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

% *Judgment Pronounced on: 09.10.2023*

\+ **ITA 1398/2006**

M/S ASIAN HOTELS LTD ..... Appellant

Through : Mr Tarun Gulati, Sr. Adv. with Ms Aakanksha Kaul, Mr Aman Sahai, Mr Kumar Sambhav and Mr Adit Khorana, Advs.

versus

COMMISSIONER OF INCOME TAX-I ..... Respondent

Through : Mr Zoheb Hossain, Sr. Standing Counsel with Mr Sanjeev Menon, Jr Standing Counsel.

CORAM:
HON'BLE MR JUSTICE RAJIV SHAKDHER
HON'BLE MS JUSTICE TARA VITASTA GANJU

[**Physical Court hearing/ Hybrid hearing (as per request)**]

TABLE OF CONTENTS

RAJIV SHAKDHER, J.:

Prefatory facts:

1. The above-captioned appeal concerns Assessment Year (AY) 1992-93. *Via* the instant appeal, the appellant/assessee seeks to assail the order dated 28.04.2006 passed by the Income Tax Appellate Tribunal [hereafter referred to as "Tribunal"].

1.1 The impugned order concerns not only AY 1992-93 but is also common to AY 1991-92 [ITA No.1394/2006], AY 1993-94 [ITA

No.1397/2006] and AY 1994-95 [ITA No.1396/2006].

1.2. The Tribunal has followed the impugned order while passing orders dated 09.02.2007 [concerning AY 1995-96, impugned in ITA 844/2007] and 31.05.2007 [concerning AY 1996-97, impugned in ITA 1342/2007].

1.3. Apart from the appeals mentioned above, ITA 486/2023 [which also pertains to the appellant/assessee], impugns the order of the Tribunal dated 15.09.2006 concerning AY 1997-98.

2. Insofar as the above-captioned appeal is concerned, i.e., ITA No.1398/2006, the following questions of law were framed by the Court *via* order dated 18.09.2007:

"(1) Whether the finding of the Income Tax Appellate Tribunal that the "renovation and repair" expenses, partly capitalised in the books of account of the Assessee, is not revenue expenditure admissible under Section 37 of the Income Tax Act, 1961, is correct?

(2) Whether the Income Tax Appellate Tribunal is correct in law in holding that payment made to Gherzi Eastern Ltd., an interior architect, Rs.23,18,695/- for consultancy and supervision of interior décor of the existing hotel of the Assessee under "renovation and refurbishment" is capital expenditure?"

2.1. The first question of law, as extracted above, arises in all appeals[1] except ITA No.1342/2007.

2.2. Likewise, the second question of law arises in all appeals[2] except ITA No.486/2007 and ITA No.1342/2007. The only difference insofar as the

[1] See paras 1.1, 1.2 and 1.3. above
[2] See paras 1.1, 1.2., and 1.3 above

second question of law is concerned, pertains to the amounts paid to Gherzi Eastern Ltd. [in short, "GEL"], an architect-consultant appointed by the appellant/assessee.

3. Therefore, for convenience, we would advert to the facts that obtain in ITA No.1398/2006 to adjudicate the common questions of law arising in the appeals.

Backdrop:

4. The appellant/assessee is in the business of running a five-star hotel named Hyatt Regency [hereafter referred to as "hotel"], which is located in Delhi.

4.1 In and about 1990, when nearly six (6) years had passed since the hotel went into commercial production, the appellant/assessee embarked on repairing, renovating and refurbishing its hotel.

5. For the accomplishment of the tasks at hand, as noticed above, the appellant/assessee had appointed GEL as a consultant *via* an agreement dated 06.11.1990.

6. In Financial Year (FY) 1991-92 [AY 1992-93], the appellant/assessee spent in and about Rs.847,91,000/- towards renovation, refurbishment and repairs of its hotel, out of which Rs.600,84,000/- was capitalised, while the remaining amount was claimed as revenue expenditure under the head "repair and maintenance". The appellant/assessee paid GEL Rs.23,18,695/- during this period.

7. The AO, via assessment order dated 13.03.1995, among other things, disallowed the expenditures claimed under the heads “repair and maintenance” and “payment to GEL”.

8. The appellant/assessee, being aggrieved, carried the matter to CIT(A).

Via order dated 09.11.1995, CIT(A) deleted, substantially, the disallowance made on account of "repair and maintenance". The deletion ordered by the CIT(A) was to the extent of Rs.2,44,00,352/-. However, the CIT(A) disallowed expenditure amounting to Rs.3,08,703/- incurred on pressurisation of lift shafts, which, according to him, had resulted in a benefit of enduring nature.

8.1 Furthermore, the CIT(A) also sustained the disallowance ordered by the AO concerning Rs.23,18,695/- paid by the appellant/assessee to GEL.

9. This resulted in the appellant/assessee and the respondent/revenue preferring appeals with the Tribunal.

10. The respondent's/revenue's appeal before the Tribunal was, thus, confined to the disallowance of the addition amounting to Rs.2,44,00,352/-, ordered by the CIT(A), with regard to "repair and maintenance". On the other hand, the appellant/assessee enlarged the scope of its appeal by not only agitating the disallowance of payments made to GEL and the expenditure incurred on pressurisation of lift shafts but also claimed, for the first time, amounts expended on renovation, which were capitalised in its books of accounts. The amounts capitalised previously that were claimed for the first time before the Tribunal as revenue expenditure was, as noticed above, Rs.600,84,000/-.

10.1 The record discloses that the appellant/assessee had moved an application for being permitted to plead additional grounds concerning the expenditure which, according to it, had been erroneously capitalised in its books of accounts, although, it was in the nature of revenue expenditure. Notably, this issue has arisen not only in the AY under consideration, i.e., AY 1992-93, but also in AY 1993-94 and AY 1994-95.

10.2 Evidently, the additional ground concerning capitalised expenditure, which the appellant/assessee wanted to be treated as revenue expenditure, was admitted by the Bench of the Tribunal, which took up the appeal concerning AY 1992-93 via order dated 08.03.2002.

10.3. However, the respondent/revenue, it appears, filed a miscellaneous application for recall of the order admitting the additional ground. The assertion made in the miscellaneous application was that a mistake apparent from the record had occurred, as the admission of the additional ground was pivoted on legal issues, whereas it would require an investigation of facts by the AO.

10.4. The miscellaneous application, however preferred by the respondent/revenue, was dismissed via order dated 22.06.2004 on the ground that no inquiry or investigation concerning facts was required to be made for adjudicating the additional grounds.

11. Against this backdrop, the Tribunal disposed of the cross-appeals filed for AY 1992-93 and other AYs, i.e., AY 1993-94 and AY 1994-95. Qua the remaining AY [i.e., AY 1991-92], only the appellant/assessee had preferred appeal from the order passed by the CIT(A).

12. The Tribunal, via the impugned order, disallowed the relief granted by the CIT(A) pertaining to the deletion of disallowance ordered by the AO amounting to Rs.2,44,00,352/- concerning expenditure made towards “repair and maintenance”.

12.1 Besides this, the Tribunal also rejected the plea advanced on behalf of the appellant/assessee that Rs.600,84,000/-, capitalised in its accounts books, should be treated as revenue expenditure.

13. In reaching its conclusion, the Tribunal provided, broadly, the

following rationale:

(i) Firstly, the renovation and refurbishment has been carried out over several years.

(ii) Secondly, for conceptualising, undertaking and supervising the renovation and refurbishment of the hotel, GEL had been paid a substantial amount by the appellant/assessee. All told, the amount paid over the AYs in issue was in the vicinity of Rs.1 crore.

(iii) Third, the total expenditure incurred in the AYs mentioned above was Rs.35 crores, surpassing the original cost incurred by the appellant/assessee for setting up the hotel before the commencement of its business operations.

(iv) Fourth, this was not a case involving “accumulated repairs”, as the appellant/assessee had been running a super-deluxe hotel for several years.

(v) Fifth, the appellant/assessee, in its annual audited accounts, has treated a significant part of the deduction claimed as capital expenditure; an aspect which cannot be ignored. In this context, it is concluded that in AY 1991-92 to AY 1994-95 and subsequent AYs, the appellant/assessee has drawn a distinction between "routine repairs" and monies expended on renovation and refurbishment. It was emphasised that the expenditure made on renovation and refurbishment has been further segregated by the appellant/assessee into revenue and capital expenditure not only in the books of accounts but also in the course of assessment proceedings before the AO and CIT(A). It is only for the first time before the Tribunal that a large portion of the capitalised expenditure is claimed as revenue expenditure.

(vi) Sixth, the expenditure incurred during each of the AYs, which culminated in an assessment order, would take care of the "special needs" of running a five-star deluxe hotel. However, the expenditure incurred on

renovation and refurbishment is "generically different". The renovation and refurbishment expenditure is not an expense that a five-star deluxe hotel incurs as a "normal incidence" of its business. The expenditure on renovation and refurbishment is a special kind of expenditure motivated by an ambition to place the hotel in a "different league". This aspect emerges upon perusal of the director's report of the appellant/assessee concerning FY 1991-92. Per the director's report, the appellant/assessee had undertaken a "comprehensive renovation project of the entire property". The director's report provides the object behind the expenditure incurred by the appellant/assessee which was that after renovation, the hotel would attain the number one position in the country and bring into existence a "New Hyatt".

(vii) Seventh, having regard to the kind of business the appellant/assessee was carrying on, the area covered by the building alone would not matter. What would also have to be considered would be the quality of construction, the building layout, the décor and ambience and other functionalities. The fact that the hotel did not have a single room added to it overlooks the hike in room tariff and the increase in occupancy.

(viii) Eighth, the appellant/assessee had failed to provide comparative details to establish that there was no significant improvement in the profit-making structure after it had carried out renovation and refurbishment.

(ix) Nineth, since fees paid to GEL is inextricably linked to the overall work concerning renovation and refurbishment, which has been treated as capital expenditure, the expense incurred on this account by the appellant/assessee would have to be treated as capital expenditure.

(x) Tenth, the CIT(A) allowed a substantial portion of the expenses incurred on renovation and refurbishment by overlooking that the AO had

allowed huge expenditure claimed towards routine repairs and replacements in each of the AYs in issue. The expenditure claimed on renovation and refurbishment, allowed by the CIT(A), was not independent of expenses claimed towards repairs, replacement and renewals but was an integral part of the overall object of creating a "New Hyatt". The CIT(A) lost sight of this aspect of the matter. The courts in the country have yet to accept that luxury renovation of property not borne from a need but springing from the owner's fancy is revenue expenditure.

14. It is in this background that the appellant/assessee has preferred the instant appeal, i.e., ITA No.1398/2006 and connected appeals against the impugned order dated 28.04.2006 passed by the Tribunal.

Submissions of Counsels:

15. On behalf of the appellant/assessee, arguments were advanced by Mr Tarun Gulati, Senior Advocate, while Mr Zoheb Hossain, Senior Standing Counsel, put forth submissions on behalf of the respondent/revenue.

16. The submissions of Mr Tarun Gulati can be broadly paraphrased as follows:

(i) The appellant/assessee provided a detailed breakdown of the expenditure incurred towards renovation, refurbishment and repairs, which included the expenses that were part of the additional claims made for the first time before the Tribunal. The expenditure incurred neither resulted in acquiring a new asset nor an advantage of enduring nature.

(ii) The appellant/assessee had only replaced worn-out and old doors, tiles, hinges and other accessories. Besides this, the appellant/assessee had also incurred expenditure on repairing damaged roofs, walls, ceilings, air ducts attached to the air-conditioners, lights, grills and flush valves. These

expenses were incurred to repair, replace and refurbish the existing utilities to provide efficiency and add to the profitable functionality of the appellant's/assessee's hospitality business.

(iii) Importantly, the expenditure incurred by the appellant/assessee was to maintain and preserve the capital assets embedded in its hotel premises. The exercise was motivated by business interest to keep its competitive edge in the hospitality sector.

(iv) Replacement and repair of items referred to above were undertaken only to restore the hotel to its original state of efficiency.

(v) The Tribunal has not found that any new asset was created and/or acquired due to the exercise carried out by the appellant/assessee. No finding is returned by any of the other authorities concerning this aspect of the matter.

(vi) The AO has drawn a false and erroneous distinction by segregating the repairs into ordinary and luxury repairs or repairs, which are incurred based on the choice of the appellant/assessee. The law does not draw any distinction between ordinary and luxury repairs.

(vii) The repairs undertaken by the appellant/assessee required the statutory authorities to take a holistic view. They could not have treated each room, washroom, lounge, carpet, door, and hinge as independent units or items. The categorisation of any expenditure as revenue or capital should also bear in mind the premises and the business in which the expense has been incurred.

(viii) The respondent/revenue has issued Circular No.69 dated 27.11.1951, which *inter alia*, provides that after the initial installation of fluorescent lights, the replacement of the same should be treated as revenue expenditure.

The respondent/revenue is bound by its circulars concerning the treatment of expenditure. [See ***KP Verghese v. Income Tax Officer*** (1981) 4 SCC 173 AIR 1981 SC 1992 and ***UCO Bank v CIT*** (1999) 4 SCC 599].

(ix) It is well-established that the expression provided in Section 37 of the Act for the "purposes of the business" includes expenditure incurred for the preservation and protection of assets and property. [See ***CIT v. Malayalam Plantations***, AIR 1964 SC 1722].

(x) The statutory authorities have wrongly applied the test of enduring benefit to categorise the expenses incurred by the appellant/assessee as capital expenditure. [See ***Empire Jute Co. Ltd. V. CIT***, (1980) 4 SCC 25]

(xi) The statutory authorities have failed to appreciate the correct ratio of the judgment of the Supreme Court rendered in ***Ballimal Naval Kishore v. CIT***, (1997) 224 ITR 414 SC. In ***Ballimal's*** case, expenses were incurred to convert a ginning factory into a cinema theatre. In contrast, in the instant case, the appellant/assessee has incurred expenditure on repair, renovation and refurbishment of the existing hotel. The distinction in this behalf has been noticed by the Bombay High Court in ***PCIT, Panaji v. Goa Tourism Development Ltd***., (2019) 261 Taxman 500 (Bombay). For the same reasons, the judgment in ***New Shorrock Spg. & Mfg*** would not be applicable in the instant case as no new asset has been created.

(xii) Lastly, the money expended by the appellant/assessee towards the consultancy fee paid to GEL is revenue expenditure. Since the expenditure incurred on renovation, refurbishment, and repairs is on the revenue account, the consultancy fee paid to GEL should also be treated as such.

17. Mr Zoheb Hossain, while refuting the submissions made on behalf of the appellant/assessee, primarily relied upon the impugned order passed by

the Tribunal. In rebuttal, Mr Zoheb Hossain made the following broad submissions:

(i) The appellant/assessee for the period captured by the AYs in issue had incurred an expenditure which was much more than the cost that was incurred by it to bring the hotel property into existence before the commencement of its business operations, an aspect exemplified in the director's report for FY 1991-92. The report categorically alluded to the fact that comprehensive renovation had taken place to bring into existence a "New Hyatt". The appellant/assessee had, thus, in the guise of repair work, claimed a deduction on expenditure incurred to replace equipment used in the hotel premises.

(ii) The expenses incurred by the appellant/assessee were not aligned with the object of maintaining and preserving existing assets or even restoring them to their original condition. The appellant/assessee had itself distinguished between routine repairs and monies expended on renovation and refurbishment. In this context, the AO allowed everyday expenditure amounting to Rs.4.34 crores and Rs.4.12 crores for AY 1993-94 and AY 1994-95.

(iii) The test for determining whether the advantage of enduring benefit has accrued to the appellant/assessee is whether the asset or right acquired due to the expense incurred has generated enough durability to justify the same being treated as a capital asset. [See ***Hotel Diplomat v. CIT***, (1980) 125 ITR 781 (Delhi)]. This principle is required to be examined in the background of the facts obtaining in the instant appeals. The appellant/assessee had taken up the work of renovation, refurbishment and repairs, which covered all 590 rooms, including the lobby, restaurants, business centre, health club,

conference halls and other facilities. Since the scope of the work was expansive, the appellant/assessee had to engage consultants. Therefore, from a commercial point of view, it can only be stated that the appellant/assessee incurred the said expense to obtain durability.

(iv) The expense incurred by the appellant/assessee created an enduring advantage, inasmuch as the appellant/assessee would have been able to collect a higher room tariff and register a greater occupancy rate.

(v) The aim and object of expenditure would determine its character, i.e., whether it is in the nature of capital or revenue expenditure. Since the aim and object was to bring a "New Hyatt" into existence, the expenditure could only be characterised as capital expenditure. [See ***Assam Bengal Cement Co. Ltd. V. CIT***, 1955 1 SCR 972; ***Ashoka Hotel v. CIT,*** 1969 72 ITR 306 (Delhi) and the judgment of the Supreme Court rendered in the ***Ballimal Naval Kishore*** case].

(vi) The fees paid to GEL by the appellant/assessee should be treated as capital expenditure owing to the enduring benefit provided by the services rendered. The services provided by GEL to the appellant/assessee have to be looked at in the context of what the project sought to achieve- renovating and replacing various capital assets, which brought the advantage of enduring benefit to the appellant/assessee. The CIT(A) has noticed that payments made to other consultants, save and except for GEL, were capitalised by the appellant/assessee. The appellant/assessee has been unable to provide any reason for deviating from the said practice while dealing with expenses incurred on payment of fees to GEL.

(vii) Since GEL's engagement required conceptualising, planning and supervision of the execution of the work at hand, the treatment to be

accorded to the fee paid to GEL is inextricably linked to the manner in which the expenses incurred on renovation and refurbishment are treated.

(viii) The expenses incurred by the appellant/assessee are capital in nature, given that they led to the creation of a new capital asset. This is evident from the finding returned by the Tribunal that the appellant/assessee had purchased five hundred thirty-four (534) guest-room door shutters and five hundred forty (540) toilet doors. It is inconceivable that door shutters would have worn out in such large numbers. Clearly, the old articles were replaced with new and improved articles of superior quality, thereby providing the appellant/assessee with a new and better-quality asset. In this context, illustratively, reference was made to the installation of bus bars for the safe distribution of electricity from automatic circuit breakers, fixation of a mild-steel frame for affixing a false ceiling in the laundry department and replacement of the basin of the cooling tower. [See ITA 486/2007.]

(ix) The expenditure incurred by the appellant/assessee travelled beyond repairs or renovation and brought into existence new assets.

Reasons and Analysis:

18. As is evident from the narration of the facts and submissions made before us, the broad issue which came up for consideration before the statutory authorities was the manner in which the expenses incurred by the appellant/assessee had to be treated.

19. However, before we proceed to rule on the nature of the expenditure incurred by the appellant/assessee, it would be of some help to advert to the tests enunciated by the courts in the past.

(i) The expenditure incurred by an assessee initially towards setting up the business would ordinarily be construed as capital expenditure. However,

if the assessee incurs expenditure in an ongoing business, one would have to ascertain whether the expense was incurred for acquiring or bringing into existence an asset or resulted in creating an advantage of enduring benefit for the business.

(ii) It is not the source and manner in which payment is made but the aim and object of expenditure which would determine its character.

(iii) Any expense incurred for acquiring a source of profit or income, in the absence of any contrary circumstance, would be construed as expenditure on capital account. In contradistinction, an expenditure which enables the profit-making structure to work more efficiently, leaving the source or the profit-making structure untouched, would be in the nature of revenue expenditure. In other words, expenditure incurred by the management to run its business effectively, efficiently and profitably, leaving the fixed assets or other capital structure untouched, would be an expenditure of a revenue nature, even though the advantage obtained may last for an extended period. In such a situation, the test of enduring benefit or advantage could be considered as having broken down.

(iv) Given the evolved and complicated nature of modern business, in determining the nature of expenditure, the courts' test would have to be applied from the business point of view, after fairly appreciating the entire fact situation.

20. In the instant case, the record discloses that the expenditure qua which deduction was claimed fell under the following broad heads:

(i) Expenditure which the appellant/assessee had capitalised in its books of accounts: Rs.5,73,54,285/-.

(ii) Expenditure which the appellant/assessee had straightaway claimed as

revenue expenditure: Rs.2,47,09,055/-.

21. The bifurcation of the amount claimed as revenue expenditure, i.e., Rs.2,47,09,055/- as per the record placed before us, is as follows:

(i) Expenditure incurred on building: Rs.1,68,61,730/-.

(ii) Expenditure incurred on plant and machinery: Rs.73,55,847/-

(iii) Expenditure on other items: Rs.4,91,479/-

22. The CIT(A), after perusing the material on record, has returned the following findings of fact in respect of each limb of expenditure noted in paragraph 21 above:

22.1 The expenditure incurred on building was mainly incurred on the following items: providing roof tiles for waterproofing, door hinges, replacement of floor tiles, fixing granite in toilets, replacement of sanitary appliances, replacing false-ceiling in the bathrooms, expenses incurred in painting the rooms, refixing the doors after they were polished, providing wooden skirting, replacement of wall panelling, replacing false ceilings in the rooms, providing skirting in corridors, painting and waterproofing.

22.2 The expenditure incurred for the abovementioned purposes involved replacing old articles with new articles without bringing any new asset into existence. By way of illustration, reference was made to the fact that since waterproofing of the roof was found to be ineffective, new tiles were provided to prevent water leakage. Likewise, marble in the toilets was replaced with granite. Similarly, the existing skirting along the walls was replaced with wooden skirting. In this context, reference was also made to the fact that existing sanitary appliances, false ceilings in bathrooms and corridors and wall panelling were replaced. None of these expenditures created a new asset.

22.3 As regards Rs.73,55,847/-, which was shown under the head expenses incurred on “plant and machinery", was expenditure incurred in respect of the following: improvement in the filtration, renewal of electric wiring and appliances, repair of the ducting for air-conditioners, provision of transformers for lights, replacement of A.C. Grills, replacement of sanitary fittings like flush valves etcetera.

22.4. Once again, the CIT(A) concluded that expenses incurred on the items mentioned above did not involve the acquisition of a new asset or replacing the whole or a substantial part of the asset. More particularly, the CIT(A) noted that the cost of articles such as transformers, A.C. Grills and flush valves was less than Rs.5,000/-, which, in any event, if treated as a capital asset, would be entitled to depreciation at the rate of 100%. According to CIT(A), the expenditure on such articles was in the nature of current repairs and not on capital account.

22.5. The only expense qua which deduction was not allowed by the CIT(A) was the expense amounting to Rs.3,08,703/- incurred by the appellant/assessee on pressurisation of lift shafts. According to the CIT(A), this expenditure has resulted in additional benefits of an enduring nature, as the safety of lifts was enhanced for a considerable period. Thus, out of Rs.73,55,847/- shown under the head “plant and machinery”, only Rs.3,08,703/- was disallowed.

23. Insofar as other expenditure amounting to Rs.4,91,479/- was concerned, the CIT(A) concluded that the expenses incurred were of a miscellaneous nature on articles like teak mouldings, replacement of coils and lamp-shades, mirror light fittings, repairs to the chimney, painting etcetera. Qua these expenses as well, the CIT(A) noted that no new articles

had been purchased and that the costs had been incurred essentially on repairing and replacing old articles.

24. In sum, the CIT(A) concluded that except for the costs incurred on pressurisation of lift shafts, none of the above expenses enhanced the earning capacity of the appellant/assessee since neither any additional space had been created nor any new plant and machinery was installed.

24.1. In CIT(A)'s opinion, all that the appellant/assessee had done was to repair old and worn-out articles or replace specific articles with new ones to give the hotel a modern and attractive look. These expenses, as per the view of the CIT(A), had facilitated the hotel operations and in running the business more profitably and efficiently.

25. As regards the disallowance of Rs.23,18,695/- was concerned, which was the fees paid to GEL, the CIT(A) relied upon the view taken by his predecessor for AY 1991-92, who had sustained the disallowance. It was observed by CIT(A) that since facts had remained the same, there was no justification for taking a different view.

26. Furthermore, the CIT(A) noticed that the appellant/assessee had capitalised the expenses incurred on payments to consultants involved with interior design, lighting and illumination. Given this position, the CIT(A) concluded that fees paid to GEL had to be treated as capital expenditure. In this regard, the CIT(A) observed that it was unclear whether the expenditure incurred towards fees paid to GEL related to the design and replacement of furniture and fittings that fell in the capital field.

27. As noticed hereinabove, the Tribunal reversed the view of the CIT(A) for the reasons broadly alluded to in paragraph 13 above.

28. In our view, the Tribunal misdirected itself in law by not applying the

correct principles enunciated by the courts while ascertaining whether a particular expense should be treated as revenue or capital expenditure.

28.1. The Tribunal, in our view, was wrongly burdened by the fact that the renovation, refurbishment and repairs were carried out over several years and that the total amount incurred was Rs.35 crores, which was much more than the cost at which the hotel had been constructed.

28.2. In coming to its conclusion, the Tribunal, in our opinion, gave undue weight to the director's report, which, *inter alia,* alluded to the fact that they were carrying out a comprehensive renovation which would ultimately result in the hotel attaining the first rank in the country by bringing into existence a "New Hyatt".

29. In our opinion, the Tribunal committed an error in disregarding the following undisputed facts:

(i) Firstly, the expenses were incurred concerning an ongoing hospitality business.

(ii) Secondly, none of the statutory authorities returned a finding that the expenses incurred by the appellant/assessee had resulted in the acquisition or bringing into existence an asset.

(iii) Thirdly, the expenses incurred by the appellant/assessee did not result in conferring upon it an advantage of enduring benefit. The advantage of enduring benefit has to be considered from the point of view of business expediency. The appellant/assessee operates in the hospitality sector and therefore, its commercial needs should have been taken into account in determining both the character and nature of the expenditure and not necessarily, the period for which the advantage would last. The only exception to this finding was CIT(A)'s conclusion about expenses incurred

by the appellant/assessee on the pressurisation of lift shafts. That this conclusion of the CIT(A) was erroneous is apparent because he appears to have run astray of the principles noticed above, which resonates in the following observations made by the Supreme Court in ***Empire Jute Company v. CIT,*** (1980) 4 SCC (SC) 1:

> *"(ii) 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 every 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 the advantage in a commercial sense*** *and it is only where 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 assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on mere efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future****. The test of enduring benefit is, therefore, not a certain or conclusive test and it cannot be applied blindly and mechanically without regard to the particular facts and circumstances of a given case.*
> *(iii)* ***What is an outgoing of capital and what is an outgoing on account of revenue depends on what the expenditure is calculated to effect from a practical and business point of view rather than upon the juristic classification of the legal rights, if any, secured, employed or exhausted in the process. The question must be viewed in the larger context of business necessity or expediency****."*
>
> [Emphasis is ours]

(iii)(a) Clearly, the principle mentioned above applies to the expenses incurred regarding the pressurisation of lift shafts. As the CIT(A) noticed, the lifts were already in place. The fact that the pressurisation of lift shafts resulted in the "safety of the lifts" being enhanced could not have led to the

expenses being incurred in that behalf being characterised as capital expenditure.

(iv) Fourthly, the expenses incurred were for preserving and protecting existing assets. The categorisation of expenses under various heads, such as renovation, refurbishment or repair, are not necessarily determinative of the nature of the expenditure i.e., whether or not it is on capital or revenue account. The segregation can be carried out by applying the principles enunciated in that behalf to the facts obtaining in each case. The broad-brush approach adopted by the Tribunal concerning expenses which had been capitalised in the books of account and were sought to be claimed as revenue expenditure for the first time before the Tribunal was, undoubtedly, not the right approach, as is evident from the following observation made in the impugned order:

> *"36…In the books of accounts of the assessee as well as audited annual accounts of the assessee company approved by the Board of Directors, a major part of this expenditure has been treated as capital expenditure. We are fully alive to the fact that entries made in the books of accounts of an assessee or the view taken by an assessee of the nature of his transaction cannot be decisive of the tax liability of an assessee that has to be determined in accordance with law…"*

After having made the observation mentioned above, the Tribunal veered, in our opinion, on the wrong path and, in this context, made the following observation:

> *"At the same time, the view taken by the present assessee in its annual accounts cannot be ignored…".*

(v) Fifthly, the reference to the appellant/assessee earning a higher room

tariff or registering a higher occupancy rate, with the view to providing a rationale for concluding that the appellant/assessee had secured an advantage by virtue of the exercise undertaken by it was wholly misconceived. The Tribunal overlooked the principle that when an expenditure is incurred to make the profit-earning structure work more efficiently, leaving the structure of the source of profit or income intact, it can only be treated as revenue expenditure, although its impact may last for an extended period. Concededly, the appellant/assessee had not added a single room to the hotel property. The renovation and refurbishment of the rooms, including washrooms and other facilities in the hotel, only improved, if at all, the efficiency of the source of profit or income and hence, in our opinion, the expenses incurred for that purpose could not be categorised as capital expenditure.

30. Therefore, for the aforesaid reasons, we are inclined to sustain the view taken by the CIT(A) that Rs.2,44,00,352/- spent on renovation, refurbishment and repairs had to be treated as revenue expenditure. The contrary view taken by the Tribunal cannot be sustained and, hence, is overruled.

31. This brings us to the treatment of fees paid to GEL. The Tribunal has linked its conclusion regarding the treatment of fees paid to GEL with its conclusion arrived at *qua* categorisation of expenses incurred on renovation, refurbishment and repairs. This aspect is evident from the following observations made in paragraph 40 of the impugned order passed by the Tribunal:

> *"…40. We now take up the assessee's appeal relating to the disallowance of fee paid by the assessee to M/s GEL. It is seen that over the years the assessee has paid the fee approximately of Rs.*

one· crore to M/s GEL to conceptualize, plan and supervise the assessee's Renovation & Refurbishment Project. M/s GEL has been associated with it right from the very beginning. ***Fees paid to M/s GEL is inextricably linked with the overall project, which we have already found to be in the capital field, in view of the discussions in the fore going paragraphs. We, therefore, have no hesitation to uphold the disallowance of fee paid to M/s GEL by the authorities below in all the four assessment years****…"*

[Emphasis is ours]

31.1. According to us, this view, on the same logic, cannot be sustained for the reason that if GEL was called upon to plan and supervise the execution of the work involving renovation, refurbishment and repairs (which, as noticed above, should be treated as revenue expenditure), the fees paid in that behalf should also be treated as revenue expenditure. The nature of the expenses incurred, as noticed by the CIT(A), is not suggestive of the fact that they were incurred on the capital account.

32. While disallowing the deduction, the CIT(A) has applied the parity principle. In his order, the CIT(A) notes that expenses incurred by the appellant/assessee towards payment of monies to other consultants involved in interior design, lighting and illumination had been capitalised.

33. In our opinion, the fact that the appellant/assessee had capitalised the expenditure, which, in law, it could claim as revenue expenditure, would not be determinative of what should be the correct conclusion in the matter.

34. It is well-established that the manner in which the expense/income is reflected in the books of accounts of the appellant/assessee or in some cases omitted, is not determinative of its true nature, although it may provide a clue. The safest and the surest way to arrive at the true nature of the expense/income in issue is by having regard to the provisions enunciated either in the statute and/or the principles enunciated by the courts. The

following observations of the Supreme Court in the judgement rendered in ***Kedarnath Jute Mfg. Co. Ltd. v Commissioner of Income Tax, (Central), Calcutta*** (1972) 3 SCC 252, being apposite, are extracted below:

> *"**8.** The main contention of the learned Solicitor-General is that the assessee failed to debit the liability in its books of accounts and, therefore, it was debarred from claiming the same as deduction either under Section 10(1) or under Section 10(2)(xv) of the Act. **We are wholly unable to appreciate the suggestion that if an assessee under some misapprehension or mistake fails to make an entry in the books of account and although under the law, a deduction must be allowed by the Income Tax Officer, the assessee will lose the right of claiming or will be debarred from being allowed that deduction. Whether the assessee is entitled to a particular deduction or not will depend on the provision of law relating thereto and not on the view which the assessee might take of his rights nor can the existence or absence of entries in the books of account be decisive or conclusive in the matter.** The assessee who was maintaining accounts on the mercantile system was fully justified in claiming deduction of the sum of Rs 1,49,776 being the amount of sales tax which it was liable under the law to pay during the relevant accounting year. It may be added that the liability remained intact even after the assessee had taken appeals to higher authorities or courts which failed. The appeal is consequently allowed and the judgment of the High Court is set aside. The question which was referred is answered in favour of the assessee and against the Revenue. The assessee will be entitled to costs in this Court and in the High Court."*
>
> [Emphasis is ours]

34.1. In other words, what is given weight, ultimately, is the provisions of the Act and not what is incorporated in or omitted from the books of accounts, annual statements, whether as a part of accounting practice or otherwise. [See ***Tuticorin Alkali Chemicals and Fertilizers ltd. Madras v Commissioner of Income Tax, Madras*** (1997) 6 SCC 117; ***Taparia Tools Ltd. v Joint Commissioner of Income Tax Special Range-1 Nasik*** (2015) 7 SCC 540; ***Pr. Commissioner of Income Tax-6 v Matrix Cellular***

International Services Pvt. Ltd. 2017:DHC:7186-DB; ***Pr. Commissioner of Income Tax-1 v Denrsply India Pvt. Ltd.*** 2022:DHC:2652-DB].

35. The appellant/assessee appears to have realised that it had wrongly capitalised certain expenses, which were in the nature of revenue expenditure and, therefore, applied for pleading additional grounds. Insofar expenses of this kind were concerned, in the AY in issue, i.e., AY 1992-93, they were quantified at Rs.600,84,000/-.

35.1. Since the Tribunal disallowed the deduction claimed by the appellant/assessee with regard to expenses incurred on renovation and refurbishment, as well as those expended on the repair of building, plant and machinery, it rejected the additional ground pleaded by the Assessee for characterising expenses which had been capitalised as revenue expenditure.

36. In our opinion, the appellant/assessee was correct in contending before the Tribunal that the expenses which had been capitalised and were sought to be treated as revenue expenditure under the provisions of the Act would require examination by the AO.

36.1. In other words, the issue concerning the recharacterisation of expenses, which was the subject matter of the additional grounds pleaded by the appellant/assessee, was a mixed question of fact and law.

37. We may note that we had put this aspect squarely to Mr Tarun Gulati. Mr Gulati had agreed that, insofar as this aspect of the matter was concerned, it may have to be remanded to the AO for fresh examination in the light of the well-established principles formulated by the courts for arriving at the true character of a particular expenditure, i.e., whether it was revenue or capital expenditure.

38. Before we conclude, we would like to indicate why the ratio of the

judgments cited on behalf of the respondent/revenue does not apply to the instant case.

38.1. The first judgment cited on behalf of the respondent/revenue is rendered by the Supreme Court in the ***Assam Bengal Cement*** case. Briefly, the facts of this case reveal that the Assessee had acquired the lease of certain limestone quarries. The lease had a tenure of twenty (20) years with a clause for renewal for a further term of twenty (20) years. The lessee was required to pay half-yearly rent at the prescribed rate, with an added obligation to pay royalties on the occurrence of certain events. In addition to these payments, further amounts were payable by the Assessee in terms of clauses 4 and 5 of the lease, which were in the nature of "protection fees". Clause 4 of the lease obligated the Assessee to pay a protection fee in consideration of the lessor being prevented from granting any lease, permit or prospecting license [concerning another group of quarries] to any other party without stipulating that limestone so quarried could not be used for manufacturing cement during the subsistence of the lease tenure.

38.2. Likewise, Clause 5 extended the protection on payment of the stipulated consideration by the Assessee regarding the hill district mentioned therein. It is in this context that the Supreme Court concluded that the Assessee had acquired an advantage of enduring benefit, which extended to the whole of the business of the Assessee for the entire tenure of the lease. It is against this backdrop that the Supreme Court characterised the expenditure incurred by the Assessee towards the protection fee as capital expenditure.

38.3. Likewise, the decision in ***Ashoka Hotels Ltd***. is distinguishable as the expenses incurred towards purchasing linen and blankets for use in hotel

rooms and liveries for peons and bearers were those incurred in the first year after it commenced its operations. In other words, the expenditure incurred by the Assessee constituted a part of its initial outlay.

38.4. In the instant case, the appellant/assessee concededly had been functioning for several years before it incurred the expenses towards renovation, refurbishment and repairs. Clearly, the fact situation is quite different from that which obtained in the ***Ashoka Hotels Ltd.*** case.

38.5. A perusal of the judgment rendered by the Supreme Court in the ***Hotel Diplomat*** case shows that in the said case, the partners of the assessee-firm were also owners of the building qua which the lease was executed in favour of the assessee-firm. The lease deed was executed on 30.11.1962, followed by a supplemental agreement dated 30.03.1963.

38.6. The assessee-firm, via an agreement dated 19.02.1963, entered into an arrangement with the American Embassy in Delhi. One of the obligations undertaken under the said agreement by the assessee-firm was that it would construct "no less than one bathroom with toilet facilities" provided with each set of two rooms. The Court was called upon to rule as to whether the expenditure incurred by the assessee-firm for building bathrooms in the AY 1963-64 could be construed as revenue expenditure. The Court, applying the test concerning the existence or creation of an asset or accrual of an advantage of enduring benefit in business, concluded that the expenses incurred in the construction of the toilet were in the nature of capital expenditure. The facts obtaining in the ***Hotel Diplomat*** case are distinguishable from those that obtain in the instant case.

38.7. This brings us to the last judgment, i.e., the judgement rendered by the Supreme Court in the ***Ballimal*** case. The broad facts obtaining in the said

case were as follows:

38.8. The Assessee was in the business of exhibiting films. He purchased a building, which was being run as a ginning factory. The ginning factory ran for about three (3) years. Five (5) years after the Assessee had bought the building, he stopped running the factory; he converted it into a cinema theatre for exhibiting films. In the period spanning between 1960 and March 1961, the Assessee spent monies on repairing the theatre. The Assessee spent amounts on purchasing machinery, new furniture, sanitary fittings, and replacement of electrical wiring, none of which was called into question. Notably, the only deduction which was questioned was the amount spent by the Assessee in repairing the walls, the hall, the flooring and roofing, the doors and windows and the stage sides.

38.9. It is in this context that the Supreme Court was called upon to rule as to whether these expenses, which amounted to Rs.62,977/- constituted "current repairs" within the meaning of Section 10(2)(v) of the Income Tax Act, 1922 [hereafter referred to as "1922 Act"]; an expression which finds mention in Section 30(a)(ii) and 31(i) of the current Act i.e., the 1961 Act.

39.10. The Court, in that context, distinguished between what would constitute current repairs as against expenses incurred for renewal or restoration, which is incurred to preserve or maintain an already existing asset and which neither brings a new asset into existence nor does it accord to the Assessee a new or different advantage. This was the test adopted by the Bombay High Court in ***New Shorrock Spg and Manufacturing Co. Ltd***., which the Supreme Court accepted in the ***Ballimal*** case. Clearly, the Supreme Court in the ***Ballimal*** case was called upon to deal with the provisions of Section 10(2)(v) of the 1922 Act.

40. In the instant case, *inter alia*, we are examining the tenability of the deductions claimed by the appellant/assessee under Section 37[3] of the Act which, *inter alia*, provides that an expenditure which is not described in Sections 30 to 36 of the Act and is expended wholly and exclusively for the purposes of business or profession, not being in the nature of either capital expenditure or personal expense, can be claimed by the Assessee in computing his income chargeable under the head "profits and gains of business or profession".

40.1 Thus, the judgment both in the ***Ballimal*** case and the ***New Shorrock*** case is distinguishable, having regard to the provisions which were under consideration therein.

41. However, at this stage, we may note that in the instant case, the Tribunal, in our view, has correctly mentioned in para 35 of the impugned order that if, for any reason, the owner of a building which is used for business incurs expenditure in the nature of current repairs and the Assessee is not able to claim expenses for current repairs under the provision of 30(a)(ii), he could still lay a claim for deduction under Section 37(1) of the Act provided the conditions stipulated therein are fulfilled.

Conclusion:

42. Thus, for the foregoing reasons, insofar as AY 1992-93 [ITA No.1398/2006] is concerned, we have arrived at the conclusion that the appellant/assessee will be entitled to claim the following deductions, as, in our opinion, they are in the nature of revenue expenditure:

(i) Rs.244,00,352/-. incurred on renovation, refurbishment and repairs.

[3] Equivalent to Section 10(2)(xv) of the 1922 Act.

(ii) Rs.3,08,703/- incurred on pressurisation of lift shafts.

(iii) Rs.23,18,695/- incurred on payment of fees to GEL.

43. Insofar as the amount of Rs.600,84,000/- is concerned, which was initially capitalised and was claimed before the Tribunal for the first time as revenue expenditure and forms part of the additional grounds raised by the appellant/assessee in its appeal preferred before the Tribunal, it would stand remanded to the AO for examination of the character and nature of the expenses incurred, in the light of the principles adverted to hereinabove.

44. Thus, the first substantial question of law framed is answered in favour of the appellant/assessee and against the revenue, with the caveat that insofar as the expenses that were the subject matter of the additional grounds taken before the Tribunal, the issue concerning the same is remanded to the AO for further examination on merits.

45. The second substantial question of law is answered in favour of the appellant/assessee and against the revenue.

46. The appeal is disposed of in the aforesaid terms.

(RAJIV SHAKDHER)
JUDGE

(TARA VITASTA GANJU)
JUDGE

OCTOBER 9, 2023/aj