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

\+ **ITA 529/2014**

COMMISSIONER OF INCOME TAX-XIII ..... Appellant
Through: Ms. Suruchi Aggarwal, Senior Standing counsel with Ms. Lakshmi Gurung, Junior Standing counsel and Mr. Abhishek Sharma, Advocates.

versus

NOIDA MEDICARE CENTRE LTD ..... Respondent
Through: Dr. Rakesh Gupta with Mr. T.R. Talwar, Ms. Poonam Ahuja and Mr. Rohit Kumar Gupta, Advocates.

CORAM:
HON'BLE DR. JUSTICE S. MURALIDHAR
HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R

% 04.08.2015

1. This appeal by the Revenue under Section 260A of the Income Tax Act, 1961 ('Act') is directed against an order dated 31st January 2014 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 4894/Del/2012 pertaining to Assessment Year ('AY') 2009-10.

2. The question urged for consideration by the Revenue in this appeal is in which AY can the Assessee capitalize the customs duty levied on import of hospital equipment and claim depreciation?

3. The Respondent-Assessee is a hospital and diagnostic centre. It earns income under the head 'Business and Profession'. The Assessee imported hospital equipments valued at Rs. 2,75,11,988 during the years 1988-89

and 1992-93, without payment of custom duty, on the basis of a customs duty exemption certificate ('CDEC') issued by the Director General of Health Services ('DGHS'). The equipment thus imported was capitalized by the Assessee on the actual value of the equipment paid by it. Depreciation was being claimed on the said equipment from year to year at the prescribed rate as per the Act.

4. Subsequently, the DGHS noted that the Assessee had failed to fulfil the essential condition stipulated in the relevant notification of the Customs Department dated 1st March 1968 for retaining CDECs for import of hospital equipments. Accordingly, the CDEC granted to the Assessee stood withdrawn.

5. Upon such withdrawal, the Customs authorities raised a demand of Rs. 3,78,66,864 as custom duty on the Assessee for the import of equipment in the aforementioned years. Later, by an order dated 28th October 2004, the Commissioner of Customs (CC) reduced the duty to Rs. 1,10,04,795 along with fine of Rs. 10,000 and Rs. 5,000.

6. The appeals filed by the Respondent-Assessee against the order of the CC were dismissed by the Customs, Excise and Service Tax Appellate Tribunal ('CESTAT'). The Special Leave Petition ('SLP') preferred thereafter by the Assessee was dismissed on 25th February 2008 by the Supreme Court. Thereafter during October, November and December 2008, the Assessee remitted the entire customs duty of Rs. 1,10,04,795 together with interest of Rs. 9,52,161.

7. The Assessee filed its return of income for the AY 2009-10 on 29th September 2009 *inter alia* declaring a total income of Rs. 65,16,324. In the

fixed schedule in the balance sheet the Assessee included 'new' plant and machinery worth Rs. 1,10,04,795 and claimed 100% depreciation on it. The case was selected for scrutiny and notices were issued under Sections 143 (2) and 142 (1) of the Act. By way of explanation, the Assessee stated that even though the customs duty was paid during the previous year relevant to the AY 2009-10, the liability to pay the customs duty related back to the accounting period 1989-90 and 1992-93 when the equipment was actually imported. Thus there was an increase in the cost of the imported machinery to the extent of customs duty paid during the year. The Assessee accordingly claimed depreciation on the enhanced cost of machinery from year to year basis since the date of actual import. Since the written down value ('WDV') had become negligible, the whole amount of depreciation was written off in the AY 2009-10 on the customs duty paid during the year.

8. The Assessing Officer ('AO') rejected the above explanation. The AO held that since the levy of customs duty was penal in nature it was not allowable expenditure in terms of the Explanation to Section 37 of the Act. The entire amount of customs duty was therefore added back to the Assessee's returned income. Alternatively, the AO held that since the Assessee had paid the customs duty in the financial year 2008-09, it had to be capitalized relevant to the AY 2009-10. Depreciation of 15% could be allowed in the current year which would result in an addition of Rs. 93,54,076, i.e., after deducting 15% of the customs duty amount. However, ultimately the AO added back the entire amount of customs duty to the returned income.

9. In the appeal preferred by the Assessee, the Commissioner of Income Tax (Appeals) ['CIT (A)'] held that the enhanced cost of equipment would

be taken into consideration from the AY 2005-06 when the CC passed an order dated 29th October 2004 requiring the Assessee to remit the customs duty of Rs. 1,10,04,795. The AO was directed to rework and allow the depreciation on that basis.

10. Aggrieved by an order of the CIT (A), the Revenue preferred an appeal before the ITAT and the Assessee preferred a cross-objection. In the impugned order dated 31st January 2014 the ITAT held that CIT (A) was right in holding that the obligation to pay customs duty and interest arose for the first time on 28th October 2004, relevant to the AY 2005-06 and therefore, the enhanced cost of the equipment should be taken into consideration from AY 2005-06 onwards. The depreciation had to be allowed accordingly. The WDV had to be reworked for the relevant AY 2009-10. The Revenue's appeal as well as cross-objections of the Assessee on this aspect were rejected.

11. In the present appeal, by an order dated 11th November 2014 the Court required the Revenue to file calculations of the WDV and the depreciation as claimed and allowed. It was also noted that Section 37 (1) of the Act would not apply if the payment of customs duty had to be treated as a capital expenditure.

12. The Revenue has not filed calculations of the WDV and the depreciation as claimed and allowed. It was urged by Ms. Suruchi Aggarwal, learned Senior standing counsel appearing for the Revenue, that the liability to pay customs duty crystallized only in the AY 2008-09 after the Assessee had exhausted all legal remedies. It could have been capitalized only in the AY 2009-10 by allowing normal rate of 15% depreciation as against 100% claimed by the Assessee. Further in the block

of assets, no individual plant or machinery was identifiable. Consequently, the customs duty paid during the year should have to be added to that block of assets @ 15% and the depreciation claimed allowed accordingly.

13. On the other hand, Dr. Rakesh Gupta, learned counsel for the Respondent-Assessee, referred to the decision of the Madras High Court in the ***CIT v. Funskool (India) Limited (2007) 294 ITR 642 (Mad)*** which according to him covered the issue in favour of the Assessee.

14. The central question is whether the obligation to pay customs duty related back to the actual date of payment of customs duty or the date of import of the equipment and whether the said customs duty paid in the previous year relevant to the AY in question can be capitalized with reference to an earlier year.

15. In ***Funskool (India) Limited*** (supra) the question was whether depreciation could be claimed on the additional customs duty paid in the previous year relevant to the AY in question although such customs duty was in respect of machinery that was imported and installed in an earlier year. That question was answered in the affirmative by the Madras High Court by following the judgment of the Gujarat High Court in ***Atlas Radio and Electronics P. Limited v. Commissioner of Income Tax (1994) 207 ITR 329 (Guj)*** in which it was held that even though the sales tax was paid in a subsequent year, the liability to pay sales tax arose in the accounting period relevant to the assessment year in which the machinery was purchased. It was held on the facts of that case that the development rebate had to be claimed in the AY in which the machinery was purchased.

16. Following the above decision of the Madras High Court in ***Funskool (India) Limited*** (*supra*), we are of the view that in the instant case, the AO erred in disallowing the capitalization of the additional customs duty in the manner claimed by the Assessee and adding the entire customs duty paid in the relevant AY to the income of the Assessee. The impugned order of the ITAT affirming the decision of the CIT (A) that the enhanced cost of equipment should be taken into consideration from AY 2005-06 onwards and that the WDV should be reworked for the AY in question does not call for interference.

17. It requires to be noted that the Assessee has not preferred an appeal against the rejection of its cross-objection by the ITAT. Therefore, the question whether the Assessee would be entitled to claim deprecation on the customs duty paid from the year of actual import of equipment is not considered but left open for decision in an appropriate case.

18. The appeal is accordingly dismissed.

S. MURALIDHAR, J

VIBHU BAKHRU, J

AUGUST 04, 2015
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