

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 31.8.2015 & Pronounced on: 12.4.2016

Coram:

The Honourable Mr. Justice V. RAMASUBRAMANIAN
and
The Honourable Mr. Justice T. MATHIVANAN

Tax Case (Appeal) Nos. 279 to 285 of 2015

Commissioner of Income Tax
Chennai-LTU. Appellant in
.. all TCAs.

Vs.

M/s. Neyveli Lignite Corporation Ltd.,
Corporate Office, P.O.
Neyveli-607 801. Respondent in
Cuddalore District. .. all TCAs.

Appeals filed under Section 260 A of the Income Tax Act, against the order of the Income Tax Appellate Tribunal Madras 'A' Bench dated 18th July 2012 in ITA Nos. 219/Mds/2009, 220/Mds/2009, 221/Mds/2009, 981/Mds/2009, 982/Mds/2009, 1458/Mds/2011 and 1459/Mds/2011 respectively preferred against the Common Order of the Commissioner of Income Tax Appeals, Large Tax Payer Unit, Annanagar West (Extn.) Chennai 101 dated 29.08.2008 made in ITA Nos. 18, 19, 20/07-08/LTU (TCA Nos. 279 to 281/15) and Common order dated 30.01.2009 made in ITA Nos. 21 & 22/07-08/LTU(A) (TCA Nos. 282 & 283/15) and order dated 23.06.2011 made in ITA No. 38/09-10/LTU(A) (TCA Nos. 284 & 285/15) preferred against the Assessment order of the

a) Assistant Commissioner of Income tax Circle IV(4), Chennai 34, dated 24.10.2007, 24.10.2007, 20.12.2007 respectively made in PAN No. AACN/121C (in TCA No. 279, 282, 283/15)

b) Joint Commissioner of Income Tax Special range VII, Chennai 34 dated 21.10.1998, 09.03.2000 respectively made in PAN No. AACN 1121C (in TCA 280, 281/15)

c) Deputy Commissioner of Income Tax, Large Tax Payer Unit, Anna Nagar West, Chennai 101, dated 14.12.2009, made in PAN No. AACN 1121C (in TCA Nos. 284 & 285/15) for the Assessment year 1995-96 (TCA 279/15), 1996-97 (TCA 280/15), 1997-98 (TCA

281/15), 1998-99 (TCA 282/15), 1999-00 (TCA 283/15), 1993-94 (TCA 284/15), 1994-95 (TCA 285/15) respectively.

For Appellant : Mr.T.Ravikumar
For Respondent : Mr.R.Vijayaraghavan
For M/s. Subbaraya Aiyar

COMMON JUDGMENT

These appeals are by the Revenue, filed under Section 260A of Income Tax Act, 1961, raising the following questions of law:

"(1) A.Y(s).: 1993-94 & 1994-95: Whether on the facts and in the circumstances of the case the Appellate Tribunal was right in allowing the claim of Expenses incurred on Life Extension Program (LEP) of Thermal Power Station (TPS-1), as Revenue Expenditure ?

(2) A.Y(s).: 1995-96 to 1999-2000: Whether on the facts and in the circumstances of the case the Appellate Tribunal was right in allowing the claim of Expenses incurred on Life Extension Program (LEP) of Thermal Power Station (TPS-1) and expenditure on rejuvenation of Bucket Wheel Excavators (BWE) as Revenue Expenditure?

(3) Whether on the facts and in the circumstances of the case, the Appellate Tribunal is correct in concluding that each machine in Thermal Power Station is not capable of generating power independently and hence to be viewed as a composite asset, in contrary to the decision of Supreme Court in the case of Mangayarkarasi Mills (P) Ltd. [315 ITR 114], wherein, it is held that each machine should be treated independently as such and not as mere part of an entire composite machinery of the spinning Mill?"

2. We have heard Mr.T.Ravikumar, learned Standing Counsel for the Department and Mr.R.Vijayaraghavan, learned counsel for the assessee.

3. The facts leading to the filing of the above appeals are as follows:

(a) The assessee is a Public Sector Undertaking engaged in the business of generation of electricity and mining of lignite.

(b) During the previous years relevant to the assessment years 1993-94 to 1999-2000, the assessee incurred expenditure to the tune of about Rs.252 Crores towards what was termed by them as ''Life Extension Program of Thermal Power Station-I''.

(c) From assessment years 1995-96 to 1999-2000, the assessee also incurred huge expenditure on rejuvenation of Bucket Wheel Excavator (BWE).

(d) The assessee claimed the expenditure to be Revenue expenditure allowable under Section 37 or as current repairs under Section 31(i) of the Income Tax Act.

(e) The Assessing Officer, while completing scrutiny assessment under Section 143(3) for the assessment years 1993-94 to 1999-2000, held these expenses to be capital in nature, on the ground that these expenses were incurred after the life span of the machinery, giving the assessee an enduring advantage and hence, covered by the decision of Hon'ble Supreme Court in Ballimal Naval Kishore v. Commissioner of Income Tax [224 ITR 414].

(f) The assessee took the matter on appeal, but the Commissioner of Income Tax (Appeals) confirmed the disallowance made by the Assessing Officer. On the second appeal filed by the assessee, the Tribunal remanded the matter back to the Assessing Officer to consider the issue de novo. Primarily the Tribunal was of the view that the admissibility of the claim has to be examined on the principles laid down by the jurisdictional court in Janakiram Mills v. Commissioner of Income Tax [275 ITR 403].

(g) The Assessing Officer went into the issue afresh and once again disallowed the expenditure incurred on Life Extension Program of TPS-I and rejuvenation of Bucket Wheel Excavator (BWE), treating the same as capital expenditure.

(h) As against the orders of the Assessing Officer, the assessee preferred an appeal. The Commissioner of Income Tax (Appeals) allowed the assessee's claim, holding that there was no increase in the production or generation of power capacity, even after the life extension program was carried out and that therefore, the same could not be treated as capital expenditure.

4. The Revenue filed appeals before the Tribunal. But, the Tribunal dismissed the appeals, holding that the expenditure on replacement and overhauling parts of the boilers/BWEs was incurred for preserving and maintaining the already existing assets and that the object of such expenditure was not to bring a new asset into existence. The Tribunal relied upon the decision of the Allahabad High Court in Commissioner of Income Tax v. Renu Sugar Power Co. Ltd. [298 ITR 94] and the decision of the Supreme Court in Commissioner of Income Tax v. Saravana Spinning Mills (P) Ltd., [293 ITR 201], to come to the said conclusion. Aggrieved by the decision of the Income Tax Appellate Tribunal, the Revenue has come up with the above appeals, raising the questions of law indicated in paragraph 1 above.

5. Though, the Revenue has raised three substantial questions of law, we think that all of them revolve only around one most fundamental question namely as to whether the

expenditure incurred by an assessee after the expiry of the life span of a machinery, for the purpose of expanding its life span, could be treated as a revenue expenditure or capital expenditure ?

6. Though Section 2 of the Income Tax Act defines expressions such as 'Capital Asset', 'Income', etc., it does not define the expression "expenditure". But, almost all types of expenditure that one could conceive of, are dealt with in the chapter relating to 'Computation of Total Income' under the heading 'Profits and gains of business or profession'.

7. Section 31(i) entitles an assessee to a deduction on the amount paid on account of current repairs, in respect of plant or furniture used for the purpose of business or profession. The Explanation to Section 31 makes it clear that the amount paid on account of current repairs shall not include any expenditure in the nature of capital expenditure.

8. After providing for deduction on various types of expenditure, the Act also contains a residuary provision in Section 37(1) which reads as follows:-

"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'.

9. Though Sections 31 and 37 use the expressions 'Capital expenditure' and 'current repairs', both these terms are also not defined anywhere in the Act. Therefore, Courts have repeatedly battled with these expressions, to find out whether an assessee is entitled to deduction or not.

10. In Commissioner of Income Tax v. Mahalakshmi Textile Mills Ltd. [66 ITR 710], the Supreme Court was concerned with a question as to whether the introduction of a conversion system in the spinning plant, by replacing certain roller stands and fluted rollers fitted with rubber aprons, constituted revenue expenditure or not. Since the Tribunal inspected the spinning factory and recorded a finding of fact that the assessee had merely replaced certain old parts, without actually putting in place a new machinery, the expenditure was revenue in nature. This finding was affirmed by the High Court and the Supreme Court. But in this case, there was a factual finding to the effect that certain moving parts of the machinery, due to wear and tear, had to be periodically replaced. However, the old type of replacement parts were not available in the market and hence, the assessee was compelled to introduce a new system to make the old machinery work. Therefore, this decision of the Supreme

Court would have only a limited application.

11. In Commissioner of Income Tax v. Chowgule & Co. Pvt. Ltd. [214 ITR 523], a Division Bench of the High Court of Bombay, was concerned with an interesting situation, where an assessee, who was engaged in the business of marine transport, incurred an expenditure towards the repair of a ship, which, together with the written down value of the ship, exceeded the original cost, but the assessee claimed the expenditure to be revenue in nature. After discussing the scope of the expression 'current repairs' in the popular or commercial sense, the Bombay High Court came to the conclusion that the quantum of expenditure, high or low, cannot determine its nature. Eventually, the Bombay High Court elicited certain principles in para 10 of the report, which read as follows:-

(i) The amount should be paid on account of current repairs.

(ii) 'Current repairs' means repairs undertaken in the normal course of user for the purpose of preservation, maintenance or proper utilisation or for restoring it to its original condition.

(iii) 'Current repairs' do not mean only petty repairs or repairs necessitated by wear and tear during the particular year.

(iv) Such repairs should not bring into existence nor obtain a new or different advantage.

(v) The quantum of expenditure nor the fact that in the process of repairs, there was substantial replacement of the parts of machine or ship, is decisive of the true nature of the expenditure.

(vi) The original cost of the asset is not at all relevant for ascertainment of the true nature of the expenditure on repairs.

(vii) The replacement cost of the asset may, however, at times may be used as indicator of the true character of the expenditure. If the expenditure on repairs added to the written down value or disposal value exceeds the replacement cost of the asset, a presumption is possible that it is not a revenue expenditure but expenditure of capital nature. Such presumption, of course, would be rebuttable.

(viii) The expression 'current' preceding 'repairs' appears to have been used by the legislature with a view to restricting the allowance to expenditure incurred for preservation and maintenance thereof in its current state in contradiction to that incurred on any improvement

or an addition thereto''.

12. In Commissioner of Income Tax v. Renu Sagar Power Co. Ltd. [298 ITR 94], the Allahabad High Court was concerned with the question as to whether the cost incurred on replacement of a Turbine Rotor, constituted a revenue expenditure or not. Upon finding that the Turbine Rotor is an essential part of Turbo generator set and that it is not an independent machinery capable of generating electricity by itself, the High Court held the expenditure so incurred was on account of current repairs and hence, revenue in nature.

13. As a matter of fact the Allahabad High Court followed in Renu Sagar, the decision of the Supreme Court in Commissioner of Income Tax v. Saravana Spinning Mills (P) Ltd. [293 ITR 201]. In Saravana Spinning Mills, the Supreme Court was concerned with the scope and extent of Section 31(i) of the Act as it stood during the accounting years ending 31.03.1993 and 31.03.1994. After pointing out the test formulated in New Shorrock Spinning & Manufacturing Co. Ltd., v. Commissioner of Income Tax [(1956) 30 ITR 338 (Bom)], which was also approved in Ballimal Naval Kishore v. Commissioner of Income Tax [(1997) 138 CTR (SC) 284], to the effect that if the object of the expenditure is not to bring a new asset into existence, nor to gain a fresh advantage, such expenditure could only be revenue, the Supreme Court held that an answer to the question whether an expenditure is revenue or capital in nature would depend upon the facts of each case and upon several factors. But, the Supreme Court limited its discussion in Saravana Spinning Mills, only to the import of Section 31(i) and did not express any opinion on Section 37(1).

14. In Commissioner of Income Tax v. Sri Mangayarkarasi Mills (P) Ltd. [315 ITR 114], the Supreme Court was concerned with the question whether expenditure incurred on replacement of machinery amounted to revenue expenditure deductible under Section 37 or current repairs deductible under Section 31. Placing reliance upon the decision in Saravana Spinning Mills, the Court held even in this case that the entire textile mill machinery cannot be regarded as a single asset, replacement of parts of which can be considered to be for mere purpose of preserving or maintaining this asset. Since each machine is an independent entity, the Supreme Court held that the replacement of an old machine with a new one would constitute the bringing into existence of a new asset in the place of the old one. The Court also pointed out two exceptions formulated in Saravana Spinning Mills, where replacement could amount to current repairs. These exceptions are "(i) where old parts are not available in the market (as seen in the case of Commissioner of Income Tax v. Mahalakshmi Textile Mills Ltd. [AIR 1968 SC 101], or (ii) where old parts have worked for 50-60 years".

15. After holding that Section 31 has no application to the case of replacement, the Court took up for consideration the

question whether the expenditure incurred would be deductible at least under Section 37. Even to find an answer to this question, the Court applied a four way test indicated in Saravana Spinning Mills, wherein it was held that expenditure is deductible under Section 37 only if it (a) is not deductible under Sections 30 to 36, (b) is of a revenue nature, (c) is incurred during the current accounting year, and (d) is incurred wholly and exclusively for the purpose of the business.

16. A question arose in Commissioner of Income Tax v. M/s. Machado Sons [Tax Case Appeal No.1011 of 2005 decided on 27.04.2012] as to whether the expenditure incurred for the replacement and renovation of a boat is to be treated as revenue expenditure even though the expenditure was incurred prior to the user of the asset. In para 14 of the unreported decision, this Court held as follows:-

'As far as the first issue raised by the Revenue that the expenditure was incurred after the boat was purchased is concerned, the issue would have taken a different turn if the assessee had replaced the entire boat with such a mechanism that the repair had brought in a totally new machinery in the place of the old one. Admittedly, such repair had not resulted in either in increase in capacity or totally a new outlook to the machinery so as to bring in a enduring benefit to the assessee. The second aspect of the matter is that if the repairs were done at the instance of the assessee by the vendor even before the sale was concluded, certainly, the expenditure is of capital in nature. On the admitted fact that the expenditure were incurred after the purchase by the assessee, the only hurdle that the assessee may have in this case is that the boat was not put into use before the repairs were made to it. But if one applies the decision of this Court reported in (1981) 128 ITR 675 (Commissioner of Income Tax, Tamil Nadu-I v. Vayithri Plantations Ltd.), to the phrase 'used for the purpose of business' used under Section 31 of the Income Tax Act, we do not think that there should be any hesitancy on our part to accept the plea of the assessee that the expenditure merits to be considered under Section 31 of the Income Tax Act'.

17. A careful look at the above decisions would show that though different tests had been formulated by Courts, the application of those tests had posed lot of difficulties, depending upon the facts and circumstances of each case. This is

why the Supreme Court pointed out in Saravana Spinning Mills that the answer to the question would depend upon the facts and circumstances of each case. Therefore, we shall now get back to the facts of the case.

18. In a Note submitted by the learned counsel for the respondent/ assessee, the following are indicated as the steps taken in so far as the boiler is concerned:-

(a) Electricity is generated in Thermal Power Station-I, Neyveli from the units consisting of boilers, turbines, generator and transformer. Steam generated in the boiler drives steam turbine that is coupled to the generator which generates electric power.

(b) The high-pressure parts of boiler namely, super heaters and Main Steam line are subjected to creep damage and have a service life or around 1,80,000 hours. Pressure parts, namely water walls, economizer, air heaters and auxiliary equipment namely fuel pulverizers, mills, draught fans etc. are subjected to corrosion, erosion, wear and tear. Thus, the performance of the boiler and also the safe operating ability of critical pressure parts of the boiler got eroded.

(c) The components subjected to creep damage namely super heaters, main steam line and high-pressure valve were replaced in full. Other high-pressure parts were inspected for damage, thinning out of tube wall thickness, etc., and were partially replaced to the extent required.

The following components were replaced completely in the Boilers:

(1) Ceiling super heaters, connective super heater, screen super heater along with their headers and inter connecting pipe.

(2) Boiler condenser and injection at temperator.

(3) Rear side water wall.

(4) Economiser and their transfer pipes.

(5) Main steam line with valves and fittings.

(6) High pressure valves.

(7) Air and gas ducts compensators.

The following components were replaced partially after inspection.

(1) Front and side water walls.

(2) Boiler Drum internals.

(3) Air Heaters

(4) Air and Gas ducts

(5) Feed water and injection pipe line

(6) Boiler shield and hydraulic seal

(7) Lignite pulversion mills

Following equipments were overhauled.

(1) Induced and forced draught fans

(2) Belt Feeder

(3) Slag conveyor and their systematic.

(4) Ash handling system.

Turbine, Generator and Transformer.

These major components were overhauled with the replacement of worn out parts. These expenditure are classifiable as current repairs, as they do not bring new asset into existence.

19. In so far as BWE is concerned, the assessee claims to have done the following:-

Rejuvenation of Bucket Wheel Excavator (BWE) of Mine-1:

The following critical items are replaced.

- (i) Crawler Pads
- (ii) All the six crawler frames with drivers assemblies (for 3 tracks) including the mechanical components.
- (iii) Traverse box of self aligning track
- (iv) Tower frame complete including pully mast
- (v) Bucket Wheel boom completely
- (vi) Discharge Boom complete
- (vii) Main slewing ball race and main slewing gear box shell
- (viii) Bucket wheel Boom hoist winch drum
- (ix) All the hose winch ropes

The following non-critical items are replaced:

- (i) Secondary structures like walk way and stair case for under carriage, turn table, Bucket Wheel boom, discharge boom, intermediate boom and counter weight boom.
- (ii) Motor foundation and Motor covers for all the drivers.
- (iii) Cabin and houses.

The following components have been subjected to only strengthening/repair:

- (i) Steering tiller (FST and RST)
- (ii) Under carriage
- (iii) Turn table
- (iv) Counter weight boom and Box
- (v) Intermediate structure.

20. On the basis of the nature of the repairs and replacement carried out by the assessee to the boiler as well as to BWE, it is contended by Mr.Vijayaraghavan, learned counsel for the assessee that the expression "current repairs" denotes the repairs for the purpose of preserving or maintaining an already existing asset. It does not bring about a new asset into existence, nor does it give a new or different advantage. Therefore, he contends that the test of improvement or advantage is not relevant to determine whether the repair was current repair or not. It is his further contention that the magnitude of the expenditure cannot also determine whether something is current repair or not.

21. In order to test the correctness of the above contention, it is necessary to have a look at the provisions of Sections 31 and 37.

22. Under Section 31, the amount paid on account of current repairs to plant or furniture used for the purpose of business or profession shall be allowed as deduction. But, the Explanation to Section 31 qualifies the general rule by stating

that the amount paid on account of current repairs shall not include any expenditure in the nature of capital expenditure.

23. Though the Act defines the expression "income", it does not define either the expression "expenditure" or the expression "repairs or current repairs". However, several heads of expenditure are separately dealt with under Sections 35 and 35A to 35E.

24. Section 37(1) states that any expenditure laid out or expended wholly and exclusively for the purpose of business or profession shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession". But, Section 37(1) excludes three items of expenditure. They are (i) expenditure of the nature described in Sections 30 to 36, (ii) expenditure in the nature of capital expenditure, and (iii) expenditure in the nature of personal expenses of the assessee.

25. Therefore, if an item of expenditure falls within any of the categories indicated in Sections 30 to 36, the same is entitled to deduction as per the provisions of those Sections. But, any expenditure which does not fall within the scope of Sections 30 to 36, but which may still qualify while computing the income chargeable under the head "Profits and gains of business or profession", will be covered by Section 37(1).

26. But, what is important to note is that under both provisions, namely Section 31 as well as Section 37(1), capital expenditure is excluded. If an amount paid on account of current repairs is in the nature of capital expenditure, Section 31 cannot be invoked. Similarly, Section 37(1) cannot also be invoked.

27. Keeping the above in mind, if we have a look at the order of the Tribunal, it could be seen that admittedly the assessee's power generation plant was installed in the year 1962-1970 comprising of 9 units. The power generation plant cumulatively accounted for 600 MW of capacity. The assessee's case was that they had erected one boiler for each 50 MW of power generation and the boilers worked for 12 years. Each boiler contained several parts, some of which were replaced.

28. During the assessment years 1993-94 to 1999-00, the assessee incurred the following expenditure towards replacement of various components in boilers and components of BWE. The year wise break-up of the expenditure was as follows:

Asst. years	Amount (Rs.)
1993-94	10,22,63,34 8/-
1994-95	39,35,07,77 4/-
1995-96	22,65,86,64 2/-

Asst. years	Amount (Rs.)
1996-97	27,78,53,677/-
1997-98	56,84,06,076/-
1998-99	48,23,92,595/-
1999-2000	47,35,92,595/-
Total	252,46,02,707/-

29. The Tribunal thought that so long as the assessee had not replaced the entire boiler/BWE and what were replaced were only part of the boiler, the expenditure incurred towards the same was only to preserve and maintain the existing assets without any enduring advantage. In such a view, the Tribunal held in favour of the assessee. The Tribunal also went on the footing that if a new plant has to be commissioned, it would cost Rs.4.5 Crores per MW and that the total project cost for 600 MW would run to Rs.2700 Crores. Hence, the Tribunal found that the amount of expenditure actually incurred by the assessee, could not be taken to be of such a huge nature as to project it as capital expenditure.

30. Assailing the order of the Tribunal, it is contended by Mr.T.Ravikumar, learned Standing Counsel for the Department that the assessee originally capitalised the expenditure and claimed depreciation, but reversed it later. The expenditure incurred was not done within the life span, but done beyond. As per the statute, the life span was about 25 years. But, the plant and machinery had worked for 35 years only after which the main parts were replaced. The expenditure was incurred as an one time expenditure and the same resulted in an increase in the power generation. Therefore, the learned Standing Counsel contended that the Tribunal was wrong in its conclusion.

31. On the contention of Mr.T.Ravikumar, learned Standing Counsel that the assessee originally capitalised the expenditure, but reversed the same later, we have to point out that there cannot be any estoppel in such cases. The question whether a particular expenditure would fall within the definition of the expression "current repairs" under Section 31 (i) or not, does not depend upon what the assessee did or did not. After all if the expenditure is capitalised, the assessee takes the benefit of depreciation. If the expenditure is treated as revenue expenditure, it is either taken as an expenditure under Section 37(1) for computing income chargeable under the head "Profits and gains of business or profession" or treated as "current repairs" entitled to deduction under Section 31(i). Therefore, the contention of the learned Standing Counsel cannot be accepted.

32. There was a clear finding in the order of assessment that the assessee had two options. The first option was to install a new plant which would have costed about Rs.4.5 Crores per MW with a longer gestation period. The second option was to go in for the life extension program at a cost of Rs.0.44 Crores per MW with a shorter gestation period. These findings of fact recorded by the Assessing Officer is accepted by the Revenue. Therefore, what follows out of these findings of fact, is the question to be addressed.

33. After having found that there were two options open to the assessee and that the assessee had gone in for a cheaper option (almost 1/10th of the cost of first option), the Assessing Officer fell into an error in treating both options to be of the same nature. This error in the reasoning of the Assessing Officer was rejected by both the Appellate Authorities on the basis of the principles of law enunciated in various cases which we have discussed above. Therefore, we are of the considered view that the CIT (Appeals) as well as the Tribunal were right in deciding the issue in favour of the assessee. Hence, the questions of law are answered against the Revenue and the appeals are dismissed. No costs. Consequently, connected M.Ps. are closed.

Sd/-
Assistant Registrar (CS-IV)

//True Copy//

Sub Assistant Registrar

gr/kpl

To

1. The Income Tax Appellate Tribunal,
'A' Bench, Chennai.

2. The Commissioner of Income tax,
Appeals (large Tax Payer Unit),
Anna Nagar, Western Extension,
Chennai 101.

3. The Joint Commissioner of Income Tax,
Special Range VII, Chennai 34.

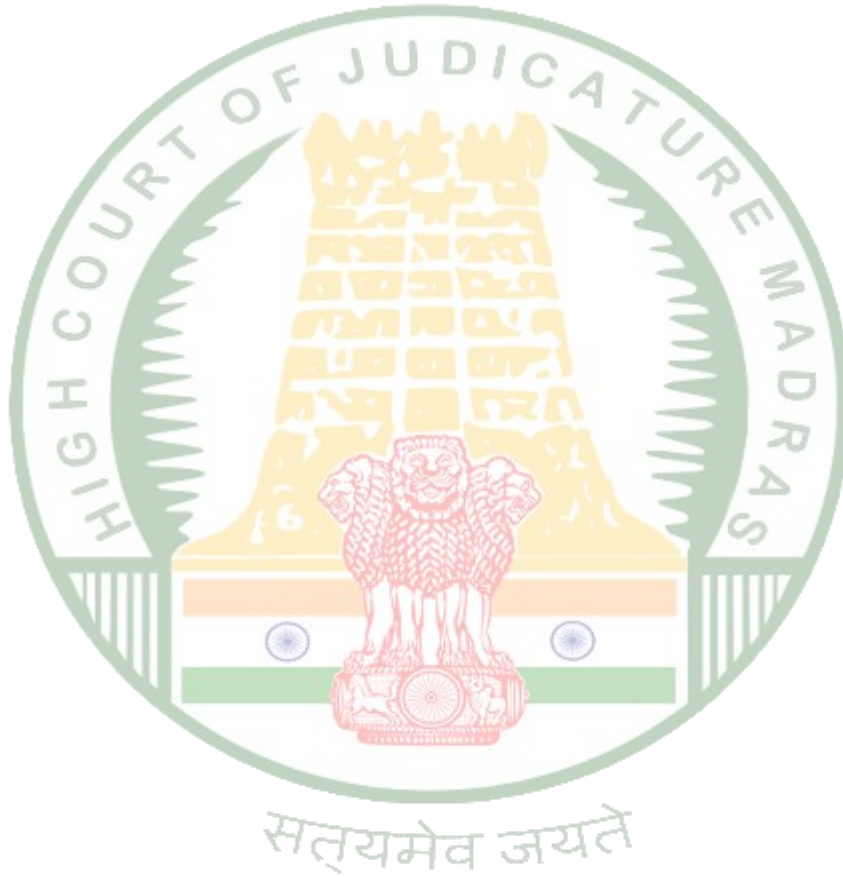
4. The Deputy Commissioner of Income Tax
Large Tax Payer Unit,
Anna Nagar West, Chennai 101.

5. The Assistant Commissioner of Income Tax Circle (IV) (4)
Chennai 34.

1 cc to M/s.Subbaraya Aiyar, Advocate, sr.22966
+2 ccs to Mr.T.Ravikumar, Advocate, sr.22661

TCA Nos.279 to 285 of 2015.

msm co
kra 25.04.2016



WEB COPY