आयकर अपीलीय अधिकरण, ' सी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH : CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं
श्री अब्राहम पी. जॉर्ज, लेखा सदस्य के समक्ष।
[BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI ABRAHAM P. GEORGE, ACCOUNTANT MEMBER**]**

आयकर अपील सं./I.T.A. No.1530/Mds/2016
निर्धारण वर्ष **/**Assessment year : 2008-2009

M/s. Amec Foster Wheeler India Private Limited, 6th floor, Zenith Building, Ascendas IT Park, CSIR Road, Taramani, Chennai 600 113.	**Vs.**	The Deputy Commissioner of Income Tax, Company Circle II(1) Chennai.

आयकर अपील सं./I.T.A. No. 1761/Mds/2016
निर्धारण वर्ष **/**Assessment year :2008-2009

The Deputy Commissioner of Income Tax, Corporate Circle 1(1) Chennai	**Vs.**	M/s. Amec Foster Wheeler India Private Limited, 6th floor, Zenith Building, Ascendas IT Park, CSIR Road, Taramani, Chennai 600 113. **[PAN AAACF 3204C]**
(अपीलार्थी/Appellant)		**(प्रत्यर्थी/Respondent)**

Assessee by	**:**	Shri. Sriram Seshadri, C.A.
प्रत्यर्थी की ओर से /Respondent by	**:**	Shri. A.V. Sreekanth, IRS, JCIT.

सुनवाई की तारीख/Date of Hearing	**:**	08-11-2016
घोषणा की तारीख /Date of Pronouncement	**:**	25-11-2016

आदेश / O R D E R

PER ABRAHAM P. GEORGE, ACCOUNTANT MEMBER

These are appeals filed by the assessee and Revenue respectively directed against an order dated 09.03.2016 of Commissioner of Income Tax (Appeals)-1, Chennai.

2. Appeal of the assessee is taken up first for disposal. Assessee has taken two grounds of which ground No.1 is general in nature needing no specific adjudication. Its ground No.2 is on disallowance of expenditure incurred towards improvement of leasehold facilities.

3. Facts apropos are that assessee rendering engineering and design services had filed its return of income for the impugned assessment year disclosing income of ₹14,56,19,859/-. During the course of assessment proceedings, it was noted by the Assessing Officer that assessee had incurred an expenditure of ₹.3,52,69,561/- for improving its leasehold building premises. Out of the said expenditure, assessee has capitalized a sum of ₹94,71,490/- and balance ₹2,57,98,071/- was claimed as revenue outgo. Ld. Assessing Officer required the assessee to furnish the breakup of the latter amount. From the details furnished, it was noted by the Assessing Officer that such expenditure was incurred for the purpose of

Air conditioner ducting, false ceiling etc. As per Assessing Officer this resulted in enduring benefit to the assessee. Relying on the Explanation 1 to Sec. 32(1) of the Act, ld. Assessing Officer held that, the sum of ₹2,57,98,071/- claimed as incurred for renovation of leasehold premises had to be capitalized. He made a disallowance of the said amount but allowed deprecation @10%.

4. Aggrieved, assessee moved in appeal before ld. Commissioner of Income Tax (Appeals). Assessee furnished a break up of the expenditure of ₹2,57,98,071/- before ld. Commissioner of Income Tax (Appeals) which read as under:-

Particulars	Amount (in INR)
Cost incurred towards partitioning, false ceiling and flooring	96,70,938
Electrical work – repairs and replacement	79,56,512
Cabling & Networking charges	57,92,628
Ducting and other air conditioner related costs	16,76,540
Fire Sprinkler works and fire Extinguishers	2,79,971
Storage units	2,43,000
Architect Fees	1,78,487
Total	2,57,98,076

As per the assessee, above expenditure did not result in creation of any new asset nor gave it any enduring benefit. Reliance was placed on the judgment of Jurisdictional High Court in the case *of CIT vs Ayesha*

Hospitals P. Ltd 292 ITR 266 and Thiru Arooran sugars Ltd vs. DCIT, 350 ITR 324. However, ld. Commissioner of Income Tax (Appeals) was not impressed by the above contention. He held as under:-

> *''10. Renovation per se would be a composite item of activity which would be violated in its concept if the same is split up into smaller fragments. This is so as these smaller individual activities would not make available any facility which could be used by the appellant void of the other co-related activities. Renovation therefore would encompass and include the sum total of all such activities to make available a common facility for the use of the appellant. The architect fees for example claimed separately by the appellant would be a integral part of the renovation activity as also the fee paid to the contractor executing the renovation. Simply put, all activity put together result in restoring to good and usable condition and such an exercise would include repairs as a integral part thereof.*
>
> *11.The case of the appellant rests on the plea that it is a leasehold premise land hence expenditure should be treated as being towards current repairs notwithstanding the provision in Explanation 1 to s.32(1). In my considered view this cannot be accepted for the reason that there is a specific provision to deal with such expenditure. Further more the rights and entitlements of the appellant is not adversely impaired as the expenditure qualifies for depreciation and in the event that the premises are vacated the appellant is entitled to terminal benefits with regard to the expenditure / investment made.*
>
> *12.FinallY with regard to the claim preferred by the appellant u/s 37 and not u/s 32, the same is not tenable on facts and in law. It is settled law that the provisions of s.37 are applicable in respect of general expenses, where expenditure not specified in s.30 to 5.36 are to be considered. As also, expenditure which is not capital or personal in nature and which is wholly and exclusively laid out or expended for the purpose of business. These exclude expenses for any purpose which is an offence or prohibited by law etc. Sec.37(1) therefore being a residual provision, cannot be taken aid! of, unless and until it is established that none of the provisions of s.30 to 36 are applicable to a given case. This view find support from the ratio in. Malwa Vanaspati and Chemical Company Ltd v. CIT 154 ITR 655 (MP) and Khimji Visram and Sons P Ltd v CIT 209 ITR 993 (Guj.).*
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> *13.The decisions relied upon by the appellant have drawn*

strength from the ruling in CIT v. Ayesha Hospitals P Ltd 292 ITR 266 (Mad). It may be taken into account that the assessment year which was before the Hon'ble court was 1991-92 in respect of an expenditure of ₹1,85,557 which was incurred by the assessee towards expenditures relating. to painting, re-laying of damaged floors, and partitions etc in a leased premise for running of a hospital. The lease deed did not provide for such expenditure to be undertaken by the lessor. Drawing support from the Apex court decision in CIT .v. Madras Auto Service P Ltd 233 ITR 468 the expenditure was held to be revenue in nature and deductible as it was for the purpose of carrying on business. The minor repairs were but essential to use the leased premises as a hospital which require the damaged floor tiles to be replaced, painting of walls and minor partitions to be put in place. In the context of the assessee there, these would constitute minor repairs not resulting in added or enduring benefit. Likewise tile amount expended and the extent of renovation and repairs carried out though not determinative would be fairly indicative towards deciding whether the same would constitute minor repairs. The facts in the case of the appellant which was regularly in occupation of lease premises for the conduct of its business are significantly different and differently placed. A situation where the appellant had taken on lease a pare building or a barren plate of floor space wherein civil, electrical, masonary, plumbing and other related works were extensively carried out to make works stations, cabins, and congenial wor1k space cannot be equated to that of a case where minor repairs as in the case of Ayesha Hospital (supra) were carried out.

14.In this context it will serve useful purpose to refer to the decision of the Hon'ble Kerala High Court dated 18.8.2015 in Indus Motor Company P Ltd v. DC IT 378 ITR 707. While examining a similar claim the Hon'ble Court observed " .... after the introduction of Explanation 1 to section 32(1) of the Act, there is no scope left out at all for any interpretation since by a legal fiction, the assessee is treated as the owner of the building for the period of his occupation. This means that by refurbishing, decorating or by doing interior work in the building and enduring benefit was derived by the assessee for the period of occupation and, therefore, is a capital expenditure and not revenue expenditure ..... " " ..... According to us, by adding Explanation 11 to section 32(1) Parliament has manifested its legislative intention to treat the expenditure incurred by the assessee on leasehold building as capital expenditure and, therefore, Explanation 1 to section 32(1) cannot be subjected to any further interpretation. Further the language of Explanation 1 is very plain and clear and there is no scope for providing a different meaning for the words used and, hence, we are bound to consider the

question by giving the literal meaning to the expressions l and phraseologies by the legislature applied." Further applying the ratio, amongst ot1ers, obtaining in the case of Madras Auto Service P Ltd 233 ITR 468 the Hon'ble High Court, the jurisdictional ITAT in its order dated 11.9.2015 in ITA No. 700/Mds/2014for the A.Y.2008-09 in the case of the Continental Enterprises v. ITO has dismisse9 the claim of 100% depreciation by the assessee

Thus he upheld the order of the Assessing Officer.

5. Before us, ld. Authorised Representative strongly assailing the orders of the lower authorities submitted that breakup of expenditure furnished by the assessee was never doubted by the lower authorities. According to him, a sum of ₹94,71,490/- was suo motu capitalized by the assessee. Relying on the judgment of Hon'ble Jurisdictional High Court in the case of *CIT vs. Armour Consultants P. Ltd. 355 ITR 418.* Ld. Authorised Representative submitted that claim of the assessee was under sec. 37(1) of the Act. As per ld. Authorised Representative the expenditure claimed was not capital in nature. According to him, Explanation 1 to Sec. 32(1) of the Act applied only to capital items. Ld. Authorised Representative submitted that expenditure incurred for false ceiling, partitions etc were held by the Hon'ble Jurisdictional High Court in the case of *Ayesha Hospital (P) Ltd (supra)* to be in the nature of repair and maintenance. Further, according to him in the case of *Ayesha Hospital (P) Ltd* (supra), the

jurisdictional High Court had also considered the effect of Explanation (1) to Sec. 32(1) of the Act.

6. Contra, ld. Departmental Representative submitted that cost of repairs claimed by the assessee could not include expenditure which was capital in nature by virtue of Explanation to Sec. 30 of the Act inserted by Finance Act, 2003 w.e.f. 01.04.2004. Further, according to him, claim of the assessee was hit by Explanation (1) to Sec. 32 of the Act. Reliance was placed on the judgment of Kerala High Court in the case Indus *Motor Company P. Ltd vs. DCIT 382 ITR 503, that of Bombay High Court in the case of RPG Enterprises vs. DCIT, 386 ITR 401 and that of Delhi High Court in the case of Bigjo's India Ltd vs. CIT. 293 ITR 170.* Further, according to him, Hon'ble Jurisdictional High Court in the case of *Ayesha Hospital (P) Ltd (supra)* had not considered the Explanation 1 to Sec. 32 of the Act.

7. We have considered the rival contentions and perused the orders of the authorities below. Ld. Departmental Representative has placed strong reliance on Explanation to Sec.30 of the Act which is reproduced hereunder:-

> *''For the removal of doubts, it is hereby declared that the amount paid on account of the cost of repairs referred to in sub-clause (i), and the*

> *amount paid on account of current repairs referred to in sub-clause (ii), of clause (a), shall not include any expenditure in the nature of capital expenditure".*

He has also placed reliance on Explanation 1 to Sec. 32(1) of the Act, which is also reproduced hereunder:-

> *'"Where the business or profession of the assessee is carried on in a building not owned by him but in respect of which the assessee holds a lease or other right of occupancy and any capital expenditure is incurred by the assessee for the purposes of the business or profession on the construction of any structure or doing of any work, in or in relation to, and by way of renovation or extension of, or improvement to, the building, then, the provisions of this clause shall apply as if the said structure or work is a building owned by the assessee".*

For applying both these explanations, the threshold requirement is that the expenditure claimed is capital in nature. If the expenditure claimed is not capital in nature then irrespective of the question whether it was incurred in a leasehold premise or on own premises, it will be allowable. Jurisdictional High Court has clearly held that in the case of *Thiru Arooran sugars Ltd (supra)* that expenditure incurred on false ceiling and office renovation were revenue in nature. The question thus is not whether expenditure is incurred in lease hold premises or not, the question is whether expenditure incurred capital in

nature or not. No doubt, assessee had furnished a break-up of the expenditure before ld. Commissioner of Income Tax (Appeals). In our opinion, none of the authorities verified whether the expenditure included any capital outgo or not. We are therefore of the opinion that matter requires a fresh look by the ld. Assessing Officer. We set aside the orders of the lower authorities and remit the issue regarding claim of expenditure on improvement of leasehold asset back to the file of the ld. Assessing Officer for consideration afresh in accordance with law. Ground No. 2 of the assessee is allowed for statistical purpose.

8. Now, we take up Revenue appeal. Sole grievance raised by the Revenue is on the direction of the ld.CIT(A) to exclude exchange loss, telecommunication expenditure, travel expenditure and other expenditure incurred in foreign currency both from export turnover and total turnover while computing deduction available to the assessee u/s.10B of the Act.

9. We find that ld. Commissioner of Income Tax (Appeals) while giving above directions had relied on the decision of Special Bench in the case *of ITO vs. Sak Soft Ltd 313 ITR(AT) 353*. Hon'ble Karnataka High Court in the case of *CIT vs. Tata Elxsi Ltd, 349 ITR 98* has held that all the items which are excluded from export turnover was to be deducted from total turnover also while computing relief

u/s.10B of the Act. In such circumstances, we do not find any reason to interfere with the orders of lower authorities.

10. To sum up the result, the appeal of the assessee is partly allowed for statistical purposes whereas that of the Revenue is dismissed.

Order pronounced on Friday, the 25th day of November, 2016, at Chennai

Sd/-	Sd/-
(एन.आर.एस. गणेशन))	**(अब्राहम पी. जॉर्ज)**
(N.R.S. GANESAN)	**(ABRAHAM P. GEORGE)**
न्यायिक सदस्य/JUDICIAL MEMBER	**लेखा सदस्य/ACCOUNTANT MEMBER**

चेन्नई/Chennai
दिनांक/Dated:25th November, 2016
KV

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त(अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीयप्रतिनिधि/ DR
6. गार्ड फाईल /GF