IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH: KOLKATA

[Before Shri Mahavir Singh, JM & Shri M. Balaganesh, AM]

I.T.A No.1873/Kol/2008
Assessment Year: 2004-05

Income-tax Officer, Wd-7(2), Kolkata.	Vs.	OSD Coke Pvt. Ltd. (formerly Om Shree Durga Hard Coke Co. (P) Ltd.) (PAN: AAACO3021G)
(Appellant)		(Respondent)

&

I.T.A No.1874/Kol/2008
Assessment Year: 2005-06

Addl. Commr. Of Income-tax, Range-7, Kol	Vs.	OSD Coke Pvt. Ltd. (formerly Om Shree Durga Hard Coke Co. (P) Ltd.) (PAN: AAACO3021G)
(Appellant)		(Respondent)

Date of hearing: 21.12.2015
Date of pronouncement: 03.02.2016

For the Appellant: Shri P. B. Pramanik, JCIT
For the Respondent: S/Shri J. P. Khaitan & J. M. Thard, Advocates

ORDER

Per Shri Mahavir Singh, JM:

Both these appeals by revenue are arising out of separate orders of CIT(A)-VIII, Kolkata vide Appeal No. 333/CIT(A)-VIII/06-07/7(2) dated 23.07.2008 and Appeal No.573/CIT(A)-VIII/07-08/7(2) dated 24.07.2008 respectively. Assessments were framed by ITO, Ward-7(2)/Addl.CIT, Range-7, Kolkata u/s. 143(3) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") for Assessment Years 2004-05 and 2005-06 vide his separate orders dated 28.12.2006 and 17.12.2007 respectively.

2. The first common issue in these two appeals of revenue is against the order of CIT(A) deleting the addition made by AO on account of expenditure incurred on repairs and maintenance treating the same as capital expenditure.

3. Briefly stated facts are that the assessee during the AY 2004-05 incurred expenditure on repair and maintenance of ovens at Rs.46,65,954/- and during AY 2005-06 at Rs.25,08,182/-. The AO in both the years treated this expenditure on repairs and maintenance of Coke Woven as capital expenditure u/s. 31 or 37(1) of the Act. The AO while disallowing expenditure as capital

expenditure allowed depreciation in respect of the said expenditure in both the years. The relevant finding as given in AY 2004-05 in para 8 of AO's order reads as under:

> *" 8. From the facts and circumstances discussed in Sr. Nos. (1) to (VII) above, it is therefore clear that the ovens in question were subject to extensive and complete overhauling during the period of those three months so as to withstand the workload over a long period of time. It is also clear that the assessee might have claimed it as repairs but in effect there was substantial reconstruction of the ovens in question. In other words, although no new asset was created, the advantage, which was created by incurring such expenses, was created for the enduring benefit of the business. Hence, the expenses of Rs.46,65,954/- incurred towards repairs and maintenance of ovens in the period from 10.12.2003 to 1.3.2004 is treated as capital in nature whether considered u/s. 31 or u/s. 37(1) of I. T. Act. The said expense is therefore disallowed as deduction from total income but capitalized within fixed assets under the block of 'plant & machinery'. Accordingly, depreciation u/s. 32 is allowed on such addition of Rs.46,65,954/-. Since the additions were made after 30.09.2003, depreciation is allowed only at the half of the prescribed rate of 25%. In consequence of the same, the assessee gets additional depreciation of Rs.5,83,244/- (50% of 46,65,954). Penalty proceedings u/s. 271(1)(c) of I. T. Act are initiated for furnishing inaccurate particulars of total income on this issue."*

Aggrieved against the action of AO in both the years, assessee went in appeal before CIT(A), who allowed the claim of the assessee and the relevant finding given in AY 2004-05 by CIT(A) in his appellate order in para 2.5 reads as under:

> *"2.5 I have considered the submission of A/R of the appellant and also gone through the assessment order. The fact that simply because repairs were massive and substantial expenditure had been incurred on repairs, it could not be treated as Capital expenditure. It is not disputed that there was no extension of the Coke Ovens. The extensive repairs were more in the nature of Accumulated repairs and had to be done to enable the appellant to have optimum use of the Ovens because of the circumstances and the surge in the business during the year. The decisions quoted by the A/R of the appellant also support the view that even replacement of the complete machinery will have to be treated as a Revenue expenditure. The Explanation inserted w.e.f. Asst. Yr. 2004-05 does not change the legal position regarding allowability of the expenditure, it has only clarified the legal position as settled by judicial pronouncements. In view of above, the expenditure of Rs.46,65,954/- incurred on repairs of the Coke ovens is a revenue expenditure allowable u/s. 31 of the I. T. Act. The disallowance made by the AO by treating the expenditure as Capital expenditure is hereby deleted. In view of this finding, the depreciation of rs.5,83,244/- allowed in respect of the said expenditure will have to be reverted back."*

Similar is the finding in AY 2005-06 also. Aggrieved against the action of the CIT(A) in both the years, revenue is now in appeals before us.

4. We have heard rival submissions and gone through facts and circumstances of the case. The Ld. Counsel for the assessee explained that there was no denial of the fact that the repairs of the Ovens were extensive, but that by itself cannot be a ground for treating the expenditure as Capital expenditure as conceived under the Act. Our attention was invited to the submissions made before the A.O. by letter dtd.26.12.2006 in which the reason for making extensive repairs and the substantial expenditure incurred therefore was explained and the same is set out hereunder for proper understanding of the case.

"This was a boom year for Coke-Oven Plants. The assessee, therefore, did massive repairs to the plant for taking maximum benefit out of the plant. The company's Coke Oven Plant is a very old one. It has 46 ovens. The first block of 14 coke ovens was constructed long back during 1978-79, and thereafter more coke ovens were added in subsequent years and by 1989 the assessee's plant had 46 coke ovens. There had been no addition of coke-oven thereafter and number of coke-ovens remains same even now. In the year 1978 / 1979 when the first block of coke-ovens was made the price of fire bricks was about Rs.1/ - per piece only. It remained at Rs.2/ - to 3/ - per piece till 1985 whereas during the F. Y.2003-2004 the fire bricks were purchased @ Rs.2 7/- per piece. The coke oven plant of the assessee was pretty old and had not been working in full capacity mainly because of shortage in getting coal from BCCL. The opportunity arose during this year because of import of coal during the year from Australia. The assessee-company therefore embarked upon fast repairing the coke ovens on war-scale for obtaining the optimum results. The company started repairing the ovens in blocks of four ovens at a time so that the entire production was not affected. Repairing of one block of coke oven takes approximately 15/20 days during which the production in those ovens remained suspended. By this process the company got about 20/25 ovens repaired during the period from December to March, 2004 without disturbing the production. The repairing during the earlier period was very little, which was mainly done by the company's own labour/workers. Since during the repairing work was done in part, block of four ovens at a time the working in the four adjacent coke ovens had also to be suspended because of the heat, but the working of the other ovens during that period remained unaffected.

The reason for higher expenditure during this year is that the ovens had become very old and had been constructed for manufacture of coke from indigenous coal, but after September, 2003 when coal started coming from Australia, the repairing was done properly keeping in mind the high V.M and low ash contents in the imported coal which resulted in increase in temperature. In view of this good quality of fire bricks was used for repairs. Further, because of setting up of many coke-ovens during the year on the Port sights the price of fire bricks had also shot up. As explained above, the repair was done in phases of four ovens at a time for getting optimum benefit of production ."

In view of this letter, he explained that the number of Ovens was not increased and it remained 46 as before in 1989. The nature of the expenditure and the manner in which the repairs were made and the purpose for which repairs were made was also explained. He also argued that no new asset was brought into existence and no part of the expenditure was a Capital expenditure as conceived u/s.31 of the. Reliance was placed on several court decisions in support of the submissions.

5. We find that assessee's submissions did not find favour with the A.O. and he treated the entire expenditure as Capital for the reasons which are already set out in Para 3 above. The entire premise of the AO was on the explanation to sec.31 of the Act inserted w.e.f. AY 2004-2005, which states that *"if the cost of current repairs is of the nature of Capital expenditure then such expenditure shall not be allowed as deduction".* We are of the view that the explanation referred to by the AO is not correctly set out. The explanation inserted actually reads as *"For removal of doubts, it is hereby declared that the amount paid on account of current repairs shall not include any expenditure in the nature of Capital expenditure".* The explanation did not in any way alter the purport and meaning of repairs as conceived u/s.3l of the Act. It only

explained the correct legal position as settled by Court decision. There was no denial of the fact that the repairs were massive because the Ovens had become very old and needed substantial repairs to withstand sudden surge in quantity as well as quality of production during the year. Our attention was specifically invited to the huge increase in the turnover and income during the year, which was about 500% of the preceding year. It was explained that the quantum of expenditure incurred for repairs should not have influenced the decision of the AO. Reliance was placed on the decision in the case of CIT Vs. Chowgule And Co. Pvt. Ltd. (1995) 214 ITR 523 (Bom) - wherein the Hon'ble Court held that *"On a plain reading of section 31 of the Income-tax Act, 1961, it is clear that in order to entitle an assessee to claim deduction under section 31 of the Act, the amount must be paid on account of 'current repairs. The expression "current repairs" has not been defined in the Act. It has, therefore, to be taken in its popular or commercial sense. In commercial parlance, it means repairs which are undertaken in the normal course of user for the purpose of preservation, maintenance or proper utilization. It does not mean "petty repairs" or repairs necessitated by wear and tear during the particular year. Payments on account of "current repairs" must be understood in contradistinction to payments for "additions". The object of the expenditure should not be to bring a new asset into existence or to obtain a new or different advantage. The quantum of expenditure incurred on the repairs is not relevant for determining whether it is an expenditure on current repairs or not, because the extent of repairs and the amount spent would depend upon various factors. Similarly, by the mere fact that old parts were replaced by new parts, it cannot be said that a new asset is brought into existence."*

6. We find that Courts have held that current repairs u/s.31 did not rule out Accumulated repairs undertaken during the year. It was argued that if renovation or replacement could not be considered as an allowable expenditure u/s. 31 it had to be considered u/s. 37(1) and in support of this reliance was placed on the decision in CIT. vs. Kalyanji Mavji & Co. (1980) 122 ITR 49 (SC). Reliance was also placed on recent decisions of the Hon'ble Madras High Court in the case of CIT Vs. Rajaram Mills P. Ltd. (2008) 302 ITR 10 (Mad) and CIT Vs. T.V.S. Sewing Needles Ltd. (2008) 302 ITR 13 (Mad). In both these cases the Hon'ble court has held that expenditure on replacement of independent complete machinery was a revenue expenditure entitled to deduction. In these cases the Hon'ble court gave the decision by following their earlier decision in the case of CIT Vs. Janakiram Mills Ltd. (2005) 275 ITR 403 (Mad).

7. In view of the above facts and circumstances and the judicial pronouncements, we are of the view that in the present case simply because there was massive repairs and substantial expenditure incurred by assessee on repairs the same cannot be treated as capital in nature for the reason that there was no expansion of the coke ovens but the number of ovens remained the same at 46 as in 1989. No new coke ovens were add-up by incurring the expenditure and moreover there was no vacant space in the factory to set up additional coke ovens. The expenditure was incurred only on fire bricks, fire clay and tiles and no expenditure on steel and other materials were required for construction of new coke ovens as is evident from bills and vouchers. Secondly, repairing was done from outer side of the ovens and the platform from where the heated coal is dragged out after production. This repair necessitated due to use of high V.M. and low ash contents of imported coal, which resulted in increase in temperature, repair had to be done by using good quality of fire bricks to safeguard the ovens from melting, bending and other damages. In view of these facts, we consider the repairs carried out by the assessee as revenue in nature and we confirm the order of CIT(A) on this issue. This issue of revenue's appeal is dismissed.

8. The next issue in ITA No. 1873/K/2008 for AY 2004-05 is as regards to the order of CIT(A) deleting the disallowance made by AO u/s. 35D of the Act amounting to Rs.15,000/-. For this, revenue has raised following ground no2:

> *"2. That the Ld. CIT(A)-VII, Kolkata erred in law as well as in facts by deleting the addition of Rs.15,000/- which was added u/s. 35D of the Act in view of the judgment held in the case of Punjab State Industrial Development Corporation Ltd. vs. CIT 225 ITR 792 (SC) and Brooke Bond (India) Ltd. Vs. CIT, 225 ITR 798 (SC)."*

9. Brief facts relating to the above issue that the assessee claimed expenses of Rs.23,000/- towards amortization of share issue expenses written off. According to AO, these are not allowable in view of the decision of Hon'ble Supreme court in the case of Punjab State Industrial Dvelopment Corporation Ltd. Vs. CIT (1997) 225 ITR 792 (SC). Hence, he disallowed the amortization expenses u/s. 35D of the Act. Aggrieved, assessee preferred appeal before CIT(A), who allowed the claim of assessee to the extent of Rs.15,000/-. Ld. Counsel for the assessee before us explained that the expenditure was capital in nature is not denied but the assessee has claimed only one-fifth of the expenditure u/s. 35D of the Act in respect of expenditure of Rs.75,000/- incurred in FY 2001-02. It was explained that deduction of Rs.15,000/- out of the total expenditure of Rs.75,000/- incurred in earlier year has all along been

allowed in the past. Accordingly, the Ld. Counsel for the assessee claimed that the deduction should be restricted to Rs.15,000/- instead of Rs.23,000/- claimed by the assessee. According to assessee's counsel, the sum of Rs.8000/- is in respect of expenditure incurred for increasing of share capital in this year.

10. We find that the assessee has claimed deduction of expenditure at one-fifth u/s. 35D of the Act in respect of expenditure of Rs.75,000/- incurred in FY 2001-02 relevant to AY 2002-03 and subsequent years the same has all along been allowed being one-fifth as per the provisions of section 35D of the Act. We find no infirmity in the order of the CIT(A) in allowing this claim of assessee. Accordingly, this issue of revenue's appeal is dismissed.

11. The next issue in ITA No. 1874/K/2008 for AY 2005-06 is as regards to the order of CIT(A) setting aside the issue to the file of the AO for verification in respect to addition of Rs.10,50,807/- by invoking the provisions of section 40(a)(ia) of the Act for non-deduction of TDS on the expenses of security guard and import expenses as well as interest on loan. We find from the order of the CIT(A) that the assessee has made payments of TDS and these payments are made within the due date of filing of return of income by the assessee as is evidenced from the details given before the CIT(A), which reads as under:

SN	Nature of payment	Amount of Expenditure	TDS amount	Date of payment	Due date of payments as per amendment
13	Security Guard Services	29,440/-	601/-	15.06.2005	07.04.2005
14	Import Expenses	8,39,789/-	17,561/-	29.04.2005	07.04.2005
19	Import expenses	1,64,615/-	3,694/-	19.09.2005	07.04.2005
23	Interest on loan	16,963/-	1,731/-	06.06.2005	31.05.2005

We find that this issue is squarely covered in favour of the assessee by the decision of Hon'ble Calcutta High Court in the case of CIT v Virgin Creations, ITAT No. 302 of 2011, GA 3200/2011, decided on November 23, 2011, wherein even amendment made by the Finance Act 2010 in section 40(a)(ia) of the Act is held to be retrospective. Hon'ble High Court held as under:

> *"We have heard Mr. Nizamuddin and gone through the impugned judgment and order. We have also examined the point formulated for which the present appeal is sought to be admitted.*
>
> *It is argued by Mr. Nizamuddin that this court needs to take decision as to whether section 40(a)(ia) is having retrospective operation or not.*
>
> *The learned Tribunal on fact found that the assessee had deducted tax at source from the paid charges between the period April 1, 2005 and April 28, 2006 and the same were paid by the assessee in July and August 2006, i.e. well before the due date of filing of the return of income for the year under consideration. This factual position was undisputed.*

Moreover, the Supreme Court, as has been recorded by the learned Tribunal, in the case of Allied Motors Pvt. Ltd. and also in the case of Alom Extusions Ltd., has already decided that the aforesaid provision has retrospective application. Again, in the case reported in 82 ITR 570, the Supreme Court held that the provision, which has inserted the remedy to make the provision workable, requires to be treated with retrospective operation so that reasonable deduction can be given to the section as well.

In view of the authoritative pronouncement of the Supreme Court, this court cannot decide otherwise. Hence we dismiss the appeal without any order as to costs."

In view of the above and since this issue is squarely covered in favour of assessee and against the revenue, we find no infirmity in the order of CIT(A) and the same is hereby upheld. This issue of revenue's appeal is dismissed.

12. In the result, both the appeals of revenue are dismissed.

Order pronounced in the open court on 03.02.2016

Sd/-	Sd/-
(M. Balaganesh)	(Mahavir Singh)
Accountant Member	Judicial Member

Dated : 3rd February, 2016

Jd. Sr. P.S

Copy of the order forwarded to:

1. Appellant – ITO, Wd-7(2), Kolkata.
2. Respondent – OSD Coke Pvt. Ltd. (formerly Om Shree Durga Hard Coke Co. (P) Ltd.) Karnani Estate, R.N. 35, 209, A.J.C. Bose Road, 1st floor, Kolkata-700017
3. CIT(A) , Kolkata
4. CIT , Kolkata
5. DR, Kolkata Benches, Kolkata

/True Copy, By order,

Asstt. Registrar.