

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "E", MUMBAI

Before Shri Saktijit Dey(JUDICIAL MEMBER)

AND

Shri G Manjunatha (ACCOUNTANT MEMBER)

I.T.A No.1743/Mum/2012
(Assessment year: 2006-07)

M/s Shell India Markets Pvt Ltd, Trent House, First Floor G Block, Plot No.C-60, Bandra Kurla Complex, Bandra (E), Mumbai-51 PAN : AAICS1404P	vs	Dy.CIT, Large Tax Payer Unit Mumbai
APPELLANT		RESPONDENT

I.T.A No.2085/Mum/2012
(Assessment year: 2006-07)

Dy.CIT, Cir.3(3) Mumbai	vs	M/s Shell India Markets Pvt Ltd, Trent House, First Floor G Block, Plot No.C-60, Bandra Kurla Complex, Bandra (E), Mumbai-51 PAN : AAICS1404P
APPELLANT		RESPONDENT

Assessee by	Shri Sunil M Lala / Shri Tushar Hathiramani
Revenue by	Shri M.C. Omi Ningshen

Date of hearing	26-03-2018
Date of pronouncement	-04-2018

ORDER

Per G Manjunatha, AM :

These cross appeals filed by the assessee as well as the revenue are

directed against the order of CIT(A)-7, Mumbai dated 27-12-2011 and it pertains to AY 2006-07. Since both the appeals pertain to same assessee, for the sake of convenience, they were heard together and are disposed of by this common order.

2. The brief facts of the case are that the assessee company is engaged in the business of marketing motor spirit and hybrid diesel through retail outlets, filed its return of income for AY 2006-07 on 30-11-2006 declaring total loss of Rs.31,14,57,633. The case was selected for scrutiny and notices u/s 143(2) and 142(1) of the Act were issued. In response to notices, the authorized representative of the assessee appeared from time to time and submitted the details, as called for. The assessment has been completed u/s 143(3) on 24-12-2009 determining the total loss at Rs.25,62,00,390 by making various additions towards disallowance of lease rent paid on land by treating it as capital expenditure, disallowance of repairs and maintenance expenses, payment for off-shore services, disallowance of foreign travel expenses and disallowance of provident fund and ESIC.

3. Aggrieved by the assessment order, assessee preferred appeal before the CIT(A). Before the CIT(A), assessee has filed elaborate written submissions to challenge each and every addition made by the AO towards disallowance of lease rent paid on land, disallowance of

repairs and maintenance, payment of offshore services, late payment of PF & ESIC and disallowance of foreign travel expenses. The Ld.CIT(A), for the detailed reasons recorded in his order dated 27-12-2011 partly allowed appeal filed by the assessee wherein he has deleted additions made by the AO towards repairs and maintenance expenses on plant & machinery, repairs and maintenance to others; however, confirmed addition made by the AO towards disallowance of lease rent paid on land, disallowance of repairs and maintenance expenses paid to WIPRO Ltd for services rendered outside India and disallowance of foreign travel expenses. Aggrieved by the order of CIT(A), assessee as well as the revenue are in appeal before us.

4. The first issue that came up for our consideration from assessee's appeal is disallowance of lease rent paid on leasehold land amounting to Rs.4,11,04,543. The factual matrix of the impugned dispute are that the assessee is in the business of marketing motor spirit and high speed diesel through retail outlets, entered into lease agreement for taking lands on lease for a period ranging from 30 years to 99 years. The assessee has entered into a lease agreement for acquiring lands for setting up retail outlets on payment of monthly rent. The AO disallowed lease rentals paid on land on the ground that once the period of lease exceeds 12 years, the assessee becomes the deemed owner of the

property and hence, whatever lease rent paid is for the purpose of acquisition of property and the same cannot be allowed as revenue expenditure. According to the AO, all lease agreements entered into by the assessee with land owners are for a period of 30 years to 99 years, therefore, opined that such payments are basically in the nature of payments for acquiring land towards cost of land. It is the contention of the assessee that it has entered into various lease agreement with land owners for a period ranging from 30 year to 99 years on monthly lease rentals. The assessee further contended that the lease rental paid by the assessee is a periodical but not lump sum. As per the terms of lease agreement, the assessee shall pay rent every month on deduction of applicable TDS. It is also evident from various clauses of the agreement that the assessee has only acquired lease right in respect of land for a limited period. The assessee has not made any separate payment except refundable security deposit for acquiring such lease rights. Therefore, it is incorrect to say that the assessee become deemed owner of the properties merely because the lease agreement period is more than 12 years.

5. We have heard both the parties and perused the material on record. The AO disallowed lease rent paid on lease hold lands on the ground that such lease rent is in the nature of capital expenditure as the period

of lease agreement is more than 12 years in all cases. According to the AO, once the period of agreement exceeds for more than 12 years, the assessee becomes the deemed owner of the property and lease rent paid on such land becomes payment for acquiring land. The AO has referred to the provisions of section 269UA to come to the conclusion that once the period of lease agreement is more than 12 years, then it is considered as deemed transfer of land and whatever lease rent paid whether it is periodical or lumpsum it is for the purpose of acquiring such property. The AO also relied upon the decision of Hon'ble Madras High Court in the case of Krishna & Co vs CIT reported in 88 ITR 406 wherein the Hon'ble Madras High Court held that amount paid for consideration for lease is for acquisition of capital asset which enables the assessee to carry on its business is a capital expenditure.

6. Having heard both the sides, we do not find any merits in the findings of the AO, for the reason that on perusal of details filed by the assessee we find that the assessee has entered into a lease agreement with various land owners and such lease agreements are entered into for a period of 30 years to 99 years. On further verification of copies of lease agreement filed by the assessee, we find that the assessee agreed for payment of monthly lease rent. It is also evident from various clauses of the lease agreement that the assessee has only acquired

lease rights in respect of land for limited period. The assessee has not made any lump sum payment, except refundable security deposit for acquiring such lease rights. The assessee is required to surrender the possession of land on expiry or termination of lease agreement. The lease agreements also provide for termination of lease by either party by giving notice in writing before expiry of term of lease agreement. It is also amply clear from the clauses of agreement that the assessee is not owner of the land but mere user of the land for certain period. Therefore, we are of the considered view that the lower authorities were erred in considering monthly lease rental payment as capital expenditure paid for acquiring land. We further notice that the AOs reliance on the decision of Hon'ble Madras High Court in the case of Krishna & Co (supra) is highly misplaced as the Hon'ble Madras High Court has considered the issue of lease rent payment in the light of facts of that case whereas the assessee has paid lump sum consideration for acquiring lease rights of land. In this case, the assessee has paid periodical payment on monthly basis. Therefore, we are of the considered view that the case law relied upon by the department is not applicable to the facts of the present case.

7. On the other hand, the Ld.AR for the assessee relied upon the decision of Hon'ble Gujarat High Court in the case of DCIT vs Sun

Pharmaceuticals Industries Ltd (2010) 329 ITR 479 (Guj) wherein the Hon'ble Gujarat High Court under similar circumstances held that when assessee acquired land on lease by paying monthly lease rent, even if such lease rent has been paid in advance, the same can be allowable as revenue expenditure and could not be treated as capital expenditure. The Hon'ble Supreme Court has approved the ratio laid down by the Hon'ble Gujarat High Court by dismissing SLP filed by the revenue in SLP No.19002 of 2009 dated 04-12-2009.

8. In this view of the matter and also respectfully following the decision of Hon'ble Supreme Court, in the case of CIT vs Sun Pharmaceuticals Industries Ltd (supra), we are of the considered view that the lease rentals paid on leasehold land cannot be regarded as capital in nature merely for the reason that the period of lease agreement is more than 12 years. Therefore, we direct the AO to delete additions made towards lease rent paid on leasehold land.

9. The next issue that came up for our consideration from assessee's appeal is disallowance of repairs and maintenance expenses paid to WIPRO for offshore services. The AO has disallowed a sum of Rs.16,26,383 on the ground that the assessee has made payment for services rendered outside India to the assessee's group companies. The AO further observed that the assessee has got no business, therefore, it

is evident that the payment has been made for other group companies and has been debited in the books of account of the assessee. It is the contention of the assessee that it has paid amount to WIPRO for services rendered towards IT support services which is revenue in nature and also it has deducted TDS from aforesaid payments.

10. Having heard both the sides and considered material on record, we do not find any merit in the arguments of the assessee for the reason that the AO has brought out clear facts to the effect that the payment made by the assessee to WIPRO is for services rendered to the parent company of the assessee in UK. Therefore, it is evident from the fact that such payment is not for the purpose of assessee's business, but for the business of assessee's parent company. Therefore, we are of the considered view that the AO was right in disallowing offshore payment made to WIPRO. The CIT(A), after considering relevant submissions has rightly confirmed additions made by the AO. We do not find any error in the order of CIT(A). Hence, we are inclined to uphold the findings of CIT(A) and reject ground raised by the assessee.

11. The next issue that came up for our consideration from assessee's appeal is disallowance of foreign travel expenses. The AO disallowed foreign travel expenses incurred by the assessee on the ground that such expenses has no relevance to assessee's business in India. The

AO further observed that from the list of foreign travel expenses furnished by the assessee it was seen that none of the expenditure was in respect of assessee's business in India. The expenditure were incurred for undertaking foreign travel to meet the business requirement of the entire shell group. The foreign travel was for other companies located outside India where the assessee has no business connection. Therefore, opined that foreign travel expenses cannot be allowed. It is the contention of the assessee that foreign travel was undertaken by the employees of the company in connection with various matters connected to the assessee. Further, the expenses were incurred in relation to visa, travel, accommodation, etc. of the employees in connection with training and meetings at regional levels. Therefore, the AO was incorrect in disallowing such expenses.

12. Having heard both the sides and considered material on record, we find that the assessee has failed to controvert the findings of lower authorities that foreign travel expenses have been incurred to meet the requirement of the entire shell group and such expense has no relevance to assessee's business in India. The AO, as well as the CIT(A) has brought out clear fact that the assessee has incurred foreign travel expenses on behalf of its employees to visit foreign countries where it has no business connection. Therefore, we are of the

considered view that the AO was right in disallowing foreign travel expenses and such disallowance has rightly upheld by the Ld.CIT(A). We do not find any error in the order of CIT(A); hence, we are inclined to uphold the order of CIT(A) and reject ground raised by the assessee.

13. In the result, appeal filed by the assessee is partly allowed.

Revenue's appeal : ITA No.2085/Mum/2012

14. The first issue that came up for our consideration from revenue's appeal is adhoc disallowance of Rs.15,87,768, out of repairs and maintenance expenses on plant and machinery. The AO disallowed a sum of Rs.15,87,768 on the ground that the repairs & maintenance expenses incurred by the assessee for the year under consideration is comparatively higher than the expenditure incurred in the previous financial year. The AO further observed that during the year, the assessee has undertaken extensive explanation of its operations and hence, the possibility of incurring repairs and maintenance expenses of huge magnitude shown in the accounts is minimal, therefore, disallowed 25% of repairs and maintenance expenses to plant and machinery; however, allowed depreciation on such disallowance @10%. It is the contention of the assessee that it has incurred various expenses for repairs and maintenance to plant and machinery and such items are purchased in bulk centrally on a year to year basis for various retail

outlets. The assessee further contended that it has expanded its business activity during the year under consideration which is evident from the fact that its revenue from operation has substantially increased. The expenditure incurred under repairs and maintenance to plant and machinery is in accordance with its business value. Therefore, there is no reason for the AO to disallow repairs to plant and machinery without pointing out any discrepancies in such expenditure.

15. We have heard both the parties, perused material available on record. The AO has made adhoc disallowance of 25% of repairs and maintenance to plant and machinery only on the basis of volume of expenditure incurred by the assessee by holding that the assessee has incurred higher expenditure under repairs and maintenance to plant and machinery. The AO has not pointed out any mistake in expenditure incurred by the assessee. The expenditure incurred under the head 'repairs and maintenance to plant & machinery' is in accordance with its business value as revenue from operation has increased substantially during the year. Such expenditure has been incurred in respect of day to day operations of the retail outlets. The AO has not brought out any instance of discrepancy in expenditure incurred under the head 'repairs and maintenance to plant & machinery' before making adhoc disallowance of 25% of such expenses. We further notice that the AO

has disallowed such expenditure only on the basis of increase in expenses without considering the increase in revenue from operations. Therefore, we are of the considered view that the AO was incorrect in making adhoc disallowance of repairs & maintenance to plant and machinery without recording any factual finding of incorrectness in claim of the assessee. The CIT(A), after considering relevant submissions has rightly deleted addition made by the AO. We do not find any error in the order of the CIT(A). Hence, we are inclined to uphold the order of CIT(A) and reject the ground raised by the revenue.

16. The next issue that came up for our consideration from revenue's appeal is disallowance of other repairs & maintenance expenses of Rs. 1,96,69,928 incurred by the assessee. The AO has disallowed computer maintenance expenses on the ground that such expenditure is in the nature of capital expenditure as the assessee has purchased software and related products and also acquired patents in some cases which are in the nature of capital expenditure as such expenditure gives enduring benefit to the assessee. The AO has analysed the details of software expenses filed by the assessee and given his findings on each and every item purchased and observed that in some cases assessee has purchased licence to use software which is in the nature of capital expenditure. The AO further observed that the assessee has purchased

laptops and computer accessories from Hewlett Packard and debited such expenditure to repairs & maintenance expenses. The AO further observed that the assessee has purchased patent and licence from M/s Systems Union Sun Lice for Rs.17,60,000 and debited such expenditure to repairs & maintenance even though such expenditure is in the nature of capital assets (intangibles). It is the contention of the assessee that repairs & maintenance expenses includes expenses incurred in respect of IT technical support services and IT maintenance service, etc. These services are received by the assessee from various entities which are in the nature of annual maintenance contracts. Therefore, the AO was incorrect in treating those expenses as capital in nature. The assessee further contended that the assessee has not outsourced IT support & maintenance services required at various outlets to WIPRO Ltd and which has provided day to day operations to be carried out by the assessee by providing IT technical support services. The assessee also operates at a financial systems named "Envoy Systems" for all its retail outlets for which it has paid an amount of Rs.11,33,371 to Bizware Software Services Ltd for providing IT support and maintenance services. Similarly, it has taken various IT related services from different vendors, which are in the nature of only annual maintenance contracts. Therefore, such expense has been rightly treated as repairs and

maintenance to others.

17. We have heard both the parties and perused materials available on record. The AO has disallowed an amount of Rs.1,16,69,928, out of repairs and maintenance to others towards expenses incurred in relation to software and related services on the ground that such expenses are in the nature of capital expenditure as the assessee has acquired various softwares including licence to use such software and also patents. According to the AO, the assessee has purchased laptops and accessories from Hewlett Packard India Sales Pvt Ltd and debited such expenses to repairs and maintenance. The expenditure incurred by the assessee are in the nature of capital expenditure as the assessee derives enduring benefit out of such expenditure. It is the contention of the assessee that expenditure incurred under the head 'repairs and maintenance to others' towards software expenses are mainly for the purpose of providing IT support services to its retail outlets for day to day operations and such expenditure are in the nature of annual maintenance contracts. The assessee further contended that wherever it has acquired laptops and accessories, the same has been capitalized to computers and softwares. However, expenses in the nature of annual maintenance contracts has been treated as revenue expenditure.

18. Having heard both the sides, we find that the Ld.CIT(A) has given a

categorical finding that all expenditure incurred by the assessee are in the nature of annual maintenance contracts for providing IT support services to its retail outlets. The CIT(A) further observed that a detailed perusal of the contract entered into by the assessee with the service providers revealed that the assessee has not purchased any patent or copyright or licence, rather than used software in line with policy of shell group of companies wherein a software is used to monitor stock position as well as other accounting policies adopted by the group. We find that the CIT(A) has given a categorical finding in respect of assessee's expenditure incurred towards IT related support services. According to the CIT(A), the expenditure incurred by the assessee are in the nature of revenue expenditure being annual maintenance contracts. According to the AO, the expenses incurred by the assessee are in the nature of capital expenditure as the assessee has acquired laptops and accessories and licence to use software and patents in certain software. No doubt, the expenditure incurred towards annual maintenance contracts for providing IT support services are in the nature of revenue expenditure. However, expenditure incurred in relation to acquiring of capital assets being laptops and accessories licence to use software and patents are in the nature of capital expenditure. The facts are contradictory. The AO has brought out facts which states that the

expenditure incurred by the assessee is in the nature of capital expenditure. The CIT(A) has brought out the facts which states that the expenditure is in the nature of annual maintenance contract. Therefore, we are of the considered view that the issue needs to be re-examined by the AO in the light of claim of the assessee that all expenditure incurred towards IT support services are in the nature of annual maintenance contract. If expenditure incurred by the assessee are in the nature of annual maintenance contracts, then such expenditure certainly are in the nature of revenue expenditure and the AO is directed to allow the same as claimed by the assessee. If expenditure incurred by the assessee is in the nature of purchase of computers, laptops and accessories and licence to use software including patents, then certainly such expenditure is capital capital in nature, then, the AO is directed to treat accordingly. Accordingly, the ground raised by the revenue is allowed for statistical purpose.

21. In the result, appeal filed by the revenue is partly allowed, for statistical purpose.

22. As a result, the appeal filed by the assessee is partly allowed and appeal filed by the revenue is partly allowed, for statistical purpose.

Order pronounced in the open court on 13th April, 2018.

Sd/-

sd/-

(Saktijit Dey)	(G Manjunatha)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt : 13th April, 2018

Pk/-

Copy to :

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

/True copy/

By order

Sr.PS, ITAT, Mumbai