IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE S.V.BHATTI

&

THE HONOURABLE MR. JUSTICE BECHU KURIAN THOMAS

THURSDAY, THE 29TH DAY OF JULY 2021 / 7TH SRAVANA, 1943

ITA NO. 26 OF 2013

AGAINST THE ORDER IN ITA 430/2006 OF I.T.A.TRIBUNAL,COCHIN BENCH, ERNAKULAM

APPELLANT/S:

M/S.APOLLO TYRES LTD.
6TH FLOOR, CHERUPUSHPAM BUILDINGS, KOCHI-31, (PAN AAACA 69900)

BY ADVS.
SRI.JOSEPH MARKOSE (SR.)
SRI.V.ABRAHAM MARKOS
SRI.BINU MATHEW
SRI.MATHEWS K.UTHUPPACHAN
SRI.TERRY V.JAMES
SRI.TOM THOMAS KAKKUZHIYIL

RESPONDENT/S:

THE DEPUTY COMMISSIONER OF INCOME TAX
CIRCLE-1(1), ERNAKULAM, KOCHI-682018.

BY ADVS.
SRI.P.K.R.MENON,SENIOR COUNSEL, GOI(TAXES)
SRI.P.K.R.MENONSR.COUNSEL GOITAXES
JOSE JOSEPH, SC, FOR INCOME TAX
CHRISTOPHER ABRAHAM, INCOME TAX DEPARTMENT

THIS INCOME TAX APPEAL HAVING COME UP FOR HEARING ON 29.07.2021, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J U D G M E N T

S.V.Bhatti, J.

Heard learned Senior Counsel Mr. Joseph Markos and learned Standing Counsel Mr. Christopher Abraham for parties.

2. M/s.Apollo Tyres Ltd., Kochi/Assessee is the appellant. The Deputy Commissioner of Income Tax/Revenue is the respondent. The subject appeal is at the instance of Assessee from the order of Income Tax Appellate Tribunal (for short 'the Tribunal') Cochin Bench in ITA No.430/Coch/2006 dated 24.08.2012. The substantial questions stated in the instant tax appeal relate to the Assessment Year 2003-04. The assessee challenges the order of Tribunal in rejecting the assessee's claim made towards showroom expenses; disallowed depreciation in respect of portion of Gurgaon building rented

out by assessee in favour of its sister concern Apollo International Ltd; expenditure on club payment towards cost of services and finally advances written off from the amount advanced by the assessee for purchase of capital items. The substantial questions are considered in the same order they are framed in the appeal.

3. The first question relates to assessee's claim of expenditure for purchasing equipments such as wheel balancer, wheel aligner, wheel changer and tyre changer for the use by dealers of assessee at Apollo Tyre World showroom. The assessee claimed that the expenditure incurred for purchasing the equipment is an expenditure for refurbishing the showrooms of the company, hence an expenditure incurred to expand the business opportunities. The Assessing Officer, by referring to the audit report of assessee/company, found that the expenditure is in the nature of purchase of equipment, but

not an expenditure incurred by the assessee for refurbishing its showroom. Having regard to the nature of expenditure, the Assessing Officer treated the expenditure as capital expenditure and allowed depreciation of Rs.8,05,009/- and declined the claim of assessee as revenue expenditure amounting to Rs.64,40,068/-. The Assessing Officer, while disallowing the claim, has further noted that the assessee has failed to prove, as a matter of fact, that the ownership of the equipment was transferred to the dealer at the time of installation of the equipment in the respective showrooms. Further, it is recorded by the Assessing Officer that as long as the ownership is continued with the assessee, the dealer can merely enjoy the equipment. The further reasoning is that the equipment is in the nature of movable property and it is capable of being reinstalled in any other showroom upon cancellation of original dealership at a place where the equipment was established.

3.1 The crucial conclusion recorded by the Assessing Officer is that the ownership of the equipment purchased, amounting to Rs.64,40,068/-, remained with the assessee. Therefore, the claim of total amount spent as revenue expenditure cannot be accepted, but was treated as capital expenditure and thereon granted depreciation on the amount claimed by the assessee. The Commissioner of Income Tax (Appeals), on appeal by the assessee, in Annexure-A2 order allowed the total claim of assessee as revenue expenditure. The basis for accepting the claim as revenue expenditure by the learned Commissioner reads as follow:

> "*The ownership of these ASSets will chAnge hAnds from deAler to deAler And the ASSessee compAny no longer hAS Any right on these ASSets once they Are erected. (sic)* These being the facts of the claim, I am inclined to accept the claim of the assessee that even these expenses were initially capital in nature i.e., creating of asset of enduring nature but the ownership has been passed on to the dealer and in the hands of the company it

> has to be treated as a sale or publicity expenses and hence should be allowed as a revenue expense." (sic installed)

Thus, the total claim has been allowed.

3.2 The Tribunal, on appeal by the Revenue, has examined the crucial aspect in the finding recorded by the Commissioner namely, whether, in the manner stated by the assessee, circumstances as noted by the Assessing Officer and expanded by the CIT (Appeals), the ownership of equipment, in fact, is transferred to the dealers. The Tribunal upon examination of the record has held as follows:

> "4. However, from the rival submissions made, it transpires that the ownership of these assets would continue to remain with the assessee only. Hence, the view of the Ld CIT(A) is contrary to the facts. The Ld Counsel placed reliance on the common order dated 09-09-2009 rendered by this bench in the assessee's own case in ITA Nos. 538/Coch/2005, ITA No.273/Coch/05 and ITA No.25/Coch/04 and submitted that the Tribunal has considered an identical issue in paragraphs 21-23 of the said order and has taken the view that the expenditure

incurred on renovation of the show rooms is revenue expenditure.

5. We have carefully considered the Tribunal's order relied upon by the Ld A.R. In the said order, the Tribunal has actually considered the nature of expenditure incurred on interior decoration of the show rooms and took the view that they are temporary structures, which cannot be retrieved back. Accordingly, the Tribunal took the view that the expenditure incurred on interior decoration is revenue in nature. However, in the instant case, the assessee has installed equipments, which can be removed and also can be taken back and reused in some other place. Hence the facts prevailing in the instant case is totally different and accordingly the decision of the Tribunal relied upon by the assessee, in our view, is not applicable. Further we notice that the assessee would continue to be the owner of these equipments, though they were installed in the premises of the dealers'. Hence, we are of the view that they have to be considered as the Capital assets of the assessee company. Accordingly, we set aside the order of the Ld CIT(A) on this issue and restore the disallowance made by the AO."

4. The assessee challenges the said finding by framing the following question of law:

> "Whether on the facts and in the circumstances of the case, the Tribunal is justified in law in holding the expenditure of Rs.56,35,059/- incurred by the assessee, in the showroom of its dealers for the purpose of promoting the sale of products of the company as capital expenditure on the ground that ownership of these assets was retained by the assessee?"

5. Senior Counsel Mr. Joseph Markos argues that the Tribunal fell in serious error by verifying the ownership of the equipment when this fact was concluded by the well considered order by the CIT (Appeals). According to him, the expenditure incurred by the assessee towards purchase of equipment, in the circumstances of the case, partakes the character of revenue expenditure. The amount was spent by the assessee to refurbish the showroom of the dealers known as Apollo Tyre World and this expense is in the nature of enhancing the sales and turnover of the assessee. By drawing the analogy of

circumstances considered by this Court in ITA No.280/2013 *RAJAn Jewellery* case, it is argued that the total expenditure claimed by the assessee should be allowed as revenue expenditure but not a portion of it as depreciation by treating the expenditure as capital expenditure.

6. *Per contrA*, Standing Counsel Mr. Christopher Abraham argues that the crucial aspect in determining the expenditure is the nature of investment or utility derived by the assessee. It is stated, it is one aspect of the matter to state that the existing showroom has been refurbished by changing the interiors and providing aesthetic value to a showroom. So expenses incurred on account of such commercial contingencies/designs once are met by the assessee the return of asset, on which amount was expended, is not possible finally into the hands of the assessee. These expenses are more or less treated as expenses incurred as revenue expenditure. In the

case on hand, the expenses incurred are towards purchase and establishment of equipment, such as wheel balancer/wheel aligner/wheel changer/tyre changer. The equipment, as rightly noted by the Tribunal, is movable equipments. The ownership is an important aspect in such expenditure. The equipment is also used by the respective dealers over a period of time but not booked against one year. Unless and until the ownership is stated to have been transferred in favour of the dealer and the assessee claims to have any interest in the movable property; according to him, the finding recorded by the Tribunal is justifiable in the circumstances of the case and any other view virtually amounts to reappreciating the findings of fact without any material on record.

7. The substantial question of law as framed refers to whether the Tribunal is correct in treating the expenditure as capital expenditure on the ground that ownership of these

assets was retained by the assessee. The question, in our considered view, begs the conclusion recorded by the Tribunal without actually pointing out the infirmity or error committed by the Tribunal in this behalf. It is not the case of assessee that expenditure is treated as revenue expenditure inasmuch as the expenditure is made over for utility by respective dealers upon purchase of equipment.

7.1 The findings of fact recorded by the Tribunal are based on record and warranted. The case relied on by the assessee in *RAyAn Jewellery* case is distinguishable on circumstances to consideration. So the decision does not assist the assessee to treat the entire expenditure as revenue expenditure. The auditor's report is referred to by the Assessing Officer for coming to the conclusion that the expenditure made by the assessee towards purchase of equipment, such as wheel balancer/wheel aligner/wheel

changer/tyre changer, is capital expenditure but not revenue expenditure. The spreadover utility or utilization of equipment over a period of a few years is not disputed. The location of equipment could be in the shops of respective dealers or the dealers were allowed to use the equipment, that cannot be understood as divesting the ownership of assessee on the equipment. The Commissioner, as rightly pointed out by the Tribunal, assumed something more than what is either available in the circumstances of the case or made out literally a new case in favour of the assessee. For the above reasons we are of the view that the question does not fall within the scope of Section 260A of the Act. Hence the question is answered in favour of the Revenue and against the assessee.

8. Next question deals with expenditure incurred on account of payments towards club membership and service charges amounting to Rs.1,48,212/- by the assessee. The extent

to which the expenses can be claimed by the assessee is considered by this Court in the case of assessee for the Assessment year 2002-2003 reported in *Commissioner of Income-Tax v. Apollo Tyres Ltd*[1]. At page 106 of the judgment of this Court in ITA No.1347/2009, the issue was considered and answered against the assessee. The operative portion which has bearing for answering the question of law reads as follows:

> "The finding arrived at by the Tribunal is well supported by reasons. The amount spent for acquiring membership in the clubs stands on a different pedestal from the amounts incurred for availing materials supplied or service provided in the clubs. This Court finds that the said issue is to be answered in favour of the assessee. It is declared accordingly."

8.1 The assessee is entitled to claim only the membership fee but not the amount spent by the assessee for availing the services of goods etc. in the club. In the case on hand, the finding is that it is not for membership. Having regard to the

1 (2019) 419 ITR 100

findings of fact recorded, the question is answered in favour of the Revenue, against the assessee.

9. Substantial question no.3 relates to disallowance of part depreciation claimed by the assessee of Gurgaon building aggregating to Rs.25,27,505/- in relation to the let out portion to Appolo International Ltd. The assessee challenges the following finding recorded by the Tribunal.

> "13. We notice that the AO had made similar disallowance in respect of claim of bonus payment in assessment year 2002-03, i.e., provision created for the year ending 31.3.2001 was paid during the year relevant to the assessment year 2002-03 and was claimed in that year. The matter was taken to Tribunal and the Tribunal, after considering the provisions of sec. 438, has held as under in the assessee's own case in ITA No.429/Coch/2006 & 377/Coch/2009 in its order dated 05-10-2002.
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> > "57. The proviso to sec. 438 gives further concession that if payment in respect of any of the items referred in sec. 438 is made in a particular year before the due date of

filing of the income tax return, then such claim can be made in the earlier year also for which return is due to be filed. This seems to be only a further concession and cannot be read as a restriction that necessarily deduction has to be claimed in the earlier year which AO had interpreted. We fail to understand that as to how AO has referred to the decision of McDowell by observing that in earlier year, Le. AY 2001-02 there was a loss and that is why assessee has not claimed any deduction. Even if it is a case of loss, such loss would have been carried forward to next year and allowed accordingly. Simply because assessee has not claimed a particular deduction, it cannot be said to be a colourable device as envisaged by the decision of McDowell case. The deduction relates to payment of bonus which has actually been paid in the present year and deduction has been claimed as per sec. 43B. Such deduction has been claimed on consistent basis in the year of payment and, therefore, no adverse inference should have been taken. In these circumstances, we find nothing wrong in the order of the Ld CIT(A) and confirm the same."

The facts relating to this issue is identical in nature and accordingly, by following the decision of the co-ordinate bench

> referred supra, which was rendered in the assessee's own case, we uphold the order of Ld CIT(A) on this issue.
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> 14. The next issue pertains to disallowance of depreciation and repair charges aggregating to Rs.27,27,505/- relating to the let out properties. Both the parties have pointed out that a similar disallowance made in preceding year was confirmed by the Tribunal in ITA No.426/Coch/2006. By the immediately following the said order of the Tribunal, we set aside the order of Ld CIT(A) on this issue and restore the addition made by the AO."

9.1 The excerpted finding of the Tribunal in the case on hand takes us to the consideration of similar issue by the Tribunal in ITA No.429/Coch/2006. It is not in dispute that the assessee has accepted the said finding of the Tribunal and allowed the finding to become final. The Tribunal has merely followed its earlier view and rejected the claim of petitioner under this head. No other ground is argued before us to contend that the view taken, at any rate, is impermissible in

law. By taking note of the circumstances stated by the assessee in respect of this particular claim, and the consideration by the Tribunal, we are of the view that the Tribunal has rightly maintained consistency in this behalf for the Assessment Years 2002-03 and 2003-04. The question raised is answered in favour of the Revenue and against the assessee.

10. Substantial question No.4 is rejection of claim of assessee in writing off bad debts. The substantial question reads as follows:

> "Whether on the facts and in the circumstances of the case, the Tribunal is justified in law in holding that the debts and advances relating to acquisition of capital assets written off in the books of accounts aggregating to Rs.28,67,407/- are not allowable as revenue expenditure on the ground these are of the nature of capital loss outside the purview of Section 37(1) or 36(1)(vii) read with Section 36(2)."

The appeal filed by the Revenue for the AY 2003-2004 as against the allowance granted under Section 37 towards the bad debts written off against the advances given for acquisition of revenue items and dismissed the appeal filed by the Revenue. The assessee claims that the advances made for acquisition of capital assets have been written off and they have to be treated as bad debt. The consideration of this issue by the Assessing Officer is independent and has completely explained the circumstances why the claim of assessee cannot be accepted in this behalf. The Tribunal has considered the scope of applicable section and also recorded that the expenditure amounting to Rs.28,67,407/- does not satisfy the test laid down by the Supreme Court in *CIT v. Mysore SugAr ComPAny Ltd*[2]. We keep in perspective the principle laid down by the Supreme Court in *Mysore SugAr ComPAny Ltd* case and also the circumstances in the case on hand. We are in full agreement with the reasoning of

2 (1962) 46 ITR 649 (SC)

the Tribunal while considering the writing off bad debts from advances made towards capital asset acquisition of the assessee. The appeal filed by the Revenue, insofar as it related to revenue expenditure was dismissed and we do not see any other reason now while applying the same test to accept the claim of the assessee made towards bad debts written off on advances made. The question of law does not arise within the scope of appeal provision, accordingly answered in favour of the Revenue, against the assessee.

For the above reasons, the appeal filed by the assessee fails and accordingly dismissed. No order as to costs.

Sd/-
S.V.BHATTI
JUDGE

Sd/-
BECHU KURIAN THOMAS
JUDGE

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APPENDIX OF ITA 26/2013

PETITIONER ANNEXURE

ANNEXURE a1	TRUE COPY OF ASSESSMENT ORDER DATED 27-3-2006 OF THE ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE 1(1), ERNAKULAM
ANNEXURE A2	TRUE COPY OF APPELLATE ORDER DATED 25-04-2006 OF THE COMMISSIONER OF INCOME TAX (APPEALS)-II, KOCHI
ANNEXURE A3	CERTIFIED COPY OF ORDER DATED 24-08-2012 OF THE INCOME TAX APPELLATE TRIBUNAL, COCHIN BENCH, COCHIN IN ITA. NO. 430/COCH/2006