IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **ITA 319 OF 2010**
ITA 1185 OF 2010
ITA 1448 OF 2010
ITA 1822 OF 2010
ITA 2091 OF 2010

% JUDGMENT RESERVED ON:22.03.2011
JUDGMENT DELIVERED ON:30.03.2011

ITA 319/2010

THE COMMISSIONER OF INCOME TAX-V ....APPELLANT
Through: Ms.Prem Lata Bansal, Sr. Advocate, Mr. Anupam Tripathi,Sr. Standing Counse, Ms.Rashmi Chopra, Advocate.

VERSUS

M/S PEPSICO INDIA HOLDINGS (P) LTD. ....RESPONDENT
Through: Mr. C.S. Aggarwal, Sr. Advocate with Mr. Vishal Kalra and Mr. Prakash Kumar, Advocates.

ITA 1185/2010

THE COMMISSIONER OF INCOME TAX-V ....APPELLANT
Through: Ms.Prem Lata Bansal, Sr. Advocate, Mr. Anupam Tripathi,Sr. Standing Counse, Ms. Rashmi Chopra, Advocate..

VERSUS

M/S PEPSICO INDIA HOLDINGS (P) LTD. ....RESPONDENT
Through: Mr. C.S. Aggarwal, Sr. Advocate with Mr. Vishal Kalra and Mr. Prakash Kumar, Advocates.

ITA 1448/2010

THE COMMISSIONER OF INCOME TAX-V ....APPELLANT

Through: Ms.Prem Lata Bansal, Sr. Advocate, Mr. Anupam Tripathi, Sr. Standing Counse, Ms.Rashmi Chopra, Advocate..

VERSUS

M/S PEPSICO INDIA HOLDINGS (P) LTD. ....RESPONDENT

Through: Mr. C.S. Aggarwal, Sr. Advocate with Mr. Vishal Kalra and Mr. Prakash Kumar, Advocates.

ITA 1822/2010

THE COMMISSIONER OF INCOME TAX-V ....APPELLANT

Through: Ms.Prem Lata Bansal, Sr. Advocate, Mr. Anupam Tripathi,Sr. Standing Counse, Ms.Rashmi Chopra, Advocate.

VERSUS

M/S PEPSICO INDIA HOLDINGS (P) LTD. ....RESPONDENT

Through: Mr. C.S. Aggarwal, Sr. Advocate with Mr. Vishal Kalra and Mr. Prakash Kumar, Advocates.

ITA 2091/2010

THE COMMISSIONER OF INCOME TAX-V ....APPELLANT

Through: Ms.Prem Lata Bansal, Sr. Advocate, Mr. Anupam Tripathi,Sr. Standing Counse, Ms.Rashmi Chopra, Advocate.

VERSUS

M/S PEPSICO INDIA HOLDINGS (P) LTD. ....RESPONDENT

Through: Mr. C.S. Aggarwal, Sr. Advocate with Mr. Vishal Kalra and Mr. Prakash Kumar, Advocates.

CORAM:

HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M.L. MEHTA

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. These appeals pertain to the same assessee and involve different assessment years. There are certain questions of law raised. However, admittedly other questions stand decided in the case of the assessee itself in ITA 574/2007 decided on 9th March, 2011 by this Court. The only question which survives in these appeals and is common to all these appeals pertains to the nature of the expenditure on account of advertising and marketing incurred by the assessee in different assessment years. The AO was of the view that the expenditure which was incurred on neon signs and glow signs was capital in nature as these signs are semi-permanent fixtures fixed at numerous retail outlets of the assessee and providing enduring benefit. Therefore, out of the total expenditure incurred on advertising and publicity,

expenditure which was specifically attributed to the glow signs and neon signs (it was major component of advertising and marketing expenditure) was disallowed as the revenue expenditure. Instead treating this to be the capital in nature depreciation thereof was allowed. The CIT (A), however, reversed the aforesaid decision of the Assessing Officer holding it to be the business expenditure and assessee being entitled to deduction as per the provisions of Section 37 (1) of the Act. He was of the view that such expenditure was recurring expenditure and essential for running of the assessee's business. Further, this type of expenditure was incurred in future years as well and contention of the assessee was accepted by the AO in earlier assessment years as well. The CIT (A) took support of the judgments in the cases of the ***Empire Jute Vs. CIT***, 124 ITR 1, ***L.H. Sugar Factory and Oil Mills P. Ltd.***,125 ITR 293 and ***Hindustan Times Ltd.*** 122 ITR 977 and few other judgments referred to by the assessee. The Tribunal vide its order dated 7th November, 2008 accepted the contention of the Revenue holding that the expenditure incurred on glow signs and neon signs had a long life thus expenditure incurred on of maintainable of glow signs and neon signs may be termed as an expenditure of revenue nature, but putting up of glow signs and neon signs gives an advantage to enduring nature in the field of advertisement and promotion of the business of the assessee

and, therefore, it could not be termed as expenditure of revenue nature. In this behalf, the Tribunal observed as under:

> "The material used for neon signs and glow signs by the assessee is a capital asset to be used for the purpose of advertisement of the business that the assessee was carrying. Even if such expenditure is said to be in assessed wholly and exclusively for the purpose of business of the assessee, it was capital expenditure and not revenue expenditure. This view also finds support from the judgment of the Bombay High Court in the case of CIT Vs. Patel Intl. Films Ltd. 102 ITR 219. In that case the assessee company purchased a film for the purpose of advertisement in order to attract customers for its business of doing colour processing work at the film centre laboratory. The Court, while regarding it as capital expenditure observed as under:
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> > "In our view, it cannot be disputed that even for advertisement purpose assets can be acquired by incurring expenditure in that behalf and, in the instant case, the film, "Pomposh", will have to be regarded as having been acquired as a capital asset by the assessee-company by incurring expenditure of Rs. 60,000 in that behalf. The asset, viz., the film, "Pomposh", could not be said to have been acquired as an asset in which the assessee-company was dealing. Nor was it going to deal with this item as a stock-in-trade, but it had acquired this asset for advertisement purposes with the help of which the assessee-company was going to carry on its business and in that sense the expenditure incurred for acquiring this asset will have to be regarded as a capital expenditure and not a revenue expenditure. It is true, as has been pointed out by Mr. Kolah, that whatever expenditure is normally incurred for advertisement purpose by an assessee is regarded as revenue expenditure and is allowed as business expenditure. But the question in the instant case in whether the expenditure incurred for acquiring the film, "Pomposh", could be regarded as an advertisement expenditure, and, in our view, it cannot be so regarded. By

> purchasing the film the assessee-company did not indulge in any advertisement at all, but advertisement was to be indulged in after the asset was acquired by the assessee-company was a capital asset to be used for the purpose of advertisement of the business that the assessee-company was going to carry on in future and, therefore, the expenditure will have to be regarded as a capital expenditure and not revenue expenditure."
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> In the case of the assessee also the glow signs and neon signs are used by the assessee for promotion of its business. Once they are fixed they are of durable nature. Expenses on their maintenance may be terms as revenue expenditure but expenditure on installation of neon signs and glow signs fail in the domain of capital expenditure."

2. However, on application filed by the assessee under Section 254 (2) of the Act seeking rectification of the aforesaid order on the ground that a mistake had allegedly crept in the order, the Tribunal recalled the said order allowing the Misc. Application partly vide orders dated 7th November 2008. Vide impugned orders dated 31st March, 2009, the view of the CIT (A) was affirmed and the appeal of the revenue has been dismissed. The two reasons given by the Tribunal for recalling the order and thereafter dismissing the appeal of the Revenue are as under:-

> (1) Similar expenditure incurred by the assessee on glow signs and neon signs in the assessment years 1996-07 and 1997-08 had been allowed by the AO himself in the

assessment year under Section 143 (3) of the Act. Though for the assessment year 1998-99, the Assessing Officer had disallowed the expenditure, this disallowance was deleted by the CIT (A) and against the order of the CIT (A) no appeal was preferred by the Department. Going by this past history, the Tribunal allowed the expenditure as revenue holding that undoubtedly, this was a recurring expenditure which the assessee had necessary to incur to carry out its business activity.

(2) As per the ratio of decision of Amritsar Bench of the Tribunal in the case of ***JCIT*** Vs. ***Diva Singh and Shyam Singh***, 95 ITD 235, the Himachal Pradesh High Court in the case of ***Mohan Meakin Breweries Ltd.*** Vs. ***CIT,*** 118 ITR 101, the advertisement expenditure was capital in nature and that deductibility or otherwise and the expenditure depends upon the provisions of the Act.

3. Spearheading a scathing attack on the aforesaid approach of the Tribunal, the learned counsel for the Revenue argued that in the first instance, the Tribunal had itself treated the

expenditure as capital in nature holding that taking into consideration long span life of neon signs and glow signs and treating it to be a benefit of enduring nature, he submitted that this aspect was altogether ignored by the Tribunal in the impugned decision. Learned counsel also pointed out that there was a difference between the glow signs and neon signs and in so far as neon signs are concerned, with the advancement in technology that these neon sign having long life could not be disputed. The learned counsel produced the following literature in support:-

> "Neon tube signs are produced by the draft of bending glass tubing into shapes. A worker skilled in this craft is known as a glass bender, neon bender or tube bender. The neon tube is made out of 3-4' straight sticks of hollow glass sold by sign suppliers to neon shops worldwide, where they are manually assembled into individual custom designed and fabricated lamps. There are many dozens of colours available, determined by the type of glass tubing and the composition of the gas filling.
> It is the wide range of colours and the ability to make a tube that can last for years if not decades without replacement, that makes this an art. Since these tubes require so much custom labour, they would have very little economic viability if they did not have such a long lifetime when well processed. The intensity of neon light produced increases slowly as the tube diameter grows smaller, that is, the intensity varies inversely with the square root of the interior diameter of the tubing and the resistance of the tube increases as the tubing diameter decreases accordingly because tube ionization is greatest at the center of the tube, and the ions migrate to and are recaptured and

> neutralized at the tube walls. The greatest cause of neon tube failure is the gradual absorption of neon gas by high voltage ion implantation into the interior glass walls of the tubes which depletes the gas, and eventually causes the tube resistance to rise to a level that it can no longer light at the rated voltage, but this may take 7-10 years.
> Pure materials and careful manufacturing processes are required n order to produce a properly operating neon sign. A well-built neon sign should have a life of over 30,000 hours. As a comparison, the average 100 watt light bulb has a rated life of 750-1,000 hours.
> This long lifetime has created a practical market for neon use for interior architectural cove lighting in a wide variety of uses including homes, where the tube can be bent to any shape, fitted in a small space, and can do so without requiring tube replacement for a decade or more."

4. He further argued that relying upon the judgment of Himachal Pradesh High Court in the case of ***Mohan Meakin Breweries Ltd.*** *(supra)* was totally misplaced as that was a decision of the year 1979. The technology over a period of time has totally changed and the manner in which the neon signs and glow signs were manufactured due to advancement of technology now give much longer life.

5. The aforesaid argument of learned counsel for the Revenue may be attractive in first blush. However, it loses its sheen when we examine it with some deeper insight. In the first place, we may point out that no such distinction between glow sign and

neon signs have been made by the AO whereas learned counsel has conceded that expenditure on glow signs may be revenue in nature because of their span of life and has confined his argument only qua neon signs. As far as AO is concerned, he did not distinguish between the two and clubbed the expenditure incurred on both glow signs and neon signs. There is no statistics or details before us to segregate the expenditure qua glow sign and neon signs which exercise is required, if we accept the argument of the Revenue. Such a question, therefore, cannot be put for the first time in this Court, that too, in an appeal under Section 260-A of the Act which lies only on the substantial question of law and not on the facts. Secondly, no argument was raised by the learned counsel for the revenue on the aspect that in the year 1998-99, though, CIT (A) had allowed this expenditure as revenue expenditure, Department had not challenged the decision and accepted the position. Thirdly and more importantly, even on merits, the core question to be decided is as to whether the expenditure incurred on glow signs and neon signs is the expenditure on advertisement and publicity or marketing, and if so, whether it qualifies for deduction under Section 37 of the Act. When we examine the matter from this angle, we come to the conclusion that the expenditure of this nature needs to be allowed as the Revenue expenditure. It is not in dispute that the

expenditure in question was infact incurred. It is also not in dispute that it was infact in furtherance of the business of the assessee and had thus direct nexus with the business of the assessee. Therefore, the provisions of Section 37 (1) of the Act are satisfied. In this scenario, whether it would make any difference if the expenditure is of enduring benefit.

6. The argument of the Revenue is based on the judgment of the Supreme Court in Madras Industrial Investment Corporation Ltd. *Vs.* ***Commissioner of Income Tax,*** 225 ITR 802. The ratio of the aforesaid case was discussed in detail by the Division Bench of this Court in ***Commissioner of Income Tax*** *Vs.* ***Industrial Finance Corporation of India Ltd.*** 185 Taxman 296. This very argument was rejected explaining the ratio of the said case in the following manner:-

> "Thus, the first thing which is to be noticed is that though the entire expenditure was incurred in that year, it was the assessee who wanted the spread over. The Court was conscious of the principle that normally revenue expenditure is to be allowed in the same year in which it is incurred, but at the instance of the assessee, who wanted spreading over, the Court agreed to allow the assessee that benefit when it was found that there was a continuing benefit to the business of the company over the entire period."

7. This Court thus explained in no uncertain terms that the normal rule accepted by the Supreme Court in the said judgment was that the expenditure is to be allowed in the year in which it was incurred. Only at the instance of the assessee who wanted to spread over, the court had agreed to allow the assessee the benefit after finding that there was a continuing benefit to the company over the entire period. The ratio of this judgment was thus summaried in the following manner:-

> "What follows from the above is that normally the ordinary rule is to be applied, namely, revenue expenditure incurred in a particular year is to be allowed in that year. Thus, if the assessee claims that expenditure in that year, the Income Tax department cannot deny the same. However, in those cases where the assessee himself wants to spread the expenditure over a period of ensuing years, it can be allowed only if the principle of matching concept is satisfied, which upto now has been restricted to the cases of debentures.'

8. At this stage, it would be of advantage to discuss the judgment of Supreme Court in ***Empire Jute*** (supra) which repelled the theory of expenditure of enduring nature, in a great measure. In that case, the Supreme Court noted that by decided cases, the courts evolved various tests for distinguishing between the capital and revenue expenditure but no test is paramount or conclusive. Every case has to be decided on its facts keeping in

mind the broad picture of whole operation in respect of which the expenditure has been incurred. At the same time, few tests formulated by the Courts were taken note of. One such test which was specifically spelled-out and may be relevant for our purpose was “when an expenditure is made not only once and for all, but with a view to bringing into existence or an advantage for which enduring benefit of a trade, the expenditure can be treated as capital in nature and not attributable to revenue”. However, cautioned the Court, it would be misleading to suppose that in all cases securing a benefit for business expenditure would be capital expenditure. The Court added the caution in the following words:-

> “There may be cases where expenditure, even if incurred for obtaining advantage, of enduring benefit, may, none-the-less, be on revenue account and the test of enduring benefit may break down. It is not every advantage of enduring nature acquired by an assesses that brings the case within the principle laid down in this test. **What is material to consider is the nature of the advantage in a commercial sense and it is only where the advantage is in the capital field that the expenditure would be disallowable on an application of this test**. If the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably white leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future. The test of enduring benefit is therefore not a

certain or conclusive test and it cannot be applied blindly and mechanically without regard to the particular facts and circumstances of a given case."

9. The similar issue has been decided by us in the judgment pronounced today titled ***The Commissioner of Income Tax-V*** *Vs.* ***Citi Financial Consumer Finance Ltd.*** [ITA 1820 & other connected matters) and all the relevant judgment including noted above are discussed in detail and position summed up is as under:-

"Applying the aforesaid principle to the facts of this case, it clearly emerges that the expenditure on publicity and advertisement is to be treated as revenue in nature allowable fully in the year in which it was incurred. Concededly, there is no advantage which has accrued to the assessee in the capital field. The expenditure was incurred to facilitate the assessee's trading operations. No fixed capital was created by this expenditure. We may also add here that in the Income-Tax laws, there is no concept of deferred revenue expenditure. Once the assessee claims the deduction for whole amount of such expenditure, even the year in which it is incurred, and the expenditure fulfills the test laid down under Section 37 of the Act, it has to be allowed. Only in exceptional cases, the nature mentioned in ***Madras Industrial Corporation*** (supra), the expenditure can be allowed to be spread over, that too, when the assessee chooses to be so."

10. The submission of learned counsel for the Revenue qua judgment of Himachal Pradesh High Court in ***Mohan Meakin***, (supra) is misplaced. The decision was not based on the issue as to whether expense incurred on neon signs was of enduring nature. The Court rather specifically stated that the question whether the expenditure was capital or revenue in nature was wholly irrelevant. The issue was whether such an expenditure was allowable under Section 37 of the Act. In that context, the question of law was decided in favour of the assessee in the following words:

> "It is obvious from the provisions of Sub-section (3) quoted above that it contemplates an altogether separate and distinct head of deduction, namely, expenditure on advertisement. It is further clear that this deduction on account of expenditure on advertisement is admissible "notwithstanding anything contained in Sub-section (1)". The use of the non obstinate clause in Sub-section (3) clearly excludes the considerations which are contemplated by Sub-section (1) of Section 37. It, therefore, follows that if once it is found that a particular deduction can be claimed as on account of expenditure on advertisement the said deduction squarely falls within Sub-section (3) and that being so the question whether the said expenditure is of capital nature or of revenue nature falls wholly out of consideration. Deduction on account of expenditure on advertisement is qua advertisement and not qua its revenue or capital nature. The Tribunal seems to have missed this aspect of the matter. We, therefore, find that this expenditure falling under Sub-section (3) of Section 37 should be treated as expenditure on advertisement and

> deduction on that account should be given not on consideration of the question whether it is of revenue or capital nature but on considerations of the conditions and restrictions contemplated by Sub-section (3) itself."

11. The question was answered in favour of the assessee on the touch stone of the provisions contained in Section 37 of the Act in the following manner:-

> "After considering the rival submissions made by learned Counsel for the parties, we are of the opinion that the Tribunal was right in confirming the order of the QT(A) and treating the expenditure incurred on glow sign boards as of revenue nature.
>
> Section 37(1) of the Act provides that "any expenditure (not being expenditure of the nature described in Sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head 'Profits and gains of business or profession."' For claiming deduction under this section, one of the conditions is that the expenditure should not be in the nature of capital expenditure. The question whether a particular expenditure incurred by the assessee is of capital or revenue nature is always a complex and intricate issue. Such a question has to be considered and answered in the facts and circumstances of each case. In Assam Bengal Cement Co. Ltd. v. CIT [1955] 27ITR34(SC) , it was held that if the expenditure is made for acquiring or bringing into existence an asset or advantage for the enduring benefit of the business, it is properly attributable to capital and is of the nature of

> capital expenditure. If on the other hand it is made not for bringing into existence an asset or advantage but for running the business or working it with a view to produce the profits it is a revenue expenditure. If any such asset or advantage for the enduring benefit of the business is thus acquired or brought into existence it would be immaterial whether the source of the payment was the capital or the income of the concern or whether the payment was made once and for all or was made periodically. The aim and object of the expenditure would determine the character of the expenditure whether it is a capital expenditure or a revenue expenditure. It was further held that the expressions 'enduring benefit' or 'of a permanent character' were introduced to make it clear that the asset or the right acquired must have enough durability to justify its being treated as a capital asset."

12. No doubt in that case the Court has also observed that the glow signs boards have a short life, they decay with the effect of weather, and require frequent replacement. These observations may not be entirely correct having regard to the literature qua neo sign board produced by the learned counsel for the Revenue. However, this fact would not alter the ultimate decision as it is still obvious that no asset of permanent nature is brought into existence.

13. Here, by putting the neon signs and glow signs, no asset of permanent nature is created. Simply because self-life of such neon signs is more, may not be of any significance once we keep

in mind the important aspect on which the expenditure is incurred i.e. on advertising and marketing. We thus, are of the opinion that no question of law arises and these appeals are accordingly dismissed.

(A.K. SIKRI)
JUDGE

(M.L. MEHTA)
JUDGE

MARCH 30, 2011
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