

ito Vs. Monnet Industries Ltd.

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SooperKanoon Citation : sooperkanoon.com/75771

Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Jul-27-2007

Judge : N Karhail, R Singh

Appellant : ito

Respondent : Monnet Industries Ltd.

Judgement :

1. This appeal of the revenue is directed against the order dated 24-6-2002 passed by the Commissioner (Appeals)-VIII, New Delhi for assessment year 1996-97. The first ground of appeal states that on the facts and in the circumstances of the case learned Commissioner (Appeals) has erred in allowing the claim of the assessee of a sum of Rs. 5,66,79,270 as a revenue expenditure in connection with the setting of sugar unit at Muzaffarnagar (U.P.).

2. Briefly stated facts are that the assessee company had set up Ferroalloys manufacturing plant in Raipur in 1991. It was also engaged in the trading business of Ferro-Alloys. In the years 1994-95 and 1995-96 it set up a sugar manufacturing project at Unn, District Muzaffarnagar with an installed capacity of 2500 TCD. It was claimed that this project started production in the month of March, 2006. The project cost stated by the assessee was Rs. 56.74 crores which was raised by way of term loans, right and public issue, etc. It was contended by the assessee that the project for manufacturing of sugar started production from 20-3-1996. It was stated before the assessing officer that the revenue expenditure capitalised to fixed assets was to the order of Rs. 5,66,79,270 the details of which were as

under: 3. The case of the assessee was that these expenses were revenue in nature since it did not represent any tangible asset and, therefore, it had been claimed in the computation of net assessable income as revenue expenses. The assessee submitted that as per the principle laid down in various judicial pronouncements all revenue expenses including interest incurred during pre-operative period even prior to trial run period in connection with the expansion of the existing unit and for setting up of a new unit which formed part of the same business carried on by the assessee were to be allowed as deduction as revenue expenses. It was, therefore, contended that the sugar project was new line of business in the same business fold, having unity of control, interlacing of funds, interdependence of a new division, thus, was an extension of the already existing business and hence, the related expenditure was allowable as revenue business expenditure.

4. The assessing officer, however, observed that (i) the business and project set up to manufacture sugar was a new and separate business; (ii) the sugar project was a source of income newly coming into existence, the previous year of which shall begin with the date of setting up of the business; (iii) the expenditure in relation to sugar project has necessarily to be capitalised up to the date of setting up; (iv) that the account capitalizing the expenditure is correct and claim made as revenue expenditure for Income-tax purposes is misplaced as is also erroneous. The assessing officer further observed that it had been endeavoured by the assessee to justify the claim as being revenue as it constituted the same business. In *Waterfall Estates Ltd. v. CIT* wherein the Hon'ble Supreme Court has held that, whether the business constituted to be same business or the separate business was necessarily a question of fact. It was held: "It is trite law that a business could not be said to be the same if it did not stand the judicial test which inter alia include: (i) The location of the project at different places and acquired at different times and were independent of closure of one another.

(ii) Each business had its own subsidiary account through the head office consolidated the accounts.

(v) Apart from centralized management there was no irrebuttable evidence relating to interlacing, interconnection, interdependence of various projects in day-to-day affairs of their functioning being dovetailed into one another.

5. Thus, the assessing officer did not accept the contention of the assessee that the aforesaid expenditure was revenue in nature. The assessing officer observed that the sugar project was a new source of income and was not the same business as that of manufacturing Ferro-chrome or trading in it. The assessing officer also held that even when the assessee had made out a case of interlacing, etc. in general terms, but did not stand any case when the tests mentioned above were applied to it. For the reasons given in the assessment order, the assessing officer concluded that the claim of the assessee was that of revenue expenditure was not admissible. Further, the assessing officer also sought to distinguish between as to when the business was ready to commence and when it was only set up. The assessing officer further held that expenditure incurred in the new project was not deductible as the same was incurred for the separate business as held in *Travancore Chemical & Mfg. Co. Ltd. v. CIT* , *CIT v. Blue Mountain Estates & Industries Ltd.* The assessing officer pointed out that different lines of business carried out by the assessee were held not constituting to be the same business. Thus, the assessing officer rejected the claim of the assessee.

6. Being aggrieved, the assessee preferred an appeal before the Commissioner (Appeals). The learned Counsel for the assessee has submitted that the view of the assessing officer that the said expenditure was capital in nature as having been incurred up to the date of setting up of sugar project was not correct. It was wrong to say that the sugar project was new source of income newly coming into existence. As per the principle laid down in various decisions all revenue expenditures including interest incurred during pre-operative period, even prior to trial run period in connection with the expansion of the existing unit and of setting up of new unit which formed part of the same business carried out by the assessee-company was to be allowed as deduction as revenue expenditure. It was stated that the Hon'ble Supreme Court in the case of *Setabganj Sugar Mills Ltd. v. CIT* has held that in determining whether different ventures may be said to constitute the same business, it has to be seen, whether there was any

interconnection, any interlacing and any interdependence, any unity embracing the venture and whether the different ventures were so interlaced and so dovetailed into each other as to make them into the same business. The aforesaid test for determining whether different ventures constituted the same business have been reiterated by the Hon'ble Supreme Court in the cases of CIT v. Prithvi Insurance Co. Ltd., L.M. Chhabda & Sons v. CIT, B.R. Ltd. v. V.P. Gupta, CIT learned Counsel has further stated that the Hon'ble Supreme Court in the case of Produce Exchange Corpn. Ltd. (supra) was considering a case where the assessee claimed carried forward and set off of losses suffered in share business against profits from transaction of the commodities, viz., sugar, molasses, etc. The Tribunal found that there was complete unit of control and shares were one of a number of commodities in which the company dealt in the ordinary course of business and that there was no element of diversity or distinction of separateness about that transaction in shares and accordingly, upheld the assessee's claim. On a reference, the Hon'ble High Court has held that the essential matter to be considered was the nature of the two lines of business and not merely the unity of control and that therefore, the Tribunal erred in holding that the whole trading activity formed one business. The Hon'ble Supreme Court in appeal, reversing the decision of the High Court held that the decisive test for terming whether two lines of business constitute the same business was unity of control and not the nature of two lines of business. He has submitted that the Bombay High Court in the case of Calico Dyeing & Printing Works v. CIT held that interest on capital borrowed for purchases and erection of additional plant and machinery in connection with expansion of the business was allowable deduction under Section 10(2)(iii) of the Income Tax Act, 1922 (corresponding to Section 36(1)(iii) of 1961 Act) and it was not relevant whether the capital was borrowed in order to acquire a revenue or a capital asset.

He has further mentioned that the Gujarat High Court in the case of CIT v. Alembic Glass Industries Ltd. on the basis of the ratio of decisions of the Bombay High Court in Calico Dyeing & Printing Work's case (supra) and the decision of Supreme Court in the cases of India Cements Ltd. v. CIT and Challapali Sugars Ltd. v. CIT evolved the following tests to determine (a) Where a borrowing is made for the purposes of a business, the interest paid on such a borrowing becomes

eligible to deduction contemplated by Section 10(2)(iii) of the 1922 Act or Section 36(1)(iii) of the 1961 Act (b) This could be so even if the capital is invested in order to acquire a revenue asset or a capital asset because the act of borrowing capital is distinct from the act of investment or that capital to acquire an asset.

7. The learned Counsel for the assessee has also submitted that the assessee company is having a common management which is looking after and responsible for affairs of both the units, the assessee-company has its business organizations in the form of common management, top executives common share capital and shareholders, head office and common business accounts. The learned Counsel for the assessee has also made reference to various decisions of High Courts including the decision of Delhi High Court in the case of CIT v. Triveni Engg. Works Ltd. wherein the Hon'ble High Court has dismissed the reference application filed by the department against the order of the Tribunal, holding that the interest paid on borrowed capital for modernization and expansion of the assessee's units could not be treated as a capital expenditure. The Commissioner (Appeals), after having considered the submissions of the assessee raised a question as to whether the sugar project which was a new source of income was the same business of manufacturing ferro-chrome or trading in it. He has observed that recently the Delhi High Court which is the jurisdictional High Court again in the case of CIT v. Modi Industries Ltd. (No.3) considered the issue whether the expenditure incurred by the assessee in the year in which the unit had not started working was allowable as business expenditure. In that case the assessee-company which manufactured various commodities like sugar, vanaspati, soaps, paints and varnish, torch and lantern, started manufacturing a new commodity viz., special alloy wires and billets.

Debentures were issued for raising funds for this new steel unit and the assessee incurred expenditure for the issue of debentures. On a reference their Lordships of the Delhi High Court held affirming the decision of the Tribunal that all the assessees did was to start manufacturing a new commodity. In a larger sense the business of the assessee remained the same viz., the business of manufacturing diverse items and a new item was added to this business.

The Tribunal had found that there was complete unity of control and that there was a common fund which were most material for testing whether the business was the same. The Tribunal was justified in holding that the business of manufacturing special alloy wires and billets was an extension of the business and not a new business and expenditure incurred for raising loans by the issue of debentures was allowable as deduction. The learned Commissioner (Appeals) has further examined the issue as to whether the assessee's case of interlacing was in general terms or in specific terms. In this connection he has examined the submission of the assessee with regard to common place of business, employment of same set to run the business, the possibility of one unit being closed without affecting the other and that the assessee-company has a balance sheet common for both the units reflecting the financial health of the total business unit. Similarly, there is a consolidated Profit and Loss account which reflects the operational efficiency of the business as a whole. The learned Commissioner (Appeals) has finally concluded as under: In particular, it is to be noticed that as per decision of the Bombay High Court in *Calico Dyeing & Printing Works v. CIT* and interest, miscellaneous expenses and travelling expenses incurred for the purpose of the assessee's business were held allowable as revenue expenses.

Also, as per Calcutta High Court decision in the case of *Keshoram Industries & Cotton Mills v. CIT* 196 ITR 846 (Cal), it was held that the expenses incurred in connection with expansion or extension of the business already in existence were deductible revenue expenses, i.e., the expenses such like as miscellaneous expenses and low charges included in the proposed factory project.

(f) In the light of these submissions and Delhi High Court decision in 200 ITR 341 it is to be held that the sugar project was in the same business fold that of the business of manufacture as that of ferro- chrome or the trading it. Similarly, it is to be held as per the submissions and case laws that it was a case of interlacing not in general terms but in specific terms.

In the light of it, the assessing officer is directed to allow the appellant claim for the revenue expenses as per merit and facts.

8. Before us, the learned Departmental Representative has submitted that the assessee was having a Ferro- Alloys manufacturing plant in Raipur since 1991. It is also engaged in the trading of ferro-alloys.

During the year under consideration and during the preceding year the assessee set up a sugar manufacturing unit in Muzaffarnagar (UP). This new unit commenced trial production on 20-3-1996. As per the assessee the project cost of new sugar unit is Rs. 56.74 crores financed by way of term loans and right/public issue. The question arises for consideration is whether the expenditure amounting to Rs. 5.6 crores capitalized in the books of account as pre-operative expenditure, is allowable as revenue expenditure for tax purposes. He has further submitted that admittedly, the sugar unit is the new source of income "may be within the same business" which has come into existence during the assessment year under consideration. As per Section 3 (Proviso) the previous year of a new source of income coming into existence during the previous year the accounts of that source are to be maintained from the date of coming into existence of the new source to the end of the previous year, hi this case, admittedly, the sugar unit commenced trial production on 20-3-1996. Therefore, the Profit & Loss Account of new source has to be prepared only for the period starting from 20-3-1996 till 31-3-1996. All the expenses incurred during this period, admittedly, are to be allowed as per law. The necessary concomitant is that the expenditures up to 19-3-1996, whether capital or revenue in nature are classifiable as preoperative expenditures qua the source of income. Once it is not disputed that the expenditure under consideration is pre-operative expenditure, the necessary consequences follow that it has to be capitalised in the books as per settled norms.

He has further submitted that the assessing officer has held that there is a difference between business and various other sources of income comprised in that business. He has further submitted that the case laws relied upon before the Commissioner (Appeals) are distinguishable as they were given in different context. However, he has further relied upon the decision of ITAT 'D' Bench in the case of Morepen Hotels Ltd. (IT Appeal No. 3583 (Delhi) of 2003 dated 4-8-2006). Thus, he has supported the order of the assessing officer.

9. During the course of hearing, the assessee moved an application for admission of additional evidence under Rule 29 of the Income Tax Act (Appellate Tribunal) rules, 1963. The learned Counsel for the assessee has submitted that the assessee was engaged in the business of ferro-alloys. During the relevant previous year, the applicant incurred certain revenue expenses in connection with the expansion of manufacturing and implemented the sugar project at Unn, District Muzaffarnagar (UP). These expenses were claimed as revenue expenses in the return of income on the ground that the same were incurred in connection with the expansion of the same business already carried out by the assessee. The assessee has always maintained and established the stand before the lower authorities that existing activities and the new activities of the applicant were interdependent, interconnected, operated by common funds and controlled by common management and, therefore, the two lines of activity constituted the same business. The stand of the assessee was not accepted by the assessing officer, but was accepted by the Commissioner (Appeals). The assessee now intends to produce additional evidence in addition to the evidence already on record which would further establish/corroborate that the aforesaid tests are satisfied in the case of the assessee. Thus, it has been submitted that in the interest of justice the additional evidence filed along with the application may be admitted and taken into consideration while adjudicating the appeal of the revenue. However, the learned Departmental Representative has opposed the application, for admission of additional evidence. He has submitted that the additional evidence filed by the assessee was very much available with the assessee at the initial stages, but they were neither filed before the assessing officer nor before the Commissioner (Appeals). While referring to Rule 29 of the Income-tax (Appellate Tribunal) Rules, 1963, he has submitted that the Tribunal can accept the additional evidence only in the following situations: (i) If the Tribunal required any document/witnesses or any affidavit to be filed; or (ii) If the Income-tax authorities have decided the case without giving proper opportunity of being heard; or (iii) If the Tribunal thinks that the additional evidence is necessary to enable it to pass the order.

10. If any of the above situations occur, then the Tribunal can accept the additional evidence. However, in the instant case, neither this is a case where the ITAT required any evidence nor it is the case where opportunity of being heard was

denied. The first two situations automatically become out. After looking to the facts of the case, it is clear that the sugar business and the business of the ferro-alloys is not interrelated or interdependent. The contention is only to establish that both the businesses have common management, control and funds.

Thus, he has urged that the admission of additional evidence at the appellate stage is not justifiable. The learned Departmental Representative has further submitted that additional evidence now proposed to be filed are only in order to overcome the decision of the Tribunal in the case of Morepen Hotels Ltd. (supra). Thus, he has urged that the application filed by the assessee under Rule 29 of the Income-tax (Appellate Tribunal) Rules, 1963 be rejected.

11. The case of the assessee is that the existing activities of the assessee were indeed interdependent, interconnected, operated by common funds and controlled by common management and, therefore, the two lines of business constitute the same business. The assessee has made similar submissions before the lower authorities that its business organization is common to both the units in the form of common management, common top executives, common share capital and common shareholders, common head office and common business funds. Thus, the additional evidence now placed by the assessee are crucial and are necessary to be on record to enable the Tribunal to pass the appropriate order in the matter. Therefore, in the interest of justice, the additional evidence filed by the assessee are required to be admitted. Hence, we allow the applications of the assessee filed under Rule 29 of the Income-tax (Appellate Tribunal) Rules, 1963.

12. As regards the merits of the case, the learned Counsel has submitted that the assessee-company was engaged in the business of ferro-alloy. During the previous year relevant to the assessment year under consideration the assessee incurred certain revenue expenditure in connection with the expansion of manufacturing activity in setting up a sugar manufacturing project in Unn, Distt. Muzaffarnagar, UP. The assessee had incurred revenue expenditure of Rs. 5,66,79,270 for sugar division which were capitalised in the books of account. However, in the return of income these expenditure were claimed as revenue expenditure as these expenses were of revenue nature and does not represent

any tangible asset. The learned Counsel for the assessee has submitted that all the direct expenses in setting up the sugar project has been capitalised and incidental expenditure such as salary, wage, etc. have been claimed as a revenue expenditure. In this connection he has referred to the balance sheet as on 31-3-1996 placed on record at page 14 of paper book. Item 5(a) relates to capital expenditure and item 5(b) relates to revenue expenditure. The same read as under: (a) Fixed assets are stated at their original cost of acquisition inclusive of inward freight, duties and expenditure incurred in the acquisition, construction and installation.

(b) Incidental expenditure on erection and commissioning of sugar project at Muzaffarnagar up to the date of commercial production shall be allocated to fixed assets on pro rata basis.

13. The learned Counsel has further referred to the details of incidental expenditure on erection and commissioning of sugar project to be allocated to fixed assets which are given in the said balance sheet at page 16 of paper book. These incidental expenditure have been claimed by the assessee as revenue expenditure.

14. The learned Counsel has submitted that the sugar project was a new line of business of the assessee having unity of control, interlacing of fund, interdependence. Thus, it was extension of existing business of the assessee. Therefore, revenue expenses incurred in connection with sugar project were allowable expenses. The learned Counsel has relied upon the following decisions wherein tests have been laid down for determining whether different lines of activities carried on by the assessee would constitute one and the same business: *B.R. Ltd. v. V.P. Gupta*, CIT 15. He has further submitted no single test can be devised as universal and conclusive. The question has to be decided on consideration of all the relevant facts and circumstances of the case. Some facts may tend one way and some others the other way. Therefore, an overall view has to be taken and a conclusion to be arrived at. The circumstances that the closure of one unit would not affect the activities of other unit is not at all a decisive consideration for determining interconnection, interlacing and interdependence

between the two activities of the assessee's business. The learned Counsel has further submitted in the case of Produce Exchange Corporation the decisive test laid down was unity of control and not the nature of the two lines of business. This view has been affirmed in *B.R. Ltd. v. V.P. Gupta, CIT*. The learned Counsel further referred to page 2 /paper book showing that Board of Director for both the units are common, registered and corporate office is common. Therefore, there is common control and management of both the units. He has stated that obviously place of both the units are a different place but this is not material. Finance, Marketing, Secretariat and legal are common, only staff peculiar to the requirement of each unit would be different. He has further submitted that project cost of sugar activity is Rs. 56.74 crores, part of which is backed by right-cum-public issue and balance have come from loans and internal accrual of Ferro-Chrome division. He has stated that right issue are given to the existing shareholders of Ferro-Chrome. This shows that there is intermingling and interlacing of funds. Sale proceeds of both the units are kept in the same bank account. There is common Employees' Provident and Gratuity Fund for both the units.

16. The learned Counsel has submitted Rs. 49 crores has been capitalised and only Rs. 5 crores (approx.) have been claimed as revenue expenditure. Out of this Rs. 5 crores above Rs. 3 crores are on account of interest on borrowed funds. The nature of expenses are salary, administrative expenses, power and fuel expenses incurred on trial run. The learned Counsel has further explained that business set up means that the assessee has set up the first business and when assessee starts new lines of business, the assessee is not setting up new business. Therefore, the previous year for both the units would be financial year 1995-96. Hence, the argument of learned Departmental Representative that there would be different previous year for sugar division is not correct. Reliance is placed on the case of *Modi Industries Ltd. (No. 3) (supra)*.

17. The learned Counsel for the assessee has submitted that the Madras High Court in the case of *CIT v. Veecumses* held that where closure of one activity of business has not affected the other business activities, there was no interconnection, interlacing or interdependence between the two activities of

business of the assessee.

However, the Apex Court in the case of *Veecumsees v. CIT* has held this is not the decisive test. The learned Counsel has pointed out in this case that the Apex Court has reversed the decision of Madras High Court in the case of *CIT v. Veecumsees*. He has further pointed out that the Madras High Court in *Veecumsees* case (supra) has followed the decision in the case of *CIT v. Blue Mountain Estates & Industries Ltd.*

Thus, ratio laid down *Blue Mountain Estates & Industries Ltd.* s case (supra) is deemed to have been reversed. He has further submitted that the decision in the case of *Blue Mountain Estates & Industries Ltd.* (supra) has also been distinguished in the case of *Kalyani Steels Ltd. v. Dy. CIT (1997) 62 ITD 233 (Pune)*. Thus, he has argued that decision of ITAT in the case of *Morepan Hotels Ltd.* (supra) cannot be said to be binding precedent.

18. Thus, the learned Counsel has argued that the existing activities and the new activities of the assessee are interdependent, interconnected, operated by common fund and controlled by common management, therefore, the two lines of activities of the assessee constituted the same business. Thus, he has supported the order of Commissioner (Appeals).

19. We have heard the parties and perused the record of the case. The assessee-company had set up Ferro Alloys manufacturing plant in Raipur in 1991. It was also engaged in the trading business of ferro-alloys.

In the years 1994-95 and 1995-96 it has set up a sugar manufacturing project in Unn District, Muzaffarnagar. The project cost was Rs. 56.74 crores. It is the claim of the assessee that revenue expenditure capitalised to the fixed assets was about Rs. 5,66,79,270, the details of which have been mentioned in the preceding paragraphs. These expenses were revenue in nature and did not represent any tangible asset. Therefore, it has been claimed as revenue expenditure in the return of income filed by the assessee. According to the assessee the sugar project was a new line of business in the same business fold, having unity of control, interlacing of funds, interdependence and thus was an extension of existing

business and, therefore, the related expenditure are allowable as revenue business expenditure. However, the assessing officer has held that the sugar project was a new source of income and was not the same business. Hence, he has disallowed the claim of the assessee. Thus, the question for consideration is whether sugar division of the assessee constitute the same business of the assessee or different and distinct business of the assessee. It may be mentioned that aforesaid question is essentially a question of fact.

The question has to be decided on a consideration of all the relevant facts and circumstances of the case. It may be mentioned that in the case of Setabganj Sugar Milk Ltd. v. CIT the Hon'ble Supreme Court has held that in determining whether different ventures may be said to constitute the same business, it has to be seen that whether there was any interconnection, interlacing, interdependence, unity of embracing, the unity venture and whether different ventures were so interlaced and so dovetailed into each other as to make them into the same business. The aforesaid tests for determining whether different ventures constitute the same business have been reiterated in the case of CIT v. Prithvi Insurance Co. Ltd. . In the said case the Hon'ble Supreme Court was considering a case where the assessee claimed carry forward and set off of losses suffered in share business against profits from transaction of other commodities viz., sugar, molasses, etc. The Tribunal found that there was complete unity of control and shares were one of a number of commodities in which the company dealt in the ordinary course of business and that there was no element of diversity or distinction or separateness about the transaction in shares and, accordingly, upheld the assessee's claim. On a reference, the High Court held that the essential matter to be considered was the nature of the two lines of business and not merely their unity of control and that, therefore, the Tribunal erred in holding that the whole trading activity formed one business. However, Hon'ble Supreme Court has held that the decisive test for determining whether two lines of business constitute the same business is unity of control of two activities and not the nature of two lines of business.

To similar effect is another decision of the Supreme Court in the case of B.R. Ltd. v. V.P. Gupta, CIT wherein the Hon'ble Supreme Court while following the decision

in Produce Exchange Corpn.

Ltd.'s case (supra) came to the conclusion that (at page 654): Thus, unity of control and other circumstances adverted to above show that there was dovetailing or interlacing between the business of import and business of export carried on by the assessee and that they constitute the same business.

20. In coming to this decision the Hon'ble Supreme Court observed that the decisive test was the unity of control and not the nature of the two lines of business.

21. The Delhi High Court in the case of Modi Industries Ltd. (No. 3) (supra) has considered the issue whether the expenditure incurred by the assessee by way of interest was allowable as business expenditure in the year in which the unit had not started. In that case the assessee-company, which manufactured various commodities like sugar, vanaspati, soaps, paints and varnish, torch and lantern started manufacturing a new commodity, viz., special alloy wire and billets.

Debentures were issued for raising funds for this new steel unit and the assessee incurred expenditure for the issue of debentures. The question was whether the expenditure incurred by the assessee in the year in which the unit had not started working was allowable as business expenditure. The Appellate Tribunal found that the management of the new unit and the earlier business were the same and there was unity of control and a common fund, and held that the manufacture of special alloy and billets was an extension of the assessee's business and not a new business and allowed deduction of the expenditure.

22. On a reference, their Lordships of the Delhi High Court held, affirming the decision of the Tribunal that all that the assessee did was to start manufacturing a new commodity. Their Lordship observed that the assessee was already manufacturing diverse items and a new item was added to this business, in a larger sense the business of the assessee remained the same, viz., the business of manufacture. Taking note of the finding recorded by the Tribunal that there was complete unity of control and that there was a common fund, the court held that the Tribunal was justified in holding that the business of manufacturing special

alloy wires and billets was an extension of the business and not a new business and expenditure incurred for raising loans by the issue of debentures was allowable as deduction.

23. In the recent decision in the case of CIT v. Relaxo Footwears Ltd. (IT Appeal No. 387 of 2007 dated 25-4-2000) (reported in Lex Reported) the Delhi High Court while following the decision of Modi Industries Ltd. 's (No. 3) case (supra) has held that expenses incurred by the assessee for setting up of a new unit which was a part of the existing business are, therefore, to be allowed as a revenue expenditure.

24. The Supreme Court in the case of Veecumsees (supra) was considering a case where the assessee, running a jewellery business, commenced business also in the exhibition of cinematographic films. In 1961, it obtained loans for building a cinema theatre which was built in 1962 and was run by the assessee until 31 -7-1965 when it was transferred to another firm. For the years during which the assessee exhibited the films in the said theatre, the interest paid on aforesaid loans was allowed as a deduction under Section 36(1)(iii). However, for the assessment years 1967-68 to 1969-70 the assessing officer declined the deduction of interest paid by the assessee, on the ground that the business of exhibition of films in theatre was no longer in existence.

The Appellate Assistant Commissioner, however, allowed the deduction.

The Tribunal, finding that the business carried on by the assessee as jewellers and the business of running of the said theatre were composite, upheld the decision of the Appellate Assistant Commissioner.

On reference, the High Court concluded that since the closing of the cinema business had not affected in the least the assessee's old business in jewellery there was no interconnection, interlacing or interdependence between the jewellery business and the cinema business and, therefore, the borrowings made by the assessee for the construction of the said theatre could not be allowed as a deduction from business income after the business of running the cinema had been closed.

25. On appeal to the Supreme Court, their Lordships observed that the fact that the revenue had during the years when the assessee carried on the business of cinematographic films permitted as a deduction under Section 36(1)(iii) the interest on loans obtained by the assessee for the purpose of constructing the said theatre, showed that at the time when the loans were obtained the said theatre was a part of the business of the assessee.

26. Their Lordships further observed that it was interest on these loans, borrowed for the purpose of the business of the assessee, which was being paid in the years in question and the Tribunal was right in concluding that such interest had to be treated as a deduction under Section 36(1)(iii) since the loans had been obtained for the purposes of the assessee's business. Their Lordships further observed that the fact that the particular part of the business for which the loans had been obtained had been transferred or closed down did not alter the fact that the loans had, when obtained, been for the purpose of the assessee's business.

27. Their Lordships further held that in view of the finding of the Tribunal that the business carried on by the assessee as jeweller and in running the cinema theatre was composite business, the assessee was entitled to the deduction of the interest paid on the loans under Section 36(1)(iii) of the Act.

28. It may be mentioned that while passing aforesaid judgment the Hon'ble Supreme Court has reversed the decision of Madras High Court in Veecumsees case (supra). It may further be mentioned that Madras High Court in the case of Veecumsee (supra) has followed its decision in the case of CIT v. Blue Mountain Estates & Industries Ltd. wherein the court held as under: Held, that the assessee in the instant case was originally carrying on business in tea and later began dealings in coffee and, ultimately began to carry on an industrial activity. In such circumstances, it could not be said that it was not possible to carry on one activity without reference to the other activity. Even though the test of unity of control was established as the finances and control were from the head office of the company, the new business undertaken by the assessee could not be taken to have any connection with the earlier business in tea and coffee. Further, fertilizers could not be said to be one of the commodities in which the company dealt with in the

ordinary course of business in coffee or tea. It was not the case of the assessee that the manufacture of fertilizers was undertaken to meet its own needs. There was a clear diversity or distinction or separateness in regard to the fertilizers qua the other trading activities of the company such as the sale of coffee or tea. Accordingly, the deduction under the heads of 'managing agency commission, sitting fees and head office expenses should be restricted with reference to the income earned, in the business carried on in tea and fertilizers and the deduction under those heads could not be given in relation to the expenses incurred in connection with the business in coffee.

29. Thus, the ratio laid down in Blue Mountain Estates & Industries Ltd. 's case (supra) would be deemed to have been implied overruled by the Hon'ble Supreme Court in Veecumsees' case (supra). Therefore, decision in the case of Morepen Hotels Ltd. (supra) given on the basis of Blue Mountain Estates & Industries Ltd.s case (supra) has lost the binding precedent force.

30. We have perused the record of the case including the additional evidence placed at pages 19 to 141 of paper book II viz., relating to copy of bank statement of sugar division and copy of the relevant extract of minutes of the Board meeting of the assessee from time to time. The assessee-company has maintained a balance sheet common for both the units reflecting the financial health of the total business and a consolidated profit and loss account for the whole business. The existing ferro-chrome and alloys division and the sugar division are controlled by the same Board of Directors. The Board of Directors are stationed at Delhi Head Office and look after the affairs of Ferro-chrome unit as well as the sugar unit. The Company Secretary, General Manager (Finance & Admn.) and HRD Managers are common to both the units. As both the units are dealing in different products viz., Ferro Chrome and Sugar having manufacturing units at different locations, it has a separate team for production at site. However, the marketing of the two units is supervised and controlled by same set of executives at Head Office. Further, the management of the business is centralized in Delhi office. Thus, it can be said that the assessee-company is having a common management which is looking after and is responsible for affairs of both the units.

31. The finances of the assessee-company are controlled from the Head Office at Delhi through accounts in various banks in Delhi. There is a common pool of funds which is utilized for meeting the revenue and capital expenses of both the units. The assessee-company is having a common share capital with common shareholders. The submission that project cost of sugar activity is backed by right-cum-public issue and balance have come from loans and internal accrual of ferro-chrome division and the rights are given to existing shareholders of ferro-chrome has not been disputed by the revenue. Therefore, the source of fund is common for both the divisions. Thus, we are of the view that there is intermingling and interlacing of funds. The test for considering whether a particular unit is separate business from the business of other unit or not, is to see whether closure of one unit would affect the other unit or not, as contended by the revenue, the closure of any of the two units would surely affect the working and the business of the remaining business, for the simple reason that a larger liability of the whole business would obviously have to be borne by the other unit on closure of one unit. In view of above we are of the view that there is unity of control, common management and interlacing of funds between the two lines of activities of the assessee. The sugar manufacturing plant was a mere extension of the existing business of ferro-alloys and its trading. Therefore, the assessee was engaged in the same business inasmuch as the decisive test is unity of control and not same line of business. In the case of Modi Industries Ltd. (supra) the assessee, who was engaged in manufacturing activities of various commodities like sugar, vanaspati, soap, paints, etc., started manufacturing of a new commodity viz-, special alloy wires and billets.

The management of new unit and earlier business was the same and there was unity of control and a common fund. The jurisdictional High Court of Delhi held that in the larger sense the business of the assessee remained the same viz., the business of manufacturing. It was already manufacturing diverse items and a new item was added to this business.

We are of the view that the ratio laid down in the case of Modi Industries Ltd. (No. 3) (supra) squarely apply to the facts of the instant case. Thus, we hold that sugar division was in the same line of business of the assessee. The next question thus

arise is whether the expenditure incurred by the assessee in respect of sugar unit is allowable as revenue expenditure. It is seen that out of expenditure of Rs. 5,66,79,270 the expenditure incurred on financial charges was of Rs. 3,50,83,472. It may be mentioned that there is distinction in treatment of interest on borrowed fund in a situation where business has not yet set up a new business and where the assessee is in business and borrowed fund to expand the existing business or set up a new unit within the same business. The interest is allowable as deduction under Section 36(1)(iii). As per said section the interest paid in respect of capital borrowed for the purpose of business and profession is allowable as deduction. In the case of India Cements Ltd. v. CIT the Hon'ble Supreme Court has held thus: Held that the amount spent was not in the nature of capital expenditure and was laid out or expended wholly and exclusively for the purpose of the assessee's business and was therefore allowable as a deduction under Section 10(2)(iv) of the Indian Income Tax Act, 1922. The act of borrowing money was incidental to the carrying on of business, the loan obtained was not an asset or an advantage of enduring nature, the expenditure was made for securing the use of money for a certain period, and it was irrelevant to consider the object with which the loan was obtained.

32. Further, in the case of CIT v. Alembic Glass Industries Ltd. the Hon'ble High Court has held thus: (ii) It was contended for the revenue that, since during the relevant account years, the unit at Bangalore had not started production, the payment of interest on the borrowing which was utilized for the purpose of establishing that new unit should go towards the cost of the new unit and, therefore, on the principle accepted by the Supreme Court in Challapalli Sugars Ltd. v. CIT this interest should be treated as a capital expenditure and not as a revenue expenditure. This contention was not correct. The ratio of the decisions of the Bombay High Court in Calico Dyeing & Printing Works v. CIT and of the borrowing is for the purpose of a business, the interest paid on such a borrowing becomes eligible for deduction contemplated by Section 10(2)(iii) of the 1922 Act or Section 36(1)(iii) of the 1961 Act; (2) this would be so, whether the capital is invested in order to acquire a revenue asset or a capital asset, because the act of borrowing capital is distinct from the act of investment of the capital to acquire an asset; (3) however, the business for which an asset of enduring nature is

purchased with the borrowed capital should not be separate or distinct from the business for the purpose of which the capital is borrowed, if deduction under Section 10(2)(iii) is to be allowed and (4) if there is no existing business with reference to which the capital is borrowed and the borrowed capital is invested to purchase a new asset of enduring nature, then the interest paid on such borrowing till the asset so purchased goes into production, increases the cost of installation of the said asset, and hence should be treated as capital expenditure not covered by Section 10(2)(iii) of the 1922 Act or Section 36(1)(iii) of the 1961 Act.

Applying the above principles the interest incurred by the assessee on the borrowing, utilized for the purpose of establishing the Bangalore unit is for the purposes of the assessee's business and as such allowable as revenue expenditure.

33. In view of above legal position, we are of the view that the expenditure of financial charges of Rs. 3,50,83,472 incurred for the purpose of setting up the Sugar Division was for the purpose of the business of the assessee, therefore, the same is allowable as deduction under Section 36(1)(iii). Therefore, assessing officer is directed to allow the expenditure of Rs. 3,50,83,472 to the assessee. However, whether any other expenditure incurred in connection with the new project will be allowable or not, will depend upon the question whether the expenditure is capital or revenue in nature. We find that a similar issue has been considered by the Hon'ble High Court of Delhi in case of Triveni Engg. Works Ltd. v. CIT . Matter in our view requires fresh examination in the light of the said judgment and other judgments that may be available on the subject. We, therefore, set aside the order and restore the same back to the assessing officer for passing a fresh order after necessary examination and after allowing opportunity of being heard to the assessee.

34. The second ground of appeal states that on the facts and in the circumstances of the case learned Commissioner (Appeals) has erred in allowing the claim of depreciation to the extent of Rs. 1,43,06,062.

35. Briefly stated facts are that assessing officer had observed that the assessee has made a claim of depreciation @ 100 per cent on flame less induction furnace

which it claim to have purchased in the assessment year 1995-96, 50 per cent of depreciation has already been claimed in that assessment year and the balance 50 per cent has been claimed in this assessment year. On 1-3-1999, the authorised representatives of the assessee were requested to furnish the papers and documents evidencing the market worth of assets purchased and its evaluation by the company before its purchase from the Ahmedabad based party. The assessee in its reply has instead of furnishing the evidence regarding the genuineness of the transaction and the genuineness of the claim of the purchase had dealt with the financial soundness and health of the supplier. Assessing officer further observed that under the Income Tax Act the onus squarely vests on the person making a claim to prove that the claim made was genuine supported by evidence in this regard. The default in the case of the assessee in not discharging the onus was manifest. Accordingly, he disallowed the claim of depreciation on this block of assets of Rs. 1,43,06,062.

36. On appeal before the learned Commissioner (Appeals) the assessee has submitted that in the earlier assessment year 1995-96, the assessee-company purchased assets at total cost of Rs. 2,86,12,124 being energy saving devices on which 100 per cent depreciation was allowable as per Appendix I of the Income Tax Act/Rules. Since the assets were put to use for less than 182 days and hence the depreciation was claimed at 50 per cent as per proviso to Section 32(1) of the Income Tax Act. The aforesaid energy saving devices were still on lease and therefore such assets were used for the leasing business of the assessee and hence as per rates prescribed under Appendix-I of Income Tax Rules, the depreciation has been claimed at 100 per cent on such opening WDV of the assets. Further, in this year the user of this assets was for more than 182 days and hence depreciation was allowable at 100 per cent as stated above. The assessee has further submitted that as regards the 100 per cent depreciation assets on which 50 per cent depreciation has been claimed in assessment year 1996-97 detail of purchase showing the name and address of the parties from whom the assets were purchased were also filed before the learned Commissioner (Appeals). The assessee also filed copy of lease deed as well as copy of bill of purchases. The assessee further submitted that the 100 per cent depreciation assets which were leased out in assessment year 1995-96 were

purchased from M/s. Inductotherm (India) Ltd. The aforesaid company was a limited company incorporated in India under Foreign Collaboration with the parent company in USA. The company is assessed to tax by JCIT, Spl. Range-8, Ahmedabad and its P.A. No. is Appellate Assistant Commissioner 3672. He has further mentioned that the payment to supplies of machinery M/s. Inductotherm (India) Ltd. was made only after a careful evaluation of the product quality, market image and financial health of the supplier. During the assessment year 1995-96, the assessee-company has leased out assets to various companies as per details of lease agreement filed during the appellate proceedings. He has further mentioned that the transaction of lease to M/s. Monnet Ispat Ltd. was not a singular isolated transaction. The complete details of the assets on which 100 per cent depreciation was claimed by the assessee-company was filed during the course of assessment proceedings along with copy of purchase bills and copy of lease deed in respect of lease of such fixed assets by the assessee-company. Therefore, as complete documentary evidence in respect of leased out assets on which 100 per cent depreciation was claimed was filed during the course of assessment proceedings and therefore requested for allowing depreciation of Rs. 1,43,06,062 on such assets.

37. He has further submitted that the aforesaid fixed assets were purchased by the assessee-company in assessment year 1994-95 relevant to assessment year 1995-96 for a sum of Rs. 2,86,12,124. The depreciation on such fixed assets was claimed by the assessee-company @ 50 per cent amounting to Rs. 1,43,06,062 as the aforesaid assets were put to use for less than 180 days. However, the assessing officer vide order under section 147(3) disallowed the claim of the assessee-company on the grounds that the aforesaid assets were not put to use in financial year 1994-95 relevant to assessment year 1995-96 but were put to use in financial year 1995-96 relevant to assessment year 1996-97. The assessee-company filed an appeal against the assessment order for assessment year 1995-96 and learned Commissioner (Appeals) deleted the entire disallowance of depreciation of such assets leased out amounting to Rs. 1,43,06,062 in Appeal No.286/2001-02 vide order dated 20-2-2002.

38. The learned Commissioner (Appeals) after having considered the submission of the assessee has held that it cannot be said that the assessee-company did not discharge its onus in not furnishing the documents evidencing the market worth of assets purchased and its evaluation by the assessee-company before its purchase from the Ahmedabad based party. As such the very basis on which the disallowance has been made does not have any force. As a result he has directed the assessing officer to allow the claim of depreciation as due as per merit and facts.

39. We have heard the parties and perused the record of the case. The assets in question were purchased by the assessee-company in assessment year 1994-95 relevant to the assessment year 1995-96 for a sum of Rs. 2,86,12,124. The said assets were purchased from M/s. Inductotherm (India) Ltd., a company which is a limited company incorporated in India, under Foreign Collaboration with the parent company in USA. The said company is assessed to tax by JCIT, Spl. Range-8, Ahmedabad and its P.A. No. is Appellate Assistant Commissioner I 3672. The assessee filed the complete details of assets on which 100 per cent depreciation was claimed along with the copy of purchase details and copy of lease deeds in respect of lease of such fixed assets by the assessee-company.

In the circumstances, the genuineness of transaction of purchase of impugned assets cannot be doubted.

40. It is further seen that the depreciation on lease fixed assets was claimed by the assessee-company at the rate of 50 per cent for assessment year 1995-96 amounting to Rs. 1,43,06,062 as aforesaid were put to use for less than 180 days. However, the assessing officer vide its order under Section 143 /143(3) disallowed the claim of the assessee on the ground that the said assets were not put to use in financial year 1994-95 relevant to assessment year 1995-96 but were put to use for financial year 1995-96 relevant to the assessment year 1996-97. However, on appeal filed against the assessment order passed for assessment year 1995-96, the learned Commissioner (Appeals) deleted the entire disallowance of depreciation on such assets leased out vide its order dated 20-2-2002. The said order of learned Commissioner (Appeals) have been accepted by the revenue

department as no appeal seems to have been filed against same. Thus the genuineness of transaction of purchase of impugned assets has been accepted by the revenue. We, therefore, find no reason to interfere in the order passed by the learned Commissioner (Appeals), hence the same is upheld 41. In the result, the appeal filed by the revenue is partly allowed for statistical purpose.

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