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(2001) 3 GLT 20

Gauhati High Court

Case No: Income tax reference No. 20 of 1997

B and A Plantations and Industries Ltd.		APPELLANT
	Vs	
Commissioner of Income Tax		RESPONDENT

Date of Decision: June 1, 2001

Acts Referred:

- Income Tax Act, 1961 - Section 10(2), 256, 37, 40A(5)

Citation: (2001) 3 GLT 20

Hon'ble Judges: H.K. Sema, Acting C.J.; A.H. Saikia, J

Bench: Division Bench

Advocate: Dr. Ashok Saraf, Mr. R.K. Joshi, Ms. U. Chakravorty, Mr. S.K. Agarwal, Mr. D. Baruah, Mr. S. Saikia and Mr. K.K. Gupta, for the Appellant; Mr. K.P. Sharma and Ms. B. Choudhury, for the Respondent

Judgement

A.H. Saikia, J.
The following question of law, under reference has been referred to the High Court at the instance of the Income Tax Appellate Tribunal.

" 1. Whether under the facts and in the circumstances of the case, the Tribunal was justified in law in restoring the order of the Assessing Officer in respect of disallowance made u/s 40A(5) of the Income Tax Act, 1961, on estimated basis ?

(2) Whether under the facts and in the circumstances of the case, the Tribunal was justified in law in coming to the conclusion that the expenditure incurred on account of repairs to plaint and machinery of Rs. 3,18,214 was for enduring benefit and restoring the order of Assessing Officer in disallowing the said amount on the basis of such conclusion ?

2. In referring the above mentioned questions of law the Tribunal has also drawn a statement of facts of the case. The statement of facts as referred by the Tribunal are as follows :-

"The facts of the case in respect of question No. 1 are that the Assessing Officer had made disallowance of Rs. 50,000 U/S 40A(5) of the I.T. Act, 1961. The assessee was requested to furnish details of salary paid allowance paid to employees, house rent paid and value of perquisites provided etc., for the purpose of section 40A(5) of the Act. The assessee did not furnish the details and contended that no amount was required to be disallowed-U/S 40A(5). In absence of specific details the Assessing Officer disallowed Rs. 50,000 on estimate as per details worked out in the immediate preceding assessment year giving increment to the employees drawn from the employer"s as well as considering the profit disclosed.

Being aggrieved, the assessee come up in appeal before the CIT (Appeals). Similar disallowance was made in the immediately preceding year and the CIT (Appeal) deleted the disallowance vide its order dated 25,2.88 in appeal No. 401. Guwahati 86-87 for the assessment year 1983-84. Following its earlier order, the CIT (Appeals) deleted the disallowance of Rs. 50,000 as according to him. the reasons given by the Assessing Officer was not understandable and the Assessing Officer should have obtained details from the books of account or by raising specific query. Before the CIT (Appeals) also no details were furnished.

In second appeal by the Revenue, the Tribunal restored the order passed by the Assessing Officer observing that even the CIT (Appeals) did not give reasons for deleting the disallowance and even before the Tribunal, the assessee failed to give necessary details as required by the Assessing Officer. The Assessee submitted copy of annual report and accounts which indicates that expenses has been claimed within the limits provided U/S 40A(5) of the Act. In this view of the matter, the order of the CIT (Appeals) is reversed and that of the Assessing Officer was restored.

The question No. 2 relates to the deletion of addition of Rs. 3,18,214 made by the Assessing Officer as capital expenditure. The facts of the case are that the assessee claimed Rs. 7,53,320 under the head machinery repairs and renewals. The Assessing Officer found that the following items were capital nature:-

(i) Installation of motors	Rs. 6,126.0
(ii) Cost of one set of casting and accessories	Rs. 1,42,199.0
(iii) Cost of spare of new CTC machine	Rs. 33,286.0
(iv) Incorporation of capital expenditure incurred by STE	Rs. 1,30,194.0
(v) Amount paid to Aspiring Ltd.	Rs. 6,400.0

Rs. 3,18,214.00

The Assessing Officer was of the opinion that the assesses would derive enduring benefit out of the above expenses and, therefore, he disallowed Rs. 3,18.214.

Being aggrieved, the assessee came up in appeal before the CIT (Appeals). Before the CIT (Appeals) the assessee submitted the details of the expenses and submitted that those expenses were in the nature of current repairs and for the replacement of worn out parts of existing machineries and for purchase of parts. The aassessee placed reliance on the decisions of Apex Court in Assam Assam Bengal Cement Co. Ltd. Vs. The Commissioner of Income Tax, West Bengal, and Empire Jute Co. Ltd. Vs. Commissioner of Income Tax, Considering the ratio laid down in the above decisions, the CIT (Appeals) held that all the above expenditure had been incurred as current repairs and, therefore, he come up to the conclusion that they were in the nature of revenue expenditure.

On further appeal by the Revenue, the Tribunal considered the details of the expenditure and recorded a finding that the expenditure incurred were for enduring benefits. The Tribunal also considered the principles laid down by the Apex Court and observed that the decision of Assam Bengal Cement Co. Ltd. (supra) was not applicable. In this view of the matter, the order of the CIT (Appeals) was reversed and that of the Assessing Officer restored."

3. We have heard Dr. A.K. Saraf, learned Sr., counsel assisted by Mr. R. K. Joshi appearing on behalf of the Assessee. Also heard Mr. K. P. Sharma, learned Sr., counsel assisted by Miss, B Choudhury, learned counsel appearing on behalf of the Revenue.

4. Challenging the order dated 27.10.1994 passed by the Tribunal, Dr. Saraf, learned Sr. counsel appearing on behalf of the assessee has strenuously argued that as regards to the question No. 1 relating to disallowance of Rs.50,000 U/S 40A(5) of the I.T. Act, 1961, here-in-after referred to as the "Act" the Tribunal had took a wrong approach in holding that the assessee failed to file the details as required by the Assessing Officer in order to enable the Tribunal to judge as to whether the disallowance was according to the provisions of Section 40A(5) of the Act. Besides the Tribunal also committed error of law and facts by observing that CIT(A) has not given any reason for deleting the disallowance. Referring pointedly to the order dated 3.10.1988 passed by the CIT (A), the learned counsel appearing for the assessee has stated that in discussing the Ground No. 2(g), the learned CIT(A) has clearly recorded the reasons as follows :

"In ground No. 2(g) it has been stated that IAC(A) was not justified in making disallowance of Rs.50,000 on estimate U/S 40A(5) of the I.T. Act, 1961. IAC(A) made the aforesaid disallowance on the ground that the appellant did not furnish details of expenses which were required to be furnished U/S 40A(5). Reasons given by IAC(A) is not understandable. IAC(A) could have obtained details from books of Account or by

raising specific query to the appellant but same has not been done. Under the circumstances, I am of the opinion that the disallowance was not called for. Moreover, similar disallowance was made in the immediately preceding year and vide my order dated 25.2.1988 in appeal No. 401-Guwa/86-87 for the A.Y.1983-84, I decided in favour of the appellant. Following the same, the addition of Rs.50,000 is deleted."

5. A bare reading of the said observation clearly transpires that the CIT(A) passed the reasoned order in deleting the addition of Rs. 50,000 as per Section 40A(5) of the Act. Be it noted that on our pointed querry it is stated at the bar that the order dated 25.2.1988 referred in the order of the CIT(A) above, has not been challenged.

6. The learned counsel appearing for the assessee has, referring to the statement of facts drawn by the Tribunal in making the present reference, stated that in the said statement of facts it was manifestly recorded that "the assessee submitted copy of annual report and accounts which indicates that expenses has been claimed within the limits provided U/S 40A(5) of the Act". Thus statement of facts has absolutely belied the findings of the Tribunal to the effect that assessee did not furnish the details as required by the Assessing Officer. It is contended that the statement of facts accompanied the reference shall be accepted orthodoxly in as much as the statements were prepared with the knowledge and in presence of both the parties. In support of his contention, Dr. Saraf, the learned Sr. counsel has referred two decisions of Apex Court in Commissioner of Income Tax, West Bengal Vs. Calcutta Agency Ltd., and Karnani Properties Ltd. Vs. The Commissioner of Income Tax, West Bengal,

7. In Calcutta Agency"s Case (supra) the Supreme Court held that the jurisdiction of the High Court in the matter of Income Tax reference is an advisory jurisdiction and under the Act the decision of the Tribunal on facts is final, unless it can be successfully assailed on the ground that there was no evidence for the conclusions on fact recorded by the Tribunal It is, therefore, the duty of the High Court to start by looking at the facts found by the Tribunal and answer the question of law on that footing. The statement of facts under the rules framed under the Income Tax Act is prepared with the knowledge of the parties concerned having full opportunity to apply for any addition or deletion to the statement of facts, the statement of facts must be accepted as correct and the Court has to pronounce its judgment on the basis of the said statement of facts.

8. In Karnani Properties* Case (supra) it was held by the Supreme Court that when the clause referred to the High Court speaks of "on the facts and in the circumstances of the case" it means on the facts and circumstances found by the Tribunal and not about the facts and circumstances that may be found by the High Court. The jurisdiction of High Court in dealing with the reference U/S 166 is very limited one and it must take the facts as stated in the statement of facts and cannot go beyond that."

9. Taking into account the ratio of the aforesaid cases, we find force in the submissions of the learned Sr. counsel appearing on behalf of the assessee and were are inclined to

hold that the statement of facts prepared by the Tribunal on making the reference must be accepted.

10. Mr. K. P. Sharma, learned Sr. counsel appearing on behalf of the Revenue has fairly accepted the contentions made on behalf of the assessee that the reasons had already been recorded by the CIT(A) in passing the order of deleting the addition of Rs.50,000. But his strong objection is that assessee had failed to file details as required by the Assessing Officer. It is submitted that inspite the request made by the assessee as well as the Tribunal, the assessee failed to furnish the detailed accounts like given increments to the employees drawn from the employers, the status and position held by the respective employees etc. Due to failure of submission of such details, the Tribunal acted legally and within the jurisdiction in restoring the order dated 31.3.1987 passed by the Assessing Officer reversing the order dated 3.10.1988 passed by the CIT(A).

11. This submission on behalf of the Revenue, in our considered view cannot be accepted, in view of the statement of facts recorded by the Appellate Tribunal as noted above that the assessee submitted copy of annual report and accounts indicating claim of expenses to the limit prescribed under the rules. It is settled position of law that since the statement of facts is prepared with the knowledge of the concerned parties, the same must be accepted as correct. The statement of the case is binding on the parties and they are not entitled to go behind the facts found by the Tribunal in the statement.

12. On careful perusal of the impugned order dated 27.10.1994 passed by the Tribunal, order dated 3.10.1988 by the CIT(A) and statement of facts drawn at the time of making reference of this Court and on consideration the rival contention of the learned counsel for the parties as well as having regard to the ratio of the decisions cited by the learned counsel for the assessee, we are of the considered view that the Tribunal was wrong and not justified in reversing the order dated 3.10.1988 passed by the CIT(A) and "restoring the earlier order of the Assessing Officer in respect of making disallowance of Rs.50,000 made u/s 40A(5) of the Act on estimated basis.

13. In that view of the matter, the question of law No. 1 under reference is answered in negative and in favour of the assessee.

14. Now coming to the second question of law under reference, the learned Sr. Counsel appearing on behalf of the assessee has stated that the Tribunal failed to apply its mind to the ratio of the two decisions cited before it namely, 1) Assam Bengal Cement Co. Ltd. Vs. The Commissioner of Income Tax, West Bengal, and (2) Empire Jute Co. Ltd. v. CIT (1980) ITR (1) . The expenditure incurred on account of repairs of Plant and Machinery of Rs. 3,18, 214 ought to have been accepted as without having the enduring benefit. It is stated that the assessee had clearly and specifically explained the expenditure of Rs.3,18,214 for accepting the same as revenue expenditure in as much as those expenses were incurred in carrying out the repairs and replacement of the machineries including purchase of parts of such purposes. There is absolutely no scope to bring such

expenditure under the head of capital expenditure.

15. Assailing the order dated 27.10.1994, the learned Sr. counsel appearing for the assessee has drawn our attention to the order dated 3.10.1988 passed by the CIT(A), particularly, the observations made in discussing in Ground No. 2(i).

16. For better appreciation of the issue in hand, we feel it necessary to reproduce the revevant portion of the observation made by the CIT(A) in discussing in Ground No. 2(i) and the same is extracted as below :-

"It has been stated that IAC(A) was not justified in making disallowance of Rs.3,18,214 out of Machinery repairs. IAC(A) noted that under this head require and maintenance a sum of Rs.3,18,214 was expenditure incurred for the purchase of various machineries. Such expenditure was in the nature of capital expenditure and therefore he disallowed Rs.3,18,214. The appellant stated before me that all these expenses were in the nature of current repairs and for the replacement of worn out parts of existing machineries and for the purchase of parts and he filed the details of such expenses which is being reproduced as under:-

(i) Installation of motors Rs.6127 - The dryers of the Salkathoni Factory had to be shifted from the "existing position to a new position for making space available for "sorting". The old motors had to be removed from their positions and fixed to a new position to be filled with drayers.

(ii) Cost of one set of casting and accessories Rs.1,42,199 - Paid to M/S Andrew Yule & Co. Ltd. for supply of spare set of castings and accessories for No. 14 S.C.D, AIR HEATER BILL No. 210120-3 dated 18.8.1983. In coal fired heaters replacement of casting from time to time is essential.

(iii) Cost of spare of new CTC machine Rs.33,285 (Bill enclosed) - Segments are used In CTC machine and after use the segments got worn out and unuseable. These segments have to be replaced from time to time to get a proper cut of the leaf.

(iv) Incorporation of capital expenditure incurred by Salkathoni Tea Estate Rs.1,30,194 - Paid to M/S Friends Electrical Co, as detailed below (Bill enclosed) :-

Bill No.	Particulars	Amounts

22/11.2.84	Overhauling of generator and repairing charges of motor.	Rs. 28,894.00
23/11.2.84	Overhauling of generator and repairing charges of motor.	Rs. 18,500.00
9.1.84	Repairing charges of alternator of generator.	Rs. 18,600.00
11/17.1.84	-do-	Rs. 27,600.00
12/17.1.84	-do-	Rs. 36,600.00
		Rs. 1,30,194.00

Amount paid to Aspiring Ltd. Rs. 6,408 - Cost of spare parts of Tea Machineries.

I have considered the submission of the learned counsel and noted that all the above expenditures have been incurred as current repairs or for the purchase of parts of the machinery for replacement of worn out parts of the existing machineries and therefore these are in the nature of revenue expenditure. The appellant has also placed reliance on the following decisions. :-

Empire Jute Co. Ltd. Vs. Commissioner of Income Tax,

I have considered the ratio laid down in these decisions and I am of the view that all these expenses are revenue in nature and therefore the addition of Rs."3,18,214 is deleted."

17. Taking us to the above observation of the CIT(A) the learned Sr. counsel has tried to explain the expenses show it item wise in order to convince that all these expenses were in the nature of current repairs and replacement of worn out parts of existing machineries as well as for the purchase of parts. For Instance regarding Item (i) i.e. installation of motors of Rs.6127 on remarks column, it was noted that the dryers of Salkathoni Factory had to be shifted from existing position to a new position for making space available for "sorting". The old motor had to be removed from their position and fixed to a new position to be fitted with dryers. It appears that such installation of motor as well as shifting of dryers are necessary for the purpose of making more space available for sorting and such as such replacement does not come under the purview of enduring benefit to make it a capital expenditure.

18. Item No. (ii) relates to cost of one set of casting and accessories for Rs.1,42,199. The said cost has shown as paid to M/S Andrew Yule & Co. Ltd. for supply of spare set of castings and accessories for No. 14 S.C.D. AIR Heater in-as-much as cold fired heaters replacement of casting from time to time Is essential, when Item No. (iii) speaks of cost of spare of new CTC machine for Rs. 33,285. This expenses was shown as the segments used in CTC machine but to be replaced from time to time to get a proper cut of the leaf because for the use of such segments get worn out and unuseable.

19. These item Nos. (ii) and (iii) appears to be expenditure incurred as current repairs and the same could be easily accepted as revenue expenditure. As regards to item No. (iv) which shown Rs.1,30,194.00 as incorporation of capital expenditure incurred by Salkathoni Tea Estate, the Tribunal held that the assessee itself admitted the said expenditure as capital expenditure and as such the same was accepted as correct. But the learned counsel appearing on behalf of the assessee, countering the said finding, has argues that showing a item under head of capital expenditure would not make the said expenditure as capital expenditure in as much as in order to declare an expenditure as capital in nature, the competent authority must consider the pros and cons of the details submitted by the assessee and depend on facts and circumstances of each case. Similarly showing an expenditure under the head of Revenue expenses shall not make that expenditure automatically the Revenue expenditure until and unless a close scrutiny and examination is made to the details. In the instant case, the reference to capital expenditure in item No. (iv) was inadvertent mistake on the part of the assessee and it is the burden of the competent authority to take into account the existing facts and circumstances of the case to declare a particular expenditure as "capital" or "Revenue" expenditure.

20. The particulars furnished against the expenditure of Item No. (iv) clearly show that these were incurred in overhauling of generators and repairing charges of motor as well as repairing charges of alternator of generator on difficult dates. The other item No. (v)

relates to the amount of Rs.6418 paid to one Aspiring Ltd. as cost of spare parts of Tea Machine which was claimed to be the expenditure of revenue in nature.

21. Now the question is whether such "overhauling" or "repairing" charges can be accepted as capital expenditure to give enduring benefit. Strongly emphasing the "overhauling" and "repairing" charges as revenue expenditure, Dr. Saraf learned Sr. Counsel has convincingly argues that overhauling or repairing charges cannot be accepted as capital expenditure under the existing facts and circumstances in as much as the said expenditure was a recurring one incurred for the purpose of maintenance of generators and motors without having any enduring benefit.

22. In order to substantiate his argument, the learned Sr. Counsel appearing on behalf of the assessee has referred to several decisions of Apex Court as well as High Courts. Those case laws are discussed as under.

23. In a celebrated case of Atherton (H. M. Inspector of Taxes) v. British Insulated and Helsby Cables Ltd. reported in 10 (Tax cases) 155, the House of Lords speaking through viscount cave, L.C. at page 192, 193 held as follows :-

".... 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. For this view there is already considerable authority. Thus moneys expended by a brewing firm with a view to the acquisition of new licenced premises (Southwell v. Savil Brothers (1901) 2 K.B. 349) "fitting expenses" incurred in transferring a manufacturing business to new premises (Granite supply Association v. Kitton (1905) 8 F 555 TC 168); cost incurred in promoting a Bill which was dropped on the desired facilities being obtained by agreement (A.G. Moore and Company v. Hare 1914 6 T.C. 572 ; and expenditure incurred by a -shipbuilding firm in depending a channel and creating a deep wather berth (not on their own property) to enable vessels constructed by them to put out to sea (Ounsworth v. Vickers. 1915) 3 K.B. 267 have been held to be in the nature of capital expenditure and not to be deductible under the Income Tax Acts ; and Rountree & Company v. Curtis (1925) 1 K.B. 328, is to the same effect. I think that the principle to be deducted from the series of authorities rests on sound foundations and may properly be adopted by this House."

23. In L.B. Sugar Factory and Oil Mills (P) Ltd., Pilibhit Vs. Commissioner of Income Tax , U.P., Lucknow, The Supreme Court page 298-299 accepted the test for distinguishing between capital and revenue expenditure as enunciated by Lord Viscount Cave, L.C., in Atherton"s case (supra) and held that the said test is not of universal application and as the parenthetical clause shows, it must yield where there are special circumstances leading to a contrary conclusion. Their Lordships had the occasion to rely the decisions in Empire Jute Co. Ltd. Vs. Commissioner of Income Tax, wherein it was held that there

may be cases where expenditure, even if, incurred for obtaining an advantage of enduring benefit, may, none-the-less, be on revenue account and the test of enduring benefit may break down. What is material to consider is the nature of the advantage in a commercial sense and it is only when the advantage is in the capital field that the expenditure would be disallowable on an application of this test. But if the advantage consists merely in facilitating the assesse"s trading operations of enabling the management and conduct of the assesse"s business to be carried on more efficiently in more profitably while leaving the fixed capital untouched, the expenditure would to on revenue account, even though the advantage may endure in an indifinite future.

24. In L.H. Sugar Factory case (supra) the question arose whether by spending an amount of Rs.50,000 as a part of the construction of the road around the factory, the assessee did acquire any asset of an enduring benefit. It was held that undoubtedly though the construction of those roads facilitated the business operations of the assessee and enabled the management to carry on the business more efficiently and profitably as well as would have an advantage for a long duration till the roads continued to be in motorable condition, there was not an advantage in the capital in nature because no tangible or intangible asset was acquired by the assessee nor was there any addition to or expansion of the profit making apparatus of the assessee. Accordingly, it was held that the amount of Rs.50,000 contributed by the assessee for the purpose of facilitating the conduct of the business and making it more efficient and profitable, was clearly an expenditure on revenue account.

25. In another case, cited by the learned Sr. counsel for the assessee in Ballimal Naval Kishore and Another Vs. Commissioner of Income Tax, the Apex Court at page - 417 held as under :-

".....if, we look at the facts of this case, it will be evident that what the assessee did was not mere repairs but a total renovation of the theatre, New machinery, new furniture, new sanitary and new electrical wiring were installed besides extensively repairing structure of the building. By no stretch of imagination, can it be held that the said repairs qualify as "current repairs" within the meaning of Sec. 10(2)(v). It was a case of total renovation and has rightly been held by the High Court to be capital in nature,"

26. We must also refer to the decision of the Bombay High Court in which strong reliance was placed on behalf of the assessee.

The Bombay High Court speaking through Chagla CJ in New Shorrock Spinning and Manufacturing Co. Ltd. Vs. Commissioner of Income Tax, Bombay North, held as follows :-

".... The simple test must be constantly borne in mind is that as a result of the expenditure which is claimed as an expenditure for repairs what is really being done is to preserve and maintain an already existing asset. The object of the expenditure is not to bring a

new asset into existence, nor is its object the obtaining of a new or fresh advantage. This can be the only definition of "repairs" because it is only reason of this definition of repairs that the expenditure is a revenue expenditure.....

Turning to the authorities, in the first place we might look at the well known definition of Lord Justice Buckley, which is always quoted whenever a case of repairs comes up before a Court, and those observations were made in the case of Lurcoll v. Wakely and Wheeler" and there Lord Justice Buckl draws a distinction between repair and renewal and this is what the learned Lord Justice says :-

"Repair" and "renew" are not words expressive of a clear contrast. Repair always involves renewal, renewal of a part, of a subordinate part .... Repair is restoration by renewal or replacement of subsidiary parts of a whole. Renewal, as distinguished from repair, is reconstruction of the entirety, meaning by the entirely not necessarily the whole but substantially the whole subject-matter under discussion. .....

It is impossible to say with regard to any particular asset when the need for repairs would arise. It would depend upon various circumstances, and in this case it so happens that the particular parts that were used by the assessee for 60 years were such parts that the need to repair them did not arise earlier. It might have been due to the quality of the parts themselves or to the care with which the parts were used by the assessee, but the fact remains that they had not to be repaired till after the passage of 60 years.

In our opinion, therefore, this was an expenditure which the assessee company could claim as a permissible deduction u/s 10(2}(v) of the Act."

27. In another case reported in Commissioner of Income Tax Vs. Indian Woollen Textile Mills P. Ltd., the Punjab and Haryana High Court held that the findings of fact recorded by the Tribunal led to the conclusion that the expenditure being for current repairs and replacement was incurred by the assessee in the day to day course of the carrying on business which was commercially expedient and demanded by the necessities of the business, such expenditure cannot be incurred as capital expenditure in nature.

28. Similarly the Allahabad High Court in Commissioner of Income Tax Vs. Kanodia Cold Storage, it was specifically held that replacement of existing service line for the functioning of the cold storage with a new line did not result in the creation of any new asset of enduring nature and the same was not in the nature of capital expenditure and as such the amount of expenditure was allowable in computing the income of the assessee.

29. The Madras High Court in Commissioner of Income Tax Vs. Sree Narasimha Textiles (P.) Ltd., held that the need for replacement of motor having become worn out and subsequent replacement of such motor was only for the purpose of keeping looms and spindles for the factory running and making it possible for production to continue and, therefore, such expenditure incurred for replacement by new motor was not capital

expenditure but only the revenue expenditure.

30. In a decision of this Court in M/S R.G.S. Industries, Dibrugarh v. Commissioner of Income Tax, reported in (1990) 1 GLR 347 it was held that for consideration whether an expenditure comes within the meaning of capital expenditure or revenue expenditure that can only be decided taking into account the facts and circumstances of the case from the angle of a practicable and prudent businessman but not from the view point of a tax gatherer upon strict juristic classification of the legal rights, if any, secured in the process.

31. Having regard to the abovementioned judicial pronouncement and on a logical deduction of the same we are of the considered view that the question whether an expenditure shall come within the purview of capital or revenue expenditure in nature shall have to be decided on the basis of the facts and circumstances of a particular case. It is to be closely looked into how has the expenditure been incurred so as to give enduring benefit or not. In our opinion the intention and object of the expenditure must not he such so as to bring a new asset into existence or obtain a new or fresh advantage having enduring benefits. Obviously, if the amount spent is made not only once and for all, but with a view to bring into existence a new asset or obtaining a new advantage for the enduring benefits of a business, such an expenditure would not be an expenditure of a revenue in nature but it would be a capital expenditure and the deduction on such expenditure is not permissible u/s 37 of the Act as revenue expenditure.

32. Applying the ratio of the above cited case in the instant case we can safely held that the installation of motors by shifting from the existing position to a new position for making space available for "sorting" and the replacement of casting essential in Coalfired heaters as well as the replacement of segments used in CTC machine cannot be treated as new asset to call as capital expenditure. Similarly the overhauling and repairing of generator and motor are necessary for the purpose of maintenance in order to make the factory run and to continue production and hence the expenditure incurred for such overhauling and repairing was undoubtedly a recurring one without having any enduring benefit.

33. A bare reading of the judgment of the Appellate Tribunal, it appears that the Tribunal in arriving at a decision of reversing the order dated 3.10.1988 passed by the C1T(A), rejected the applicability of the ratio of Assam Bengal Cement Co. Ltd. and Empire Jute Co. Ltd. (supra), pressed into service on behalf of the assessee. The Tribunal held that both the aforesaid decisions did not come to the rescue of the assessee as the facts and circumstances of the instant case altogether different.

34. Now let us closely look at these decisions to find out whether the ratio laid down therein can be made applicable to the case in hand. In Assam Bengal Cement Co. Ltd (supra) the Apex Court dealing in details on the question of capital or revenue expenditure held that line of demarcation of capital expenditure and revenue expenditure is very thin. It depends on the facts and circumstances of any particular case. In the said decision the Apex Court at page 45 held as follows :-

"If the expenditure is made for acquiring or bringing into existence an asset or advantage for the enduring benefit of the business it is properly attributable to capital and is of the nature of capital expenditure. If on the other hand it is made not for the purpose of bringing into existence any such asset or advantage but for running the business or working it with a view to produce the profits it is a revenue expenditure. If any such asset or advantage for the enduring benefit of the business is thus acquired or brought into existence it would be immaterial whether the source of the payment was the capital or the income of the concern or whether the payment was made once and for all or was made periodically. The aim and object of the expenditure would determine the character of the expenditure whether it is a capital expenditure or a revenue expenditure. The source or the manner of the payment would then be of no consequence. It is only in those cases where" this test is of no avail that one may go to the test of fixed or circulating capital and consider whether the expenditure incurred was part of the fixed capital of the business or part of its circulating capital. If it was part of the fixed capital of the business it would of the nature of capital expenditure and if it was part of its circulating capital it would be of the nature of revenue expenditure. These tests are thus mutually exclusive and have to be applied to the facts of each particular case in the manner above indicated. It has been rightly observed that in the great diversity of human affairs and the complicated nature of business operations it is difficult to lay down a test which would apply to all situations. One has therefore got to apply these criteria one after the other from the business point of view and come to the conclusion whether on a fair appreciation of the whole situation the expenditure incurred in a particular case is of the nature of capital expenditure or revenue expenditure in which latter event only it would be a deductible allowance U/S 10(2)(xv) of the Income Tax Act. The question has all along be considered to be a question of fact to be determined by the Income Tax authorities on an application of the board principles laid down above and the Courts of law would not ordinarily interfere with such findings of fact if they have been arrived at on a proper application of those principles."

35. Similarly the Supreme Court in Empire Jute Company''s case (supra) pointed out as follows:-

"There may be cases where expenditure even if Incurred for obtaining an advantage of enduring benefit, may none-the-less be on revenue account and the test of enduring benefit may break down. It is not even advantage of enduring nature acquired by an assessee that brings the case within the principle laid down in this test. What is material to consider is the nature of advantage in a commercial sense and it is only when the advantage Is in the capital field that the expenditure would be disallowable on an application of this test. If the advantage consists merely in facilitating the assesse''s trading operations or enabling the management and conduct of the assessee''s business to be carried on more efficiently and more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure to an Indefinite future."

36. Paraphrasing the above observations, we do not find any reason why the ratio of those decisions shall not be applicable in the instant case and we respectfully agree to accept that the proposition of law laid down in those Judicial pronouncement is very much essential to decide the case in hand as the guiding principles.

37. Opposing the contentions made on behalf of the Assessee, Mr. K.P. Sharma, learned Sr. counsel appearing on behalf of the revenue has urged that the items shown above cannot be accepted as revenue expenditure as claimed by the Assessee. But it would come directly under the capital expenditure because, as evident from the remarks column, the expenditures were seemingly for enduring benefit giving raise to capital expenditure. Distinguishing the Assam Bengal Cement Co. Ltd. (supra) and Empire Jute Company''s case (supra), Mr. Sharma has contended that the question whether the matter comes under the capital or revenue expenditure is exclusively a question of fact to be determined by the Revenue authority and this Court would not interfere with such finding of facts under reference.

38. The learned counsel appearing for the Revenue has further stated that all the items mentioned above carried the advantage for enduring benefit. There was substantial replacement of the machineries. On the other hand the claim for overhauling and repairing was not explained properly for which the Tribunal rightly accepted that the expenditure incurred were for enduring benefit which automatically shall bring the expenditure under the Head of capital expenditure.

39. We have given our thoughtful consideration to the rival contentions and also gone deeply to the ratio of all the decided cases above cited. Under the existing facts and circumstances of the case we have unhesitatingly agreed to approve the submissions made on behalf of the Assessee when the claim of the learned counsel appearing for the Revenue for accepting the expenditure as capital in nature cannot be countenance.

40. It is settled position of law that there is no cut and dry formula for accepting particular expenses as revenue of capital expenditure, It all depends on the particular case having its own set of facts and circumstances. Applying the ratio of the above noted cases, we are of the firm opinion that the expenditure in question fall under the category of revenue expenditure in question fall under the category of revenue expenditure without having enduring benefit. Rejecting the submission made on behalf of the Revenue that the question involved herein is purely a question of fact which is only to be determined by the Revenue authority and not to be interfered with by this Court, we clearly say that taking into account the observation made in Assam Bengal Cement Co. Ltd. (supra), though the questions of fact would not be ordinarily interfered with by this court, the same can be brought under judicial scrutiny if such finding of facts have not been properly appreciated by the Income Tax authority. In the case in hand, the Tribunal faultered in looking into the factual position in its proper perspective. Accordingly, in view of the matter, the finding of the Appellate Tribunal resulted in reversion of the finding of the CIT(A) cannot be sustained in law.

41. This answers the question no. 2 in negative accordingly and in favour of the assessee.

42. For the reasons, observations and discussions made above, this Reference is answered accordingly.