on the revenue account. On the other hand, if the object of assistance was to enable the assessee to set up a new unit or expand the existing unit, then the receipt is on the capital account. In the case before us, the Government of India provided the incentive for exploring the new markets across the globe. Exploring a new market for a specified area would naturally expand the market area of the assessee. The incentive given to the assessee is not for running the business profitably but for expanding the market area. Therefore, this Tribunal is of the considered opinion that the incentive given by the Government to the assessee for exploring the new market is a capital receipt, hence it cannot be treated as income either under Section 2(24) or 28 of the Act. In view of the above, we are unable to uphold the order of the lower authority. Accordingly, the orders of the lower authorities are set aside and the addition made by the Assessing Officer is deleted."

11. This order of the Tribunal was followed by the CIT(Appeals). Therefore, this Tribunal do not find any reason to interfere with the order of the lower authority and accordingly the same is confirmed.

12. In the result, both the appeals filed by the Revenue stand dismissed.

Order pronounced in the court on 12th September, 2019 at Chennai.

sd/-	sd/-
(इंटूरी रामा राव)	(एन.आर.एस. गणेशन)
(Inturi Rama Rao)	(N.R.S. Ganesan)
लेखा सदस्य/Accountant Member	न्यायिक सदस्य/Judicial Member

चेन्नई/Chennai,
दिनांक/Dated, the 12th September, 2019.

Kri.

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)-3, Coimbatore
4. Principal CIT- 3, Coimbatore
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF.