

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 19.07.2016

CORAM:

THE HONOURABLE MR.JUSTICE **S.MANIKUMAR**

and

THE HONOURABLE MR.JUSTICE **D.KRISHNAKUMAR**

T.C.A.Nos.321 and 322 of 2016

The Commissioner of Income Tax,
Chennai

... Appellant/Appellant

Vs.

M/s.Tamil Nadu Tourism Development Corporation Ltd
No.2 Wallajah Road
Chennai - 600 002

... Respondent/Respondent

Prayer: Tax Case Appeals filed under Section 260A of the Income Tax Act, 1961, against the orders made in I.T.A.Nos.550 and 551/Mds/2010, dated 12.08.2013.

For Appellant : Mr.M.Swaminathan
in both TCAs

For Respondent : Mr.M.Vijayaraghavan
in both TCAs

COMMON JUDGMENT

S.MANIKUMAR, J.

Tax Case Appeals have been filed against the common orders, made in I.T.A.Nos.550 & 551/Mds/2010 and Cross-Appeals.

2. Facts leading to the appeals are that the assessee, M/s.Tamil Nadu Tourism Development Corporation Ltd., filed returns for the assessment year 2005-06 on 31.10.2005 and a revised return on 06.06.2006, admitting the total income of Rs.2,12,97,601/-. For the assessment year 2006-07, the assessee filed returns on 27.11.2006, admitting the total income of Rs.2,05,70,640/-. Returns were processed under Section 143(1), selected for scrutiny and notice under Section 143(2) was issued.

3. After enquiry, assessment was completed and vide order, dated 05.12.2012, the following additions were made to the income of the assessee for the assessment year 2005-06:

30% deduction claimed for franchise income as discussed above	50,88,343/-
Interest on Government Loan as discussed above	17,55,632/-
Thiruvalluvar statue expenses as discussed above	45,34,350/-
Prior period expenses as discussed above	8,20,616/-
Government grants as discussed above	5,42,20,000/-

Similar order was passed for the assessment year 2006-07 and the assessing officer has made the following additions:

30% deduction claimed from income from lease/franchise of hotels	41,47,414/-
Thiruvalluvar statue expenses as discussed above	45,34,350/-
Loss on sale of assets	3,14,286/-
Depreciation on coaches	7,45,813/-
Grants from Government	1,88,97,000/-

4. Being aggrieved by the same, Tamil Nadu Tourism Development Corporation has filed two appeals in I.T.A.Nos.436/07-08 and 246/08-09 respectively. I.T.A.No.436/07-08 was partly allowed and I.T.A.No.246/08-09 was allowed, on all the grounds raised in the appeal.

5. Aggrieved by the order of C.I.T.Appeal No.436/07-08 dated 19.01.2010 for the assessment year 2005-2006 and C.I.T.(Appeal) No.246/08-09 dated 20.01.2010, for the assessment year 2006-2007, the Commissioner of Income Tax, Chennai filed ITA Nos.550 and 551/2010 respectively. Cross Objection Nos.29 and 30/Mds/2010 have been filed by the assessee.

6. As the issues involved in all the appeals were same, but for the difference in the assessment years, the Income Tax

Appellate Tribunal, by common order dated 12.08.2013 in I.T.A.Nos.550 and 551/Mds/2010 filed by the Commissioner of Income Tax, Chennai and Cross Objection Nos.29 and 30/Mds/2010, dismissed the appeals filed by the Revenue. Cross objections filed by the assessee were also dismissed.

7. Aggrieved by the order in I.T.A No.550/Mds/2010 for the Assessment year 2005-2006, Tax Case (Appeal) No.321/2016 has been filed on the following substantial questions of law.

1. Whether in the facts and circumstances of the case, the Tribunal was right in holding that the expenses incurred by the assessee in maintaining the Thiruvalluvar statue is revenue in nature on the ground that the statue did not belong to the assessee?

2. Has not the Tribunal erred in overlooking the fact that the expenses incurred for providing protective coating to the statue with poly silicon has extended the 'life' of the statue and therefore the expenses resulting in an advantage of enduring benefit ought to have been classified as capital expenditure?

3. Whether in the facts and circumstances of the case, the Tribunal was right in holding that the receipt of grants by the assess from the Central Government capital in nature?

4. Has not the Tribunal erred in overlooking the fact that the grants received by the assessee was for improving existing facilities and therefore the proposed

expenditure for which money was received was only revenue in nature?

5. Whether the Tribunal is right in ignoring the fact that the money received by the assessee for meeting revenue expenditure has not been utilised by the assessee and therefore the receipt by the assessee has to be treated as a revenue receipt only?

8. Aggrieved by the order in I.T.A No.551/Mds/2010 for the Assessment year 2006-2007, Tax Case (Appeal) No.322/2016 has been filed on the following substantial questions of law,

1. Whether in the facts and circumstances of the case, the Tribunal was right in holding that the expenses incurred by the assessee in maintaining the Thiruvalluvar statue is revenue in nature on the ground that the statue did not belong to the assessee?

2. Has not the Tribunal erred in overlooking the fact that the expenses incurred for providing protective coating to the statue with poly silicon has extended the 'life' of the statue and therefore the expenses resulting in an advantage of enduring benefit ought to have been classified as capital expenditure?

3. Whether in the facts and circumstances of the case, the Tribunal was right in holding that the receipt of grants by the assess from the Central Government capital in nature?

4. Is not the Tribunal wrong in applying the facts of the AY 2005-06 to the AY 2006-07 and holding the receipt of grants by the assessee as capital in nature

when in respect of the AY 2006-07, the grants were received by the assessee was for improving its existing infrastructure and not for bringing into existence any new asset?

5. Has not the Tribunal erred in overlooking the fact that the grants received by the assessee was for improving existing facilities and therefore the proposed expenditure for which money was received was only revenue in nature?

6. Whether the Tribunal is right in ignoring the fact that the money received by the assessee for meeting revenue expenditure has not been utilised by the assessee and therefore the receipt by the assessee has to be treated as a revenue receipt only?

Both Tax Case Appeals have been filed in respect of an issue relating to the expenses incurred in maintaining the Thiruvalluvar statue and grants received from the Central Government.

9. Inviting the attention of this court to the finding of the Assessing Officer on the expenses incurred in maintaining the Thiruvalluvar statue, Mr.M.Swaminathan, learned standing counsel for Income Tax Department submitted that the Tribunal erred in holding that the expenses incurred by the assessee, Tamil Nadu Tourism Development Corporation Limited, Chennai, to maintain Thiruvalluvar statue at Kanyakumari, is revenue in nature, as the

assessee has been directed by the State Government to maintain the same. He further submitted that the Tribunal went wrong in holding that the expenses incurred by the assessee in the nature of security charges, electricity charges, establishment charges and expenses for providing protective coating with poly silicon to the statue, as revenue in nature, on the ground that the statute of Thiruvalluvar is a public property, and not the property of the assessee Corporation. According to him, the only issue to be decided by the Tribunal was whether the expenses for maintaining Thiruvalluvar statue is, revenue or capital in nature, and that the Tribunal was not called upon to decide as to whether the statue itself was owned by the assessee or not.

10. Mr.M.Swaminathan, learned standing counsel for the appellant further submitted that the Tribunal failed to consider that the expenses incurred for coating the statue with poly silicon was capital in nature, as it helped in enduring a long term advantage to the statue, so that the statue is not adversely affected by the salty sea water.

11. As regards the substantial question of law regarding the receipt of grants by the assessee held as capital in nature, learned Standing Counsel for Income Tax Department, by drawing the

attention of this court to the finding of the Assessing Officer, submitted that the Tribunal erred in holding that the grants given by the Government of India, to the assessee were capital grants for developing infrastructural facilities, at tourist destinations and according to him reading of the sanction orders would show that the money was invested only for meeting the existing infrastructure and therefore, the receipt was revenue in nature. He also added that the Tribunal failed to note that though money was received by the assessee for meeting its revenue expenditure for improving the existing facilities, and the Tribunal has failed to consider that the assessee had not utilised the same, and therefore, has to be treated only as a revenue receipt and added to the income of the year of receipt.

12. Inviting the attention of this court to the observation of the Tribunal that insofar as the grants given by the Government of India is concerned, the proposed projects were dropped and that the funds were directed to be kept as trust so that the same can be spent for other alternative projects as directed by the Government from time to time and in the above said circumstances, when the Tribunal itself expressed an opinion that it was not in a position to give a clear finding as to how the grants were expended, learned senior standing counsel for Income Tax department prayed that the matter be remitted to the original authority for fresh adjudication.

13. Per contra, Mr.M.Vijayaraghavan, learned counsel for the respondent submitted that M/s.Tamil Nadu Tourism Development Corporation Limited, Chennai was formed for the purpose of improving tourism in the State of Tamil Nadu. It has various activities, having hotels, running buses and taxis, for the purpose of tourism. One of the important spots for tourism is Kanyakumari and major attraction therein is the statue of Thiruvalluvar in the middle of the sea. He further submitted that, tourists, who visit Kanyakumari, invariably visit the statue of Thiruvalluvar in the middle of sea. In 2002, maintenance of the statue was handed over to M/s.Tamil Nadu Tourism Development Corporation Limited, Chennai. To fund the maintenance charges, Poompuhar Shipping Corporation has been collecting Rs.5/- from ferry charges. Poompuhar Shipping Corporation had already collected Rs.1.00 Crore towards maintenance charges and the same was handed over to the assessee.

14. Mr.M.Vijayaraghavan, learned counsel for the respondent further submitted that the respondent/assessee, for the assessment year 2005 - 2006 in the Profit and Loss account, the assessee claimed Rs.45,34,350/- and for the assessment year 2006 - 2007, the assessee claimed the same amount towards recurring expenditure like, security charges, electricity charges, establishment

charges and providing protective coating with poly silicon to Thiruvalluvar statue, at the rate of Rs.34,00,000/-. He further submitted that the assessee is not the owner of the statue. The assessee is only maintaining the statue in Kanyakumari District on the directions of the State Government and thus the assessee earns only a small income from the ferry charges of Poompuhar Shipping Corporation. As the assessee is not the owner of the asset and inasmuch as, maintenance is done, with the source of the income earned at the rate of Rs.5/- from ferry charges, repairs and maintenance done are only on revenue field. Therefore, the expenses incurred for maintaining the statue by the assessee cannot be said to be a capital expenditure. He also added that assessee has also incurred similar expenditure for all the years prior to the assessment year 2005 - 2006 and 2006 - 2007 respectively, and therefore, the expenditure has to be held only, as revenue in nature.

15. Placing reliance on the judgments in ***L.H.Sugar Factory & Oil Mills (P) Ltd. vs. Commissioner of Income Tax*** reported in ***125 ITR 293 SC, C.I.T. vs. Coats Viyella India Ltd*** reported in ***253 ITR 667 Mad, C.I.T. vs. T.V.Sundaram Iyengar & Sons (P) Ltd*** reported in ***186 ITR 276 SC, C.I.T. vs. Chemicals and Plastics Ltd*** reported ***292 ITR 0115 Mad and CIT vs. Saw Pipes***

Ltd reported in **300 ITR 35 (Del)**, Mr.M.Vijayaraghavan, learned counsel for the respondent submitted that when expenditure was incurred on the asset not owned by the assessee, then the same has to be construed only as a revenue expenditure. At this juncture, he reiterated that the statue is not owned by M/s.Tamil Nadu Tourism Development Corporation Limited, Chennai/respondent/assessee.

16. Learned counsel for the respondent submitted that both the Appellate Authority and the Tribunal, concurrently and rightly, both on facts and law, held that the department was not correct in disallowing the claim of the assessee, according to him, the well considered orders stated supra, cannot be termed as perverse, warranting interference.

17. On the substantial question of law relating to government grant, Mr.M.Vijayaraghavan, learned counsel for the respondent/assessee submitted that during the assessment year 2005 - 2006, the assessee received Rs.478.70 Lakhs and Rs.188.97 Lakhs, for the assessment year 2006-2007. It is the further submission of the learned counsel for the respondent/assessee that Government grants are only for carrying out specific projects. Expenditure that may be incurred on such projects are estimated

and based on such estimation, Government gives grant for implementing the specified projects. If for any reason, the project is not carried out, then the respective Government will issue instructions to deal with the grant/money, given to Tamil Nadu Tourism Development Corporation. He also submitted that normally, Central Government may grant permission to Tamil Nadu Tourism Development Corporation, to utilise the fund for other projects approved by the Central Government. In the case of State Government, if the grant cannot be used for the specified projects, for which they were given, it has to be treated as repayable loan converted as equity in Tamil Nadu Tourism Development Corporation.

18. In this context, he invited the attention of this court to the letter dated 04.12.2008 of the Government of India, Ministry of Tourism, wherein, the Central Government have given grant for development in Kolli Hills in Namakkal District, a tourist destination, at an estimated cost was Rs.327.98 lakhs. He also submitted that in the said letter dated 04.12.2008, it has been clearly stated that the State Government shall utilise the amount only for the projects and in case, the fund cannot be utilised for more than six months, the same should be surrendered to the Central Government. Attention of this court was also invited to clauses 10 and 12 of the letter dated 04.12.2008.

19. Learned counsel for the assessee further submitted that final installment of Central Financial Association will be released only after the completion of the project, and upon the receipt of utilisation certificate, completion certificate and management agreement. According to him, grant of the Government is coupled with an underlying obligation to spend the entire amount on the project for which grant has been released. According to him, at the time of grant, it was never envisaged that any part of the grant would accrue as income to the implementing agency like, Tamil Nadu Tourism Development Corporation Ltd. He added that if at all, it is only after completion of the project and if surplus remains unutilised and if the Government permits the implementing agency like, Tamil Nadu Tourism Development Corporation to treat the surplus income, such portion can be treated as income of the Corporation and that too, only for the year, for which the Government has permitted the Corporation to utilise any amount of the project as income.

20. Learned counsel for the respondent further added that till the Government issues appropriate orders enabling the Tourism Development Corporation to retain any portion of the grant as its income, the same can be treated as income of the Corporation in the year, in which the Government grants permission. It is also his

submission that at the time of grant, there is an attendant obligation to utilise the entire amount for the project contemplated by the Government. No part of the same will constitute as income of the Corporation. According to him, merely because the Corporation could not give particulars as to how the grants were to be utilised in the future, it does not mean that the grant should be treated as income of the corporation in the first year only.

21. Learned counsel for the respondent further submitted that during the subject assessment years, the Government have not permitted the Corporation to treat any of the amount given by it by way of grant, either for the year earlier, as income of the assessee. He also submitted that insofar as Rs.478.70 Lakhs given as grant by the Government of India for the assessment year 2005 - 2006, subsequently, vide letter dated 04.12.2008, the Government has directed Rs.476 Lakhs to be utilised for other projects, the balance 2.76 lakhs has been added as income by the Appellate Authority. As regards Rs.663.50 Lakhs given by the State Government, the same has subsequently been converted into equity.

22. Learned counsel for the assessee further submitted that as regards the Government of India grant for the assessment year 2006-2007 of Rs.188.97 Lakhs, the entire sum has been earmarked

to be spent on specific projects only and Government of India have not permitted any amount out of the grants and the subject assessment years towards income of the assessee. In the light of the above contentions, learned counsel for the assessee submitted that the above said aspects have been properly adverted to by both the Appellate Authority and the Tribunal, and thus, the well considered order under challenge in the present appeals does not warrant intervention. Learned counsel for the assessee submitted that substantial question of law framed in both the appeals have to be answered against the revenue and prayed for dismissal of the appeals.

23. Heard the learned counsel for the parties and perused the materials available on record.

24. In the light of the rival submissions, let us consider as to how the Assessing Officer, Appellate Authority and ITAT, have dealt with the issues. As regards the expenses for maintaining Thiruvalluvar statue, the Assessing Officer has recorded as under:

"Assessee in the profit and loss account claimed Rs.45,34,350/- for Thiruvalluvar statue expenses for the previous year relevant to the Assessment Year 2005-06. While discussing with the assessee's representative it was asked why the expenses claimed

for Thiruvalluvar statue cannot be disallowed as it is in nature of capital expenditure. The assessee submitted a written reply letter dated 14.12.2007 stating that " the expenditure towards Thiruvalluvar statue incurred to the tune of Rs.45,34,350/- for the assessment year 2005-06 related to recurring expenditure like security charges, electricity charges, establishment charges and providing protective coating with poly silicon to the statue (Rs.34.00 Lakhs). As the entire expenditure incurred in Thiruvalluvar statue was of recurring nature and no capital expenditure is involved the expenditure may be allowed. Moreover all expenditure incurred towards Thiruvalluvar statue are of maintenance nature only as TTDC has been entrusted with the task of maintaining the Thiruvalluvar statue only by virtue of government order and as such TTDC does not have any ownership towards the Thiruvalluvar statue. I have considered the arguments of the assessee, but the contentions are not acceptable. As such there is no income directly derived from the statue by the Corporation but is an unrefutable fact that the Thiruvalluvar statue is a capital asset to the corporation through which a portion of income is earned. It is clear from the reply that the expenditure is capital in nature as a huge portion of it was spent for poly silicon coating by which the life of the statue can be increased. Thus cannot be allowed as deduction as it is a capital expenditure"

25. For the Assessment year 2005 - 2006, the Assessing

Officer disallowed the maintenance charges of Rs.34,00,000/-, as capital expenditure. Citing the very same reasons for the Assessment Year 2006 - 2007, the Assessing Officer disallowed the sum of Rs.45,34,350/-.

26. Letter No.12745/TS2/2000 dated 22.06.2002 of the Commissioner of Tourism Incharge, Chennai addressed to the Managing Director, Tamil Nadu Tourism Development Corporation is extracted here under:

DEPARTMENT OF TOURISM

From:

To

*V.Ramadoss
Commissioner of Tourism Incharge
Tamil Nadu Tourism Complex
Chennai 600 009*

*The Managing Director
Tamil Nadu Tourism Development
Corporation
Chennai 600 002.*

Letter No.12745/TS2/2000, Dt.22-6-2002

*Sub: Tourism - Thiruvalluvar Statue Maintenance -
Taken over by the TTDC - Regarding.*

- Ref: 1) G.O.Ms.No.260, Information and Tourism (T4)
Department, dt.27.11.2000*
*2) D.O. Letter No.V2/42556/2001, dt.26.5.2002 of
District Collector, Kanniyakumari addressed to the
Secretary to Government, Information and Tourism
Department.*
*3) From the Secretary to Government D.O.Letter
No.33447/T3/2001-02, dt.31.5.2002 addressed
to the Commissioner of Tourism*
4) This Office Proc. No.12745/TS2/2000, Dt.22.6.02

I am to invite your kind attention to the G.O. cited, wherein orders have been issued to take over the administration of the Thiruvalluvar statue and its surroundings by the Tourism Department and the maintenance of the Statue by Public Works Department.

The District Collector, Kanniyakumari has sent a proposal for taking over the statue by the Tourism Department. The request of the District Collector was examined in detail and decided to take over the maintenance of the statue from the State Construction Corporation. Therefore, the Tourist Officer, Kanniyakumari has been requested in the reference fourth to take over the statue from the Construction Corporation and handed over the same to the TTDC for future maintenance.

In respect of funds for the maintenance of statue, I am to inform that Poompuhar Shipping Corporation has been collecting an amount of Rs.20/- as ticket from the tourists out of which Rs.5/- is meant for the maintenance of the Thiruvalluvar statue. It is learnt that an amount of Rupees One Crore so far collected on behalf of the Thiruvalluvar statue is available with the Shipping Corporation. As the developmental works have to be carried out immediately, I am to request that the Poompuhar Shipping Corporation may be requested to pay the amount to TTDC immediately. This department has also requested the Managing Director, Poompuhar Shipping Corporation separately to hand over the amount to the TTDC.

I am therefore to request you to issue instructions to the official concerned to take over the maintenance of statue from the Tourist Officer, Kanniyakumari. Early action may also be taken to collect the amount from Poompuhar Shipping Corporation.

This may be treated as 'Most Urgent'.

*Sd/- V.Ramadoss,
Commissioner of Tourism Incharge.*

*Copy to:
The District Collector, Kanniyakumari at Nagercoil
The Tourist Officer, Kanniyakumari
The Secretary to Government,
Information and Tourism Department,
Fort St. George, Chennai - 600 009.*

A reading of the above said letter fortifies the contention of the respondent/assessee that maintenance of Thiruvalluvar statue has been entrusted to Tamil Nadu Tourism Development Corporation Ltd, from the year 2002 onwards and for maintenance of the statue, Poompuhar Shipping Corporation, has been collecting a sum of Rs.20/- as ticket fee from the tourists, and Rs.5/- has been

earmarked for the maintenance of Thiruvalluvar statue by Tamil Nadu Tourism Development Corporation. As per the letter dated 22.06.2002, a sum of Rs.1.00 Crore collected towards maintenance, was also available with Poompuhar Shipping corporation and as developmental work was to be carried out, Commissioner of Tourism (Incharge) vide letter dated 22.06.2002 has requested the Managing Director, Poompuhar Shipping Corporation to hand over the amount to Tamil Nadu Tourism Development Corporation Limited.

27. As rightly contended by the learned counsel for the respondent, Thiruvalluvar Statue is not owned by the Tamil Nadu Tourism Development Corporation. It is owned by Government of Tamil Nadu. Statue has been constructed by the State Construction Corporation. From out of the contribution of Rs.5/- towards maintenance of statue, out of Rs.20/-, as ticket fee collected from the tourists, by Poompuhar Shipping Corporation Ltd, the respondent has to meet the maintenance expenses and thus, they have submitted returns for the assessment year 2005 - 2006 and 2006 - 2007 respectively, stating that a sum of Rs.45,34,350/- has been incurred every year, towards security charges, electricity charges, establishment charges and providing protective coating with poly silicon to the Thiruvalluvar statue. The source of income

for meeting the expenditure is from Poompuhar Shipping Corporation Limited and not from the capital asset of the Tamil Nadu Tourism Development Corporation Limited.

28. One of the contentions raised by Mr.M.Swaminathan, learned counsel for the revenue is that the Tribunal went wrong in its conclusion and owing to the fact that the expenditure was not made once for all, but with a view to bring advantage of enduring benefit to the statue and keep attracting tourists, which is the business of the assessee corporation and therefore, the expenses incurred on the statue, results in extending the life of the statue and therefore capital in nature.

29. On the above submission, let us consider some of the cases relied on by Mr.M.Vijayaraghavan, learned counsel for the respondent.

30. In ***L.H.Sugar Factory & Oil Mills (P) Ltd. vs. Commissioner of Income Tax*** reported in ***(1980) 125 ITR 0293***, assessee therein, contributed a sum for meeting the cost of construction of roads in the area around the factory. Construction of roads around the factory, facilitated transportation of sugar cane. On the aspect, as to whether the assessee therein has acquired any

asset of an enduring nature, the Hon'ble Supreme Court held in the negative. The Apex Court further held that no doubt the advantage secured for the business existing was of long duration inasmuch as it would last so long as roads continued to be in motorable condition, but it was not an advantage in the capital field, because no tangible or intangible asset was acquired by the assessee nor was there any addition to or expansion of the profit-making apparatus of the assessee.

31. In respect of enduring benefit, it is also worthwhile to extract the judgment of the Hon'ble Apex Court in ***Empire Jute Co. Ltd. vs. CIT*** reported in **(1980) 124 ITR 1 (SC)**, as follows:

"There may be cases where expenditure, even if incurred for obtaining an advantage of enduring benefit, may, none the less, be on revenue account and the test of enduring nature acquired by an assessee 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 while leaving the fixed capital untouched, the expenditure would be on revenue

account, even though the advantage may endure for an indefinite future."

32. In ***Commissioner of Income Tax vs. Coats Viyella India Ltd.*** reported in **(2002) 253 ITR 0667**, contribution was made by the assessee for building a new project, essential to provide access to the assessee's factory. Following L.H.Sugar Factory's case, a Hon'ble Division Bench of this court, held that the bridge is not owned by the assessee. It is built by the Government and therefore, the assessee will not acquire any right or ownership over the bridge in the short term or in the long term or in the long run by reason of the contribution. The Hon'ble Division Bench rejected the contention of the revenue to treat the expenditure as capital. Similar is the view in ***Commissioner of Income Tax vs. T.V.Sundaram Iyengar & Sons (P) Ltd.*** reported in **(1990) 186 ITR 0276** the contribution for construction of houses for employees under the subsidised interest scheme was held as revenue expenditure.

33. In ***Commissioner of Income Tax vs. Chemicals & Plastics India Ltd.*** reported in **(2007) 292 ITR 0115**, contention of the revenue was "whether on the facts and circumstances of the case, the Tribunal was right in holding that Rs.1.5 Lakhs paid

towards the construction of the building to the Madras Chamber of Commerce is allowable as business income? A Division Bench of this court held that the contribution to construction of a building to the Chamber of Commerce was a revenue expenditure.

34. On the aspect of enduring benefit, it is worthwhile to consider the observations of the Hon'ble Supreme Court in ***K.T.M.T.M.Abdul Kayoom & Anr. vs. CIT*** reported in **(1962) 44 ITR 689 (SC)** as hereunder:

"what is decisive is the nature of business, the nature of the expenditure, the nature of the right acquired, and their relation inter se, and this is the only key to resolve the issue in the light of the general principles, which are followed in such cases."

(Emphasis supplied)

35. In ***CIT vs. Ashok Leyland Ltd.*** reported in **(1969) 72 ITR 143 (Mad)** confirmed by the Hon'ble Supreme Court in ***CIT vs. Ashok Leyland Ltd*** reported in **(1972) 86 ITR 549 (SC)**, it is held as follows:

" The facts of each case, the attending circumstances revolving round the expenditure, the aim, object and purpose of the same, their impact on the assessee, particularly in matters relating to the future of the assessee's trade and business, whether it

could be sustained on ordinary canons of commercial expediency simpliciter, whether it is a step in aid of future expansion or prolongation of life of an existing business, whether it is to secure an enduring benefit, whether the expenditure constitutes conceivable nucleus to form the foundation for the posterior profit earning, whether the expenditure could be viewed as an integral part of the conduct of the business and to avoid the inroads and incursions into its concrete present and potential future, are all some of the main instances which have a bearing on the decision, whether in a given case, the expenditure is capital or chargeable to Revenue. On the whole, an objective application of the judicial mind to the facts of each case is necessary."

(Emphasis supplied)

36. In **Commissioner of Income Tax vs. Saw Pipes Ltd.** reported in **(2008) 300 ITR 0035**, on the facts and circumstances of the case, a Hon'ble Division Bench of the Delhi High Court observed that the admitted position is that the service lines did not belong to the assessee, but belonged to MSEB and were laid, so as to enable the assessee to conduct its business more efficiently, which may perhaps be an enduring advantage, but intended to enable the assessee to carry on its business more efficiently and profitably leaving the fixed capital untouched. It is correct that the assessee had spent an amount of about 52 lakhs towards laying of

service lines but the cables did not belong to the assess but belonged to MSEB and, therefore the benefit that the assessee got was of a commercial nature and a business advantage. Consequently, the expenditure incurred by the assessee should be treated as a revenue expenditure."

37. Now let us consider as to how the Commissioner of Income Tax (Appeals) has adverted to the above said aspect. The Commissioner of Income Tax (Appeals)-III at paragraph No.5.2 assessed as follows:

" 5.2. I have carefully considered the facts of the case and the submissions of the Id. AR. The appellant is maintaining the Thiruvalluvar statue in Kanyakumari based on direction from State Government of Tamilnadu. Kanyakumari is also one of the major tourist spots attracting large number of tourists and many people visit Thiruvalluvar statue located in the sea. As such, the statue promotes tourism in a significant way and is very much in line with the objectives of the appellant as a promoter of tourism in the State of Tamilnadu. The appellant is also not the owner of the statue nor the land nor the other structures on which the statue is standing surrounded. The appellant also earns small income from the ferry charges of Poompuhar Shipping Corporation. The appellant has also incurred similar expenditure in the subsequent year. Therefore, the

expenditure of Rs.45,34,350/- is held to be revenue in nature and allowable as business expenditure. Hence, the AO is directed to delete the addition of Rs.45,34,350/-."

Setting out the same reasons, for the assessment year 2006 - 2007, the Commissioner of Income Tax (Appeals) held that the Assessing Officer should have allowed depreciation on the income incurred on Thiruvalluvar statue.

38. Considering the case of the assessee that the main object is to develop and carry on tourism in the State of Tamil Nadu and therefore, in the fitness of things the assessee Corporation was directed by the Government of Tamil Nadu to properly maintain the Thiruvalluvar statue and when the asset being, fully owned Government of Tamil Nadu Undertaking is bound by the orders of the Government, and when the business of the Corporation was to develop tourism, vide Common Order dated 12.08.2013 in ITA Nos.550 and 551/Mds/2010, the Income Tax Tribunal, held that as the expenditure incurred by the assessee for the purpose of maintenance of the statue is recurring in nature and the same is only a revenue expenditure. The Tribunal further held that it has to be seen that the statue Thiruvalluvar is a public property and not the property of the assessee corporation. Therefore, under no

stretch of imagination, expenditure can be treated as capital, and so saying the Tribunal has concurred with the orders of the Commissioner of Income Tax (Appeals) and accordingly, rejected the contentions of the revenue.

39. Benefit of enduring nature is not the sole or exclusive test to decide, whether a particular expenditure is a capital or revenue. In ***Empire Jute Co. Ltd. vs. CIT*** reported in **(1980) 124 ITR 1 (SC)**,, the Hon'ble Apex Court held that when expenditure is directly related to the expansion of capital base of the company, it will be capital in nature, although incidentally that would help in the business of the company and may help in profit making. If the expenditure incurred is only to help the business of the company and also to help in the profit making, without affecting the capital base of the company, the expenditure will have to be allowed as revenue expenditure. As observed by the Apex Court in ***Empire Jute Co. Ltd.'s*** case (cited supra), it is not every advantage of enduring benefit acquired by an assessee amounts to capital expenditure. What is the material to be considered is the nature of advantage, in a commercial sense and it is only where the advantage is in the capital field, then the expenditure would be capital. If the advantage consists merely in facilitating the assessee's trading operations or enabling the management and

conduct of the business of assesseees, to be carried on, leaving the capital untouched, then the expenditure should be treated as revenue in nature, even though there may be an enduring advantage. On the aspect of enduring benefit, let us consider some of the decisions,

(i) In **Bikaner Gypsums Ltd., v. CIT** reported in **[1991] 187 ITR 39 = [1999] 53 Taxman 279**, the Hon'ble Supreme Court held that,

"where the assessee has an existing right to carry on a business, any expenditure made by it during the course of business for the purpose of removal of any restriction or obstruction or disability would be on revenue account, provided the expenditure does not acquire any capital asset. Payments made for removal of restriction, obstruction or disability may result in acquiring benefits to the business, but that by itself would not acquire any capital asset."

(ii) In **Royal Calcutta Turf Club v. CIT** reported in **[1991] 188 ITR 352 = 57 Taxman 185**, it has been held by the Calcutta High Court as under :--

"The true test of an expenditure laid out wholly and exclusively for the purposes of trade or business is that it is incurred by the assessee as incidental to his trade for the purposes of keeping the trade going and of making it pay and not in any capacity other than that of

a trader. The question whether a particular expenditure is a revenue expenditure incurred for the purposes of the business must be determined on a consideration of all the facts and circumstances and by the application of the principle of commercial trading. The question must be viewed in the larger context of business necessity or expediency. If the outgoing or expenditure is so related to the carrying on, or conduct of, the business that it may be regarded as an integral part of the profit-earning process and not for acquisition of an asset or a right of a permanent character the possession of which is a condition for the carrying on of the business, the expenditure should be regarded as a revenue expenditure incurred wholly and exclusively for the purposes of the business."

(iii) In **CIT v. Cominco Binani Zinc Ltd.**, reported in **[1993] 204 ITR 56**, the Calcutta High Court held that,

*"In the case of **Empire Jute Co. Ltd., v. CIT, [1980] 124 ITR 1 (SC)**, following the decision of Lord Radcliffe in **Commr. of Taxes v. Nchanga Consolidated Copper Mines Ltd. [1965] 58 ITR 241 (PC)**, it was held by the Supreme Court at page 10 of the said report (124 ITR 1) that it would be misleading to suppose that, in all cases, securing a benefit for the business would be, prima facie, capital expenditure "so long as the benefit is not so transitory as to have no endurance at all". There may be cases where expenditure, even if incurred for obtaining an advantage*

*of enduring benefit, may, nonetheless, be on revenue account and the test of enduring benefit may break down. It is not every advantage of enduring nature acquired by an assessee that brings the case within the principles laid in this test, provided by Lord Cave L.C. in **Atherton v. British Insulated and Helsby Cables Ltd. [1925] 10 TC 155 (HL)**. 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 while 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."*

(iv) In **Minoo F. Mehta v. CIT** reported in **[1996] 217 ITR 578** the Bombay High Court held as under:--

"The line that divides revenue expenditure from capital expenditure is often very thin and hazy. None of the tests evolved from time to time to determine what is attributable to capital and what to revenue is either exhaustive or of universal application. Each case depends on its own facts. To decide, therefore, on which side of the line the expenditure falls, it is necessary to look at the nature of the business, the nature of the expenditure and the nature of the right

acquired. If it is incurred by the assessee for the purpose of creating, curing or completing his title to capital, it must be regarded as capital expenditure. But, if it is for the purpose of protecting his business, it would be considered as revenue expenditure. Moreover, it is the true nature of the expenditure that is relevant and not the description given to it by the assessee in his books of account or other documents."

(v) In **CIT v. Madras Auto Service (P) Ltd.**, reported in **[1998] 233 ITR 468 = 99 Taxman 575**, it is held as follows:

"All these cases have looked upon expenditure which did bring about some kind of an enduring benefit to the company as a revenue expenditure when the expenditure did not bring into existence any capital asset for the company. The asset which was created belonged to somebody else and the company derived an enduring business advantage by expending the amount. In all these cases, the expenses have been looked upon as having been made for the purpose of conducting the business of the assessee more profitably or more successfully. In the present case also, since the asset created by spending the said amounts did not belong to the assessee but the assessee got the business advantage of using modern premises at a low rent, thus saving considerable revenue expenditure for the next 39 years, both the Tribunal as well as the High Court have rightly come to the conclusion that the expenditure should be looked upon as revenue expenditure."

40. A capital expenditure is an expenditure incurred on the acquisition of a capital asset, by which, expenditure incurred, the value of the asset is increased and consequently, there is an enhancement in the earning capacity of the assessee. The asset would be charged to depreciation, if the assessee is the owner of the asset. The amount spent by the assessee, on the capital asset, should be a long term investment, to generate financial gains to the assessee, for future years. Whereas, the revenue expenditure incurred by the assessee is only for the current years, in which it is spent. Revenue expenditure is the ongoing operational costs, for running the business.

41. Capital expenditure enhances the productivity or the earning capacity. Whereas, the Revenue expenditure does not enhance, neither the value or the earning capacity. But the condition of the asset is retained. Capital expenditure derives benefits beyond the current accounting period. They are non-recurring in nature. Whereas, the revenue expenditure is incurred on regular basis. The benefits are relatively for a shorter period. Expenditure incurred in the day-to-day business, is revenue expenditure. Initial expenditure incurred for acquiring a capital asset is capital in nature. Whereas, the expenditure incurred in

repair works, maintenance and repainting costs, do not value of the asset or the earning capacity of the assessee, but only maintains the asset.

42. In the case on hand, Thiruvalluvar Statue, is not on the asset side of the Corporation, as it is not owned by the Corporation. Tamil Nadu Tourism Development Corporation, Chennai, is engaged in the business of conducting tours, operation of hotels and exhibition, etc. The expenses incurred in maintaining of the statue from the source from Poompuhar Shipping Corporation, is an expense incurred in consonance with the activities of the business of Tamil Nadu Tourism Development Corporation, Chennai and such activity cannot at any stretch of imagination to be termed as capital expenditure, in the light of the contrasting features, as capital and revenue expenditure, is understood. Expenditure incurred by Tamil Nadu Tourism Development Corporation, Chennai, cannot be said to be non-recurring.

43. The expenditure incurred is not for the purpose bringing into existence of any or advantage on the capital side, but for running the business or working it with a view to earn profit, it is a revenue expenditure. From the above decisions, it could be deduced that merely because there was expenditure incurred by the

Corproation, that alone does not mean that the assessee had acquired any capital asset or enduring benefit or advantage when the object of incurring expenditure from out of the source from Poompuhar Shipping Corporation Limited is one of business expediency and therefore, it constitutes revenue expenditure.

44. Admittedly, in the case on hand, asset Thiruvalluvar statue is not owned by the Tamil Nadu Tourism Development Corporation Ltd. Corporation has been entrusted with the only work of maintenance of the statue from out of the contribution made by Poompuhar Shipping Corporation. Business of the Corporation is tourism. Though Mr.M.Swaminathan, learned counsel for the appellant submitted that the Tribunal went wrong in adjudging the issue, with reference to the ownership of the statue and should have confined itself only to the issue as to whether, the expenditure incurred is capital or revenue, in the light of the judgments extracted supra, as to how ownership or acquisition of capital asset, but the expenditure incurred, has a bearing on the decision, as to whether the expenditure is capital or revenue, submissions to the contra, cannot be countenanced. Maintenance of the statue, may endure some benefit towards the conduct of the assessee's business, but the expenditure incurred cannot, at any rate, to be said as an advantage to the assessee in its capital field and thus the

expenditure would be capital in nature, so as to disallow the expenditure incurred for maintenance of Thiruvalluvar statue by security charges, electricity charges, establishment charges and expenses for providing protective coating with poly silicon to the statue.

45. In the light of the above discussion and decisions extracted supra, we are of the view that the findings recorded by the Appellate Authority and Tribunal, both on law and facts, do not warrant any interference and therefore, the substantial question of law No.1 raised by the revenue is answered in the negative.

46. The next question to be considered is *"whether the Tribunal was right in holding the receipt of grants as capital in nature?"*

47. Contention of the respondent/assessee, extracted supra, is fortified by the letter dated 04.12.2008. Perusal of the same shows that the Ministry of Tourism, Government of India has sanctioned a sum of Rs.327.98 Lakhs for development of Kolli Hills as a tourist destination in Namakkal District in Tamil Nadu with the release of the first instalment of Rs.262.38 Lakhs for specified projects. At paragraph 6 of the letter, Government of India have

stated that the Central Government assistance will be utilised for the purpose for which funds are released. Paragraph 10 of the said letter states that the final instalment of the Central Financial Assistance would be released after the completion of the project and on receipt of utilisation certificate, completion certificate and management agreement. Paragraph 12 of the letter reads as follows:

"The State Government will not keep the amount released by Central Government unutilised for more than six months. In case the funds cannot be utilised by any such time, the same will have to be surrendered to Central Government with interest or their formal approval should be taken to transfer/adjust the amount against other Central financially assisted projects."

48. In paragraph 13 of the said letter, Ministry of Tourism, Government of India has said as follows:

"13. The payment of Rs.262.38 Lakhs (Rupees Two sixty two lakh and thirty eight thousand only) would be made to the State Government by adjusting the dropped projects as under:

(i) Rs.238.00 (Rupees two hundred and thirty eight lakh only) released to the Commissioner (Tourism), Government of Tamil Nadu for "Erection of Ropeway at Ooty in Tamil Nadu" vide sanction no.5-PSW920)/2004 dated 26.3.2004 (copy enclosed).

(ii) Rs.24.38 lakh (Twenty four lakh and thirty

eight thousand only) out of an amount of Rs.238.00 lakh released to the Commissioner (Tourism) Government of Tamil Nadu for "Erection of Ropeway at Kodaikanal in Tamil Nadu" vide sanction No.5-PSW(19)/2004 dated 26.3.2004. (copy enclosed). The balance amount of Rs.213.62 lakh (Rs.238.00 lakh minus Rs.24.38 lakh) would be adjusted against some other project in the future."

49. Now let us consider as to how the Assessing Officer has dealt with the issue relating to grants from Government.

Grants from Government

As per the notes and accounts (schedule (9), Point No.6), the assessee has received a sum of Rs.542.20 Lakhs from various sources for which the breakup is as follows:

Government of India grant	Rs.478.70 lakhs
HADP grant	Rs. 18.50 lakhs
WGDP grant	Rs. 45.00 lakhs

The assessee was asked for explanation about the grants the assessee submitted a reply stating that "the amount received by TTDC from the government cannot be treated as grant in the absence of government order for the same as we have sought government clarification, these receipts cannot be treated as revenue receipts and added to income in the absence of government clarification as to the nature of the government assistance. In the absence of any particular government order or clarification or notification with

respect to the grants issued, it cannot be considered as the receipt is in the nature of capital grant but to be taxed as it is a revenue receipt thus the entire amount of Rs.542.20 lakhs will be assessed as income of the assessee for the Assessment Year 2005-06."

50. Insofar as Assessment Year 2006 - 2007, the grants from Government are as follows:

"As per the notes and accounts (schedule (9), Point No.6), the assessee has received a sum of Rs.256.72 lakhs from various sources from which the break up is as follows:

Government of India grant	Rs.188.97 lakhs
HADP grant	Rs. 37.75 lakhs
Govt. of TN grant	Rs. 30.00 lakhs

Citing the very same reasons, receipt has been considered as capital grant for Assessment Year 2006 - 2007.

51. Admittedly letter dated 04.12.2008 was not placed before the Assessing Officer. For the assessment year 2005—2006, assessment order has been passed on 18.12.2007. For the assessment year 2006-2007, assessment order has been passed on 05.12.2008. Reading of the order of the Appellate Authority makes it clear that letter dated 04.12.2008 has been placed before the Appellate Authority and submissions have been advanced. Adverting

to the contents of the letter dated 04.12.2008, the Appellate Authority has recorded as under:

"The payment of Rs.262.38 (Rupees Two sixty two lakhs and thirty eight thousand only) would be made to the State Government by adjusting the dropped projects as under:

i) Rs.238 Lakhs (Rupees Two thirty eight lakhs) released to the Commissioner (Tourism), Government of Tamil Nadu for "Erection of Ropeway at Ooty in Tamilnadu vide sanction No.5 PSW (20) 2004/ dated 26.03.2004. (copy enclosed)

ii) Rs.24.38 (Rupees twenty four lakhs and thirty eight thousand only) out of an amount of Rs.238.00 lakh released to the Commissioner (Tourism), Government of Tamil Nadu for "Erection of Ropeway at Kodaikanal in Tamil Nadu vide sanction No.5 PSW (19/2004) dated 26.03.2004 (copy enclosed). The balance amount of Rs.213.62 lakh (Rs.238.00 lakhs minus Rs.24.38 lakhs) would be adjusted against some other project in the future.

Therefore appellant argues that since the projects are dropped and grants are to be adjusted to other projects in future, the said grant of Rs.478.70 lakhs should not be treated as income."

Considering the same, the Commissioner of Income Tax (Appeals), Chennai has noticed that a sum of Rs.238 Lakhs each was granted for ropeways at Ooty and Kodaikanal from the total grant of Rs.5,42,20,000/-, the projects relating to Rs.4,76,00,000/- has

been dropped as per G.O. dated 04.12.2008. Further, grants totalling to Rs.63.5 Lakhs has been converted into equity shares by Government of Tamil Nadu. Thus, additions of Rs.476 lakhs i.e. (Rs.238 x 2) lakhs of the Government of India grants on capital projects has been dropped and Rs.63.5 lakhs relating to grant of Government of Tamil Nadu converted into equity shares.

52. Insofar as the Assessment year 2006 - 2007, grant received by the assessee was Rs.256.72 lakhs. The break-up figures are as under:

Government of India	Rs.188.97 lakhs
HADP Grant	Rs. 37.75 lakhs
Govt. of TN Grant	Rs. 30.00 lakhs

In the absence of any Government clarification, the Assessing Officer has treated the grant as revenue receipts.

53. However, after considering the materials produced, the Appellate Authority, has found that a sum of Rs.1,88,97,000/- was

received for capital projects, like restoration of properties damaged by tsunami, improving ecotourism at Pitchavaram and improving Yercaud boat house, as per the sanction letters of the Ministry of Tourism, Government of India. The major grant of Rs.150.00 lakhs was for restoration of properties damaged by tsunami. The other two grants were for promoting eco-tourism at Pitchavaram and boat house at Yercaud. The quantum and purpose are specified in the sanction letters of Ministry of Tourism. After perusal of the same, the Commissioner of Appeals (Appellate Authority) has categorically held that the grants received are in the nature of capital grants and thus directed the Assessing Officer to delete the addition. Thereafter the department filed an appeal, the Tribunal, vide common order for the Assessment years 2005-06 & 2006-07 respectively vide Appeals in ITA Nos.550 & 551(Mds)/2010.

54. The Tribunal has also held that the grants by Government of India and Tamil Nadu were capital grants, for developing infrastructural facilities, at tourist destinations, where the assessee Corporation is operating. Government of India has disbursed such grants also for restoration of facilities damaged, due to tsunami in Tamil Nadu. It is to be seen that grants were given by the Central and State Governments, towards specific capital projects, either for renovation of damaged facilities or for erecting

new facilities such as ropeway. The entire grant has been sanctioned by the respective Governments to develop tourism facilities available in State of Tamil Nadu. They are all basically capital outlays. The grants are not made for any revenue expenditure in maintaining such basic facilities.

55. At this juncture, this Court deems it fit to consider the difference between capital receipts and revenue receipts, as generally understood. Capital receipts are the receipts, which do not form part of the normal trading or operating activity of the assessee. They are generally part of financing and investing activities of the assessee. Whereas, the revenue receipts arises through the business activities of the assessee. Revenue receipts are part of normal business operations. They are recurring. Benefits derived from the receipts are short-term. Whereas, the capital receipts are non-recurring in nature. The benefit derived is for long period. Capital receipts are amounts received in the form of corpus, infused into business. Corpus received from the normal business, for capital investment, is one of capital receipt. The nature of receipt is determined by the character, in the hands of the recipient.

56. The Tribunal has further held that the grants are not given for meeting the day-to-day expenses of the assessee corporation. On the aspect of grant, the Tribunal has also recorded that the grant has already been converted into equity capital. Therefore, it would not take partake the character of income. Tribunal has recorded a finding that the proposed projects were dropped and further observed that the funds are directed to be kept in trust so that the same can be spent for other alternative projects as directed by the Government from time to time and also expressed a note that there was no clear picture. Though on the basis of the said observation, Mr.M.Swaminathan, learned counsel for the Revenue seeks for a remand, is not inclined to order for the reason that clause 12 of letter dated 04.12.2008 of the Ministry of Tourism, Government of India, makes it abundantly clear that the State Government will not keep the amount released by the Central Government unutilised, for more than six months. In case the funds cannot be utilised for such time, the same will have to be surrendered to the Central Government with interest, or a formal approval should be taken to transfer/adjust the amounts against other Central financially assisted projects.

57. Contention of the learned counsel for the assessee that during the Assessment years under appeal, the Government have

not issued any order to take any of the income given as grant, for the earlier year, as income of the assessee has not been disputed. When the details of the grant, clarificatory letters dated 22.06.2002 of the Commissioner of Tourism, Chennai and 04.12.2008 of the Ministry of Tourism, Government of India, respectively, produced before the Appellate Authority, have been considered as to how the expenses towards security charges, electricity charges, establishment charges and expenses for providing protective coating with poly silicon to the statue have been incurred and when the assessee, by producing the letter dated 04.12.2008, had convincingly explained as to how the grant has been made for specific purposes, some of which were dropped, and the obligation of the state government to return within six months and when the assessee has offered a reasonable explanation, both the Appellate Authority and Tribunal, have rightly held that the expenditure from the grant was capital in nature. When the grants were to be utilised for a capital asset, but some of the projects, dropped, receipts should be treated only as capital in nature. Reasoning of the Tribunal, on the issue as to whether the expenditure incurred from the grant is capital receipt or revenue is convincing. On both the issues discussed supra, finding recorded are concurrent with reasons. Revenue has not made out a case for answering the substantial questions of law raised in its favour. In the light of the

discussions and decisions, all the substantial questions of law are answered against the revenue.

58. In the result, both the Tax Case Appeals are dismissed.

(S.M.K., J.) (D.K.K., J.)
19.07.2016

Index: Yes/No
Internet: Yes/No

asr/skm

S.MANIKUMAR, J.
AND
D.KRISHNAKUMAR, J.
asr

Pre-Delivery Judgment in
T.C.A.Nos.321 & 322 of 2016

19-07-2016