IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.1337 OF 2000

M/s. Sandvik Asia Limited]
Bombay Poona Road,]
Pune 411 012.] .. Appellant.

V/s.

1 The Deputy Commissioner of]
Income Tax, Spl. Rg. 2, Pune,]
having his office at PMT Bldg.,]
Sworgote, Pune 411 013]

2 The Commissioner of Income tax]
Pune, having his office at Proptikar]
Bhavan, Karve, Pune 400 004.]

3 Union of India]
through Ministry of Finance,]
North Block, New Delhi.] .. Respondents.

Mr. J. D. Mistri, Sr. Advocate a/w. Mr. K. Gopal and Mr. Jitendra Singh i/b. K. Gopal, for the Appellant.
Mr. Suresh Kumar, for the Respondent.

CORAM: M.S.SANKLECHA, &
N.M.JAMDAR, JJ.
RESERVED ON : 24th JULY, 2015.
PRONOUNCED ON : 11th AUGUST, 2015.

JUDGMENT (Per M. S. Sanklecha,J.):-

This appeal under Section 260-A of the Income Tax Act, 1961

(the Act) challenges the order dated 2nd February, 2000 passed by the Income Tax Appellate Tribunal (the Tribunal), raising a perennial issue of deciding the difference between revenue and capital expenditure.

2 The Assessment Year involved is A. Y. 1990-91.

3 On 25th February, 2002, this Appeal was admitted on the following substantial questions of law:-

> *"(a) Whether on the facts and in the circumstances of the case and in law, the Tribunal was right in holding that the assessee was not entitled to a deduction of Rs.23,34,615/- when computing its income chargeable to tax?*
>
> *(b) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in rejecting the claim of the assessee for depreciation on the expenditure of Rs.23,34,615/- which goes to increase the cost of the building?"*

4 The facts relevant for both the aforesaid questions are as under:-

(a) The Appellant is engaged in the business of manufacturing of cutting tools at its factory. The Appellant owned another area of land other then the land on which factory is situated, ad-measuring 47,296 sq. mtrs (the said land) which was vacant at village Aundh in District Pune;

(b) In 1976, the Urban Land (Ceiling and Regulation)Act, 1976 (ULCA) was enacted. On 14th January, 1981, the Appellant applied to the Competent Authority under ULCA for exempting an area of 10,462 sq.mtr. (exempted land) out of the said land under Section 20 of ULCA;

(c) Pending consideration of its application for exemption, the State Government issued a notification under Section 41 of the Maharashtra Housing & Area Development Act, 1976 (MHADA) on 3rd December, 1987, seeking to acquire the said land. Consequent to the above, on 30th May, 1988, the Appellant made a representation to the State Government and prayed that the proposed acquisition of the said land and the issue of notification under Section 41 of the MHADA be withdrawn. It appears that the State Government treated the Appellant's representation as an application for exemption under Section 20 of the ULCA and consequently by an order dated 29th November, 1989, granted exemption to a portion of the said land i.e. the area of 10,462 sq. mtrs, in the aggregate (exempted land). This was with an obligation to construct hostel, training centre and guest house on an area of 6,767 sq. mtrs and also to construct tenements of 50 to 80 sq. mtrs. each for housing to be given to the State Government. The aforesaid exemption to the exempted land was on further payment of consideration of Rs.23.35 lakhs. The Appellant paid the aforesaid amount and also carried out its obligation under the order dated 29th November, 1989, for availing the exemption granted under Section 20 of ULCA.

(d) It is the aforesaid payment of Rs.23.35 lakhs to the State Government that is claimed by the Appellant as the revenue expenditure while arriving at its profit for the A. Y. 1990-91. The Assessing Officer by an order dated 19th December, 1991 did not accept the Appellant's claim that the aforesaid payment of Rs.23.35

lakhs was revenue expenditure and held that payment was in the nature of capital expenditure on the following grounds:-

(i) The exempted land was not being used for the purpose of business. Thus, the acquisition would not have had any immediate effect on the Appellant's carrying on business;

(ii) The amount of Rs.23.35 lakhs was paid by the Appellant only for perfecting and protecting its title over the exempted land; and

(iii) The benefit obtained by making the payment of Rs.23.35 lakhs was a benefit of an enduring nature in respect of the exempted land.

(e) Being aggrieved, the Appellant carried the above issue to the Commissioner of Income Tax (Appeals) [CIT(A)]. By an order dated 16th June, 1992, the CIT(A) held:-

(i) That an amount of Rs.23.35 lakhs was paid to the State Government to ensure that the 10,642 sq. mtr. (exempted land) is not acquired under the ULCA;

(ii) The payment was made to regain exempted land which would be otherwise lost;

(iii) Obtained a benefit of enduring nature in respect of the exempted land; and

(iv) The payment was not for the purpose of business but to acquire full ownership of the exempted land.

Thus, the appeal was dismissed on the above account by holding that the payment of Rs.23.35 lakh was revenue expenditure.

(f) Being aggrieved, the Appellant preferred a further appeal to the Tribunal. By the impugned order dated 2nd February, 2000, the Tribunal held:-

(A) Payment of Rs. 23.35 lakhs in respect of land is capital expenditure for reasons, as under:-

(i) In view of enactment of ULCA, the Appellant was divested of its right to surplus land including the right to alienate and/or deal with it any manner it deems fit;

(ii) The payment was made to complete the title in the land which became defective/ imperfect in view of fetter by virtue of ULCA;

(iii) Payment not made to avert threat to the running of its business; and

(iv) The payment ensured enduring benefit in respect of the exempted land as otherwise the acquisition of the land under the ULCA with nominal compensation.

(B) So far the alternative contention that Rs.23.35 lakh be considered a part of the costs of the building and be allowed as depreciation. The Tribunal held as under:-

> The expenditure of Rs.23.35 lakhs as incurred was to perfect and/or cure the defect in the title of the land, therefore could not be added to the costs of the building.
>
> In the above view, the appeal of the Appellant was dismissed.

5 We shall now deal with each of the two questions independently. -

Regarding Question -1 –

6 Mr. Mistri, learned Senior Counsel appearing for the Revenue in support of the appeal, submits as under:-

(a) It is an admitted position between the parties that the Appellant was entitled to the exempted property at all times. In spite of the above, the impugned order holds that the amount of Rs.23.35 lakhs has been paid to cure a defect in title, therefore holding that the above expenditure is on capital account;

(b) The mere enactment of ULCA does not in any manner affect the title of the Appellant to the said land and in particular, 10,462 sq. mtr, of exempted land by virtue of Section 20 of the ULCA. The title of the Appellant on said land would only be lost when notification is issued under Section 10 of the ULCA. Thus, the title to be exempted land always being with the Appellant, the payment of Rs.23.35 lakhs could not have been made to obtain the title and/or complete an incomplete title. Consequently, the impugned order could not have held the payment is on capital account;

(c) As the title to the subject property including 10,462 sq. mtr. exempted land was with the Appellant at all time, the payment of Rs.23.35 lakhs was made only so as to protect Appellant's business asset. It is well settled that payments made to protect the business asset from the threat of acquisition would be on revenue account; and

(d) It is submitted that the decision of this Court in ***C.S.T. v/s.***

Brihan Maharashtra Sugar Syndicate Ltd.,[1] completely concludes the issue in favour of the Appellant wherein it has been held that expenditure incurred on litigation for preserving and preventing a loss of land by virtue of land ceiling enactment, is an expenditure which is revenue in nature.

In the above circumstances,it is submitted that the payment of Rs.23.35 lakhs was in the nature of revenue expenditure.

7 Per contra, Mr. Suresh Kumar, learned Counsel appearing for the Revenue supports the impugned order and submits as under:-

(a) The exempted land i.e. 10,462 sq. mtrs, was not land being used by the Assessee for carrying on its business. This asset in the form of land was available for future exploitation. Consequently, payment made to thwart the acquisition of 10,462 sq. mtrs. was not made for the purpose of carrying on its business as the business of manufacturing cutting tools would continue whether or not the exempted land was acquired under ULCA. Therefore, in the above facts, the expenditure of Rs.23.35 lakhs cannot be considered on revenue account;

(b) The amounts of Rs.23.35 lakhs was paid by the Respondent-Assessee to the State Government so as to continue to have possession of the land for indeterminate period. Thus ownership became complete and the benefit obtained by making the payment being enduring in nature can only be on capital account as correctly held by the impugned order; and

1 165 ITR 275

(c) Attention was drawn to Section 3 of the ULCA which prohibits any person from holding any vacant land in excess of ceiling limit. Admittedly, the subject land including 10,462 sq. mtr. of and which was exempted under Section 20 of the ULCA was vacant land in excess of ceiling limit and the Appellant could not have held the same. It is by virtue of an exemption granted to the Appellant on conditions of constructing building on the land and payment of Rs.23.35 lakhs that an area of 10,462 sq. mtr. of land exempted. Therefore, the payment made was in the nature of capital expenditure for excluding the operation of ULCA in respect of 10.462 sq. mtrs. of land.

In view of the above, it is submitted that no interference with the order of the Tribunal is called for to the extent it holds that the payment of Rs.23.35 lakhs was in the nature of capital expenditure.

8 We have considered the rival submissions. The issue whether an expenditure is capital or revenue in nature, cannot be decided on the basis of any pre-existing Rules under the Act, as there is none. Section 37 of the Act allows expenditure expended for the purposes of business or profession as a deduction to compute the income chargeable under the head '*profit and gain of business or profession.*' However, Section 37 of the Act, itself mandates that such expenditure should not be in the nature of capital expenditure. However, no definition or rules to determine the character of expenditure i.e. capital or revenue is found in the Act. The Courts have repeatedly made attempts to formulate tests to distinguish between capital and revenue expenditure. However, no single test/ rule has yet been evolved to distinguish between revenue and capital

expenditure. Finally, each case has been decided and would have to be decided upon some particular aspect i.e. fact that exists in case which comes up for consideration. In fact, Lord Greene M. R. in ***IRC v/s. British Salmson Aero Engines Ltd***.[2] observed that *"the spin of a coin would decide the matter almost as satisfactorily as an attempt to find reasons."*. It is possibly so in many cases where the expenditure lies within the realm of uncertanity i.e. to decide whether predawn would appropriately fall within the province of night or within the domain of day.

9 Neither the Parliament has laid down any tests to distinguish between capital and revenue expenditure nor the Courts have been able to evolve an universal tests to distinguish between the two types of the expenditure. However, the observations of the Courts will be helpful to decide the character of the expenditure under examination. The entire issue whether the expenditure is capital or revenue has to be looked at through the eyes of the businessman incurring the expenditure. This in the context of a commercial perspective.

10 Keeping the above observations in view, the facts which emerge for our consideration are:-

(a) Appellant was admittedly in possession of an area of 47.290 sq. mtrs., land all of which were excess vacant land and had sought exemption to 10,462 sq. mtr. of land only under Section 20 of the ULCA;

(b) Section 3 of ULCA prohibited any person from holding any vacant land in excess of any ceiling limit provided under the ULCA;

2 (1939)-7 ITR 245

(c) Before proceedings under the ULCA for acquiring the land could be completed by issuing necessary notification under Section 10 thereof, the Appellant on its own moved the Competent Authority, seeking exemption under Section 20 of ULCA for an area of 10,462 sq. mtrs out of the 47,290 sq. mtrs. of excess vacant land which is liable for acquisition and would be so in due course;

(d) The exemption was granted by the Competent Authority under Section 20 of ULCA by putting conditions viz: constructing building on the land, prohibiting sale/ transfer of the land on which the construction is carried out till such time the construction is complete and making a payment of Rs.23.35 lakhs to the State Government; and

(e) The Appellant accepted and complied with the conditions stipulated in the notification for exemption issued under Section 20 of ULCA including making the payment of Rs.23.35 lakhs to the State Government.

11 On the aforesaid factual background, what is to be examined is whether the payment of Rs.23.35 lakhs is to be considered as revenue expenditure as contended by the Appellant or as capital expenditure as contended by the Revenue.

12 The Appellant's primary submission is that it is the owner of the said land including 10,462 sq. mtrs of exempted land at all times. It is submitted that the title of the exempted land is and has always been with the Appellant. The payment of Rs.23.35 lakhs made by the Appellant was only to protect its title to 10.462 sq. mtrs. by claiming exemption under

Section 20 of the ULCA. The Appellant's contends that it was not a payment made to regain something which has been lost or to complete / perfect its title to the 10,462 sq. mtrs of land. It is submitted that only in case the payment was made consequent to issue of notification under Section 10 of the ULCA, then the payment would acquire the colour of capital expenditure as it was being made to get something which the Appellant did not have. In support of its contention that the Appellant had complete title over the exempted land inasmuch as they could construct on the same and/or deal with it, notwithstanding the enactment of the ULCA, reliance was placed upon:-

(I) Srinivasa Builders Pvt. Ltd. v/s. Government of Andhra Pradesh[3] (Andhra Pradesh High Court, Single Judge);

(II) G. Jayamala v/s. Commissioner of Municipal Corporation, Hyderabad[4] – (Andhra Pradesh High Court, Division Bench) and;

(III) Ghanshyamdas v/s. Union of India in LPA 765/ 2003 rendered on 2nd September, 2011 (unreported decision of Delhi High Court-Division Bench).

13 We find that the decisions of the Andhra Pradesh High Court in M/s. Srinivasa Builders (supra) and M/s. G. Jayamala (supra) proceeded upon the Corporation seeking a no objection certificate from the ULCA authorities to permit construction on the land. In that context, the Court held that only on a notification being issued under Section 10 of ULCA would the holder of the vacant land loose its title to the said land. It further held that on the land being notified as excess vacant land by the

3 (APLJ 1978 (1) page 174)
4 1989(1) APLJ 3636

Competent Authority, then the party concerned will take such steps as are necessary to make the excess vacant land available to the State. Therefore, the construction on the land impliedly was to be carried out by the Appellant at its own risk. It would thus include the obligation to demolish the construction. In the present facts, the Appellant was not willing to take such a risk and for that reason in their representation dated 30th May, 1988 records that the Authorities under ULCA have not permitted the Appellant to construct on the said land. Thus, there was a certain fetter/ restriction of rights/ uncertainty over the use of the said land including the exempted land once it is land in excess of the ceiling limit provided under ULCA. It is only by having the land exempted under Section 20 of ULCA that this fetter/ uncertainty over the use of land is lifted and the same in the present facts is obtained inter alia on making a payment of Rs.23.34 lakhs.

Similarly, the unreported decision of Delhi High Court in Ghanshyamdas Sheth (supra) would not apply to the present facts as it inter alia concludes that there can be no dealing with the excess land by way of transfer, sale etc. only between the notification issued under Section 10(1) and Section 10(3) of the ULCA. It does not even remotely suggest that prior to notification under Section 10 of the ULCA there is an unfettered right to dispose of and/or sell the property. It dealt with the issue of carrying out construction of the vacant land in terms of the grant of the land. In fact, it applies and follows the aforementioned decisions of the Andhra Pradesh High Court to conclude that mere enactment of ULCA will not prevent the owner of the land for putting any construction thereon till a notification under Section 10 of ULCA, is issued.

14 In any case, the distinguishing feature in the present facts to those cited by the Appellant, is that in the cited cases, the issue whether the land is in excess or not is a matter of dispute i.e. not settled. Although in the Delhi High Court's decision, the notification under Section 10 of ULCA was a subject matter of challenge by way of a Writ Petition. In this case, the Appellant has itself declared to the Competent Authority that the said land is in excess of the ceiling limit. Hence, it was only a matter of time. Therefore, the Appellant was aware or had accepted the fact that the exempted land would be acquired under ULCA in due course. Therefore, as a preemptive step, the Appellant has itself declared to the State Government that it holds excess land to the extent of 47.296 sq. mtrs. and sought exemption of 10,462 sq. mtrs. out of the said land. This exemption was sought under Section 20 of the ULCA. The State Government while granting exemption under Section 20 of the ULCA by an order dated 17th April, 1989 also requires the Appellant to construct hostel, training centre and guest house on an area of 6,667 sq. mtrs, for Appellant's use and in the balance area of 3695 sq. mtrs., the Appellant was required to built tenements, each having an area of up to 80 sq. mtrs. In the aforesaid background, the aforesaid amount of Rs.23.35 lakhs was paid by a businessmen to ensure that the area of 10,462 sq. mtrs out of the total exempted land of 47,296 sq. mtrs is available for the Appellant's use and taken out of the ambit of Section 3 of ULCA. In case, the Appellant's had not made this payment of Rs.23.35 lakhs, the consequence would be that the entire area of 10,462 sq. mtr. would be acquired under the provisions of ULCA.

15 In the circumstances, the payment of Rs.23.35 lakhs paid by the Appellant was not with a view to protect the property per se but to ensure that the proceedings under ULCA do not result in the entire property being taken over by the State Government, which was otherwise a fait accompli. As a consequence, inter alia, of making a payment of Rs.23.35 lakhs, the Appellant received a benefit of enduring nature inasmuch as 10,462 sq. mtr of land came out of the clutches of ULCA and an area of 6767 sq. mtr was available for all times to be used by the Appellant including the power to sell of the land along with the structures thereon. In the above facts, the payment of Rs.23.35 lakhs from a businessman's point of view is a payment made to stop/stall the acquisition of land which a businessman was able to foresee. Therefore, the adoption of the entire process of exemption to ensure that the land is available to the Appellant for indeterminate period albiet with the constructed hostel, training centre and guest house on the same. The exemption itself only prohibits the Appellant from disposing of land in favour of any third party till such time as the construction on the land is complete in terms of the conditions of the exemption. Thereafter, there is no prohibition to transfer the structure along with the land. Thus a right to transfer, unfettered in any manner became available to the Appellant after construction of the building on the land. This right was not available to the Appellant prior to the grant of the exemption as the disposition was fettered because of the certain acquisition of land as even according to the Appellant, vacant land was in excess of the ceiling limit under ULCA. This payment made by the Appellant in its nature is different from a payment made to protect the property. In fact, Supreme Court in the case of ***Assam***

Bengal Cement Co. Ltd. v/s. CIT[5] while laying down the criteria to decide/ determine whether the payment is of capital or revenue nature has observed that the aim and object of the expenditure would determine the character of the payment. In the present facts, as pointed out above, the entire aim and object of the payment was not only that the certainty of acquisition is aborted but enduring benefit as pointed out above is obtained by the Appellant. This would conclusively determine that the payment in this case was capital in nature in the capital field.

16 It was also contended that the title to the exempted land in respect of which the payment was made, was at all times with the Appellant. Therefore, it could not be a case of acquisition of asset or curing a defect in the title so as to become an expenditure which is capital in nature. It is a settled position that a title is an evidence of ownership to the property. Ownership as such constitutes a bundle of rights over a land or thing i.e. right to possession, right to use and enjoy, right to consume, destroy or transfer and all the above rights are indeterminate in time. The ownership of the exempted land is affected inasmuch as the right to consume and/or transfer the excess vacant land is affected/ fettered by virtue of the enactment of ULCA. Thus, by obtaining exemption from ULCA inter alia on payment of Rs.23.34 lakhs, the fetter / encumbrance/impediment is removed in the ownership of the land. Therefore, the title which is evidence of ownership in the present facts was not complete ownership as the same was fettered by the provisions of ULCA. This removal of a fetter by making payment completes the ownership of the land which was otherwise imperfect and would be

5 27 ITR 34

reflected in the title on grant of exemption, the title to the exempted land is no longer encumbered by the provisions of ULCA. Therefore, we do not accept the Appellant's contention that the payment was revenue in nature. As observed by the Apex Court in ***Dalmia Jain & Co., v/s. CIT***[6] if the expenditure is incurred to create, cure or complete the title, then the expenditure is capital in nature. In this case, the payment cures and/or completes the title by removing the fetter/ encumbrance of ULCA being invoked in respect of the exempted land. In fact, the authorities were correct in applying the test laid down in the Apex Court's decision in ***V. Jagmohan Rao v/s. CIT***[7] that to determine an expenditure to be a capital expenditure, it must be incurred in getting rid of a defect in title or a threat to litigation. Moreover, in this case, the threat to a certain acquisition would be on a higher footing then a threat to litigation. Therefore, it has been correctly held to be capital in nature on both counts i.e. getting rid of a defect and avoiding a certain acquisition.

17 We are of the view that the impugned orders of the authorities have reached a correct finding of fact that the land was not being used for the purposes of the Appellant's business. It was a vacant land to be exploited in the future. The business of the Appellant i.e. of manufacturing of cutting tools continued and the factory land nor its manufacturing activities was affected by the ULCA even remotely. Thus, exemption obtained on payment made was not to protect a running business or business asset of the Appellant. Therefore, the decision of the Apex Court in ***Empire Jute Co. Ltd. v/s. CIT***[8]***, Bikaner Gypsum v/s.***

6 82 ITR 754
7 75 ITR 375
8 124 ITR 1

CIT[9] and Shree Meenakshi Mills Ltd. v/s. CIT[10] would have no application to the present facts. In Empire Jute Co. Ltd. (supra), the advantage of enduring benefit was not obtained in the capital field i.e. the payment made merely facilitated the assessee's day to day business while leaving the fixed capital untouched. In this case, the payment is in the capital field and does not in any manner affect the day to day running of the Appellant's business. Similarly, in Bikaner Gypsum (supra) the payment was made only to remove an obstacle to carry on the day to day business of mining. The Court held that no advantage of enduring benefit was obtained therein. In the present facts, the payment does not affect the carrying on day to day business and in fact a benefit of enduring nature is also received by the Appellant. In Sree Meenakshi Mills Ltd. (supra) also the expenditure was incurred in legal proceedings in relation to the Assessee's right to carry on its day to day business. This is not so in the present facts.

18 The reliance by the Appellant upon the decision of this Court in Brihan Maharashtra Sugar Syndicate (supra) is not of any assistance to it. The Appellant therein` held land which it used for sugarcane cultivation so as to carry on its business of manufacturing sugar. This land was being acquired under the Land Ceiling Act. The Appellant therein incurred expenses to protect the land which was used for its sugarcane cultivation from acquisition. Therefore, it was an expenses incurred to protect/maintain its running business and/or business asset. It was in the above background, that the Court held that the expenditure incurred for litigation, was revenue in nature. In the present facts, the excess land was

9 187 ITR 39
10 62 ITR 207

not a business asset i.e. not being used in running a business but was to be exploited in future. Therefore, no occasion to apply the decision of this Court in Brihan Maharashtra Sugar Syndicate (supra), can arise.

19 In view of the above, we see no reason to disturb the finding of the Tribunal upholding the order of the lower authority that amount of Rs.23.35 lakhs is an expenditure on revenue account.

Regarding Question 2 -

20 Mr. Mistri, learned Senior Counsel for the Appellant submits that in the alternative, in case the amount of Rs.23.35 lakhs is considered to be capital in nature, then the same must be added to the cost of constructing the building as allowed by the order, granting exemption under Section 20 of ULCA. It is the above expenditure of Rs.23.35 lakhs that allowed the Appellant to construct the buildings. Therefore, this expenditure be added to the cost of constructing the buildings and depreciation be allowed thereon;

21 Mr. Suresh Kumar, learned Counsel appearing for the Revenue submits that the payment of Rs.23.35 lakhs was made in respect of land. Therefore, no occasion to add the same as the cost of constructing the building, can arise;

22 We have found that the expenditure of Rs.23.35 lakhs has been incurred so as to complete the title/ ownership of the land. Therefore, the above expenditure cannot be attributed to the construction of the building. The construction of the building mandated by the exemption order under Section 20 of ULCA is only on consequence of the

title/ ownership becoming complete. Therefore, we see no reason to interfere on this account as also with the impugned order of the Tribunal negating the plea of the Appellant that the amount of Rs.23.35 lakhs be added to the cost of constructing the buildings so as to avail of depreciation on the same.

23 We shall now answer the substantial questions of law as under:-

Q.1 In the affirmative i.e. against the Appellant-Assessee and in favour the Revenue; and

Q.2 In the affirmative i.e. against the Appellant-Assessee and in favour of the Revenue.

24 In view of the above, we see no reason to disturb the impugned order dated 2nd February, 2000 of the Tribunal.

25 Accordingly, **Appeal dismissed**. No order as to costs.

(N.M.JAMDAR,J.) **(M.S.SANKLECHA,J.)**