IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT PANAJI-GOA
TAX APPEAL NO.05 OF 2007

The Commissioner of Income Tax,
having office at Aayakar Bhavan,
Patto, Plaza, Panaji-Goa. Appellant

Versus

V.M.Salgaonkar & Brothers Pvt.Ltd.,
Salgaonkar House, Post Box No.14,
F.L.Gomes Road,
Vasco-da-Gama, Goa-403 802. Respondent

Ms.Asha Desai, Advocate for the Appellant.
Mr.A.F.Diniz, Advocate for the Respondent.

CORAM : R.M.BORDE &
F.M.REIS, JJ.
DATE : 24th December, 2014

JUDGMENT (Per R.M.Borde, J.):

1 The Revenue has presented instant appeal challenging the decision rendered by Income Tax Appellate Tribunal, Panaji on 28.06.2006, whereby appeal presented by Respondent-Assessee, challenging the decision of the Commissioner of Income Tax (Appeals), came to be allowed.

2 Respondent is a Company incorporated under the Companies Act and engaged in hotel business. The Assessee Company furnished return of income along with audit report in prescribed form on 31.10.2001 informing total loss to the tune of

Rs.12,11,91,594/-. The return was processed under Section 143 (1) of the Income Tax Act on 23.09.2002. The notice under Section 143(2) of the Income Tax Act came to be issued on 16.10.2002.

3 According to the Assessing Officer, Respondent-Company is eligible for deductions under Section 80IB (7)(b) of the Act and during second year, no claim is made under the aforesaid section in view of the loss sustained by the Company during its operation. The deduction under Section 80IB is available at 50% of the profit and gains derived from business beginning from initial assessment year. The assessee Company has written off depreciation of Rs.5,00,36,420/- in profit and loss account filed along with the return to arrive at the loss of Rs.17,29,00,519/-, but in the statement of computation of income, depreciation is added back and deleted to arrive at the returned loss. According to the Respondent-Company, since there is total loss, the claim for depreciation, being optional, cannot be thrust upon the assessee. The Assessing Officer, however, took a different view and rejected the contention of the assessee and total loss of the year is computed after allowing depreciation, worked out as per the Income Tax Act.

4 Being aggrieved by the order of the Assessing Officer, appeal came to be presented by the Assessee to the Commissioner of Income Tax (Appeals), which came to be turned down and the order of Assessing Officer was confirmed. The assessee preferred further appeal to the Income Tax Appellate Tribunal at Panaji Bench, which came to be allowed and the Tribunal accepted the contentions raised by the assessee that the depreciation cannot be

thrust upon the assessee, it being optional and since it was not claimed under Chapter VIA of the Income Tax Act.

5 At the stage of admission of appeal, following substantial question of law has been framed:

> "Whether on the facts and in the circumstances of the case, the action of the ITAT in holding that the depreciation is optional and cannot be thrust upon the assessee if not claimed while computing total income u/s 80IB under chapter VIA, is justifiable in law, particularly in view of decision of our High Court in "Indian Rayon Corp. Ltd.," (261 ITR 98)?"

6 At the time of hearing of appeal, learned Counsel for the appellant has requested for formulating additional question of law as under:

> "Whether on the facts and circumstances of the case, for the AY 2001-2002 the assessee had an option to claim depreciation in the light of the amendment to Section 34(1) of the Income Tax Act, 1961, while computing income under section 29 under the head "profits and gains of business?"

7 According to the appellant, the Tribunal has failed to appreciate that though deduction under Chapter VIA were not

claimed in computation of business income, it was essential to deduct the depreciation irrespective of, whether it was claimed or not and an option was available to the assessee only until Section 34(1) was maintained in the statute book. After omission of the said provision in the year 1988, the assessee had no option of not claiming the depreciation.

8 Relying upon the judgment in the matter of **Commissioner of Income Tax Vs. Pruthvi Brokers and Shareholders Pvt.Ltd.** (2012) 349 ITR 336 (Bombay), it is contended that, it is open for the assessee to raise not merely additional legal submissions before the appellate authorities, but is also entitled to raise additional claims before them. The appellate authorities have the discretion, whether or not to permit such additional claims to be raised. It is, thus, contended that applying the analogy, additional question of law can be urged at the appellate stage.

9 It is contended that the claim for depreciation was optional until Section 34(1) was maintained in the statute book, however, after repeal and omission of the said provision, such an option is not available to the assessee. It is contended that while computing business income under Section 29, the depreciation is required to be deducted to arrive at total income. The appellant contends that *explanation* 5 to Section 32 is only declaratory and clarificatory in nature and as such, it applies to the case and it is not open for the appellant to contend that option is available either to claim depreciation or not to claim.

10 Section 2(45) of the Income Tax Act defines "total income", to mean, the total amount of income referred to in Section 5 computed in the manner laid down in the Act. Section 5 provides for "Scope of total income". Sub-section (1) reads thus:

> **5(1)** Subject to the provisions of this Act, the total income of any previous year of a person who is a resident includes all income from whatever source derived which--
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> (a) is received or is deemed to be received in India in such year by or on behalf of such person; or
>
> (b) accrues or arises or is deemed to accrue or arise to him in India during such year; or
>
> (c) accrues or arises to him outside India during such year:
>
> Provided that, in the case of a person not ordinarily resident in India within the meaning of sub-section (6) of section 6, the income which accrues or arises to him outside India shall not be so included unless it is derived from a business controlled in or a profession set up in India.

11 Chapter IV of the Income Tax Act deals with computation of total income under various heads of income. Under Section 14 – Heads of Income is classified as:

A. -- Salaries

B. -- Omitted

C. -- Income from house property.

D. -- Profits and gains of business or profession.

E. -- Capital gains

F. -- Income from other sources.

12 Section 28 of the Act provides for, Profits and gains of business or profession, which was carried on by the assessee at any time during the previous year, shall be chargeable to income-tax under the the head "Profits and gains of business or profession. Section 29 contained in Chapter IV provides for computation of income from profits and gains of business or profession, which is required to be computed in accordance with provisions contained in Sections 30 to 43D. Section 32 refers to "depreciation", which reads thus:

> **32(1) In respect of depreciation of**-
>
> (i) buildings, machinery, plant or furniture, being tangible assets;
>
> (ii) know-how, patents, copyrights, trade marks, licenses, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998, owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed
>
> (i) in the case of assets of an undertaking engaged in generation or generation and distribution of power, such percentage on the actual cost thereof to the assessee as may be prescribed.
>
> (ii) In the case of any block of assets, such percentage on the written down value thereof as may be prescribed;
>
> *Explanation 2 -* For the purposes of this sub-section "written down value of the block of

> assets" shall have the same meaning as in clause [c] of sub-section (6) of section 43.
>
> *Explanation 5* – For the removal of doubts, it is hereby declared that the provisions of this sub-section shall apply whether or not the assessee has claimed the deduction in respect of depreciation in computing his total income.

13 Section 34 (1), prior to its deletion in the year 1988, provides thus:

> **34 Conditions for depreciation allowance and developmental rebate**:
>
> (1) The depreciation referred to in sub-section (1) {or sub section (1A)] of section 32 shall be allowed only if the prescribed particulars have been furnished; and the deduction referred to in section 33 shall be allowed only if the particulars prescribed for the purpose of clause (I) and clause (ii) of sub section (1) of section 32 have been furnished by the assessee in respect of the ship or machinery or plant.

14 According to the appellant-Revenue, bare perusal of Section 34 (1) and (2) shows that the assessee had an option to claim depreciation, since as per Section 34 (1), depreciation was made available only if prescribed particulars have been furnished. Referring to the case of **Commissioner of Income Tax Vs. Mahindra Mills**, (2000) 243 ITR 56 (SC), it is contended that Section 32 allows depreciation as deduction subject to provisions of Section 34. It is contended that Section 34 (1) provides that deduction under Section 32 shall be allowed only if prescribed particulars have been furnished. It is contended that once the condition contained in Section 34 is omitted, the deduction has to

be computed even if details were not furnished by the assessee. It is further contended that in order to settle the controversy, the Legislature has inserted *Explanation* to Section 32 clarifying that the claim of depreciation is mandatory. It is, thus, contended that since the explanation is clarificatory in nature, it applies to the instant case also. It is, thus, contended that since the assessee is an eligible unit for deduction under Chapter VIA, the income has to be computed in accordance with the provisions of the Act and the permissible deduction has to be allowed while computing the income.

15 Reliance is placed on the judgment in the matter of **Dabur India Ltd. Vs. Commissioner of Income Tax** (2008) 219 CTR 152 (Delhi), to contend that deductions sought by the assessee under Section 80IB and 80HHC are required to be allowed in computing the total income of the assessee. Similarly, reliance is placed on the judgment in the matter of **Commissioner of Income Tax Vs. Willamson Financial Services and others**, reported in (2008) 297 ITR 17 (SC). The appellant has also referred to the judgments in the matter of **Indian Rayon Corporation Ltd. Vs. Commissioner of Income Tax**, reported in [2003] 261 ITR 98 (Bombay); and in the matter of C**ommissioner of Income Tax Vs. V.M.Salgaonkar & Brothers Ltd. & another**, reported in (2012) 72 DTR 369 (Bombay); as also in the matter of **Plastiblends India Ltd. Vs. Additional Commissioner of Income Tax, Mumbai**, reported in [2009) 318 ITR 352 (Bombay).

16 It is contended by the assessee that the question of law, including the substituted question, does not arise in the

appeal in view of the fact situation, since the assessee has reported total loss.

17 According to us, depreciation is a deduction from profit and since there was no profit, but total loss, there arises no question of claiming depreciation. The assessee contends that in view of Section 32(2) of the Income Tax Act, in the absence of profit, the depreciation amount has to be added to the amount of allowance for depreciation for the following previous year and deemed to be a part of that allowance, or if there is no such allowance for that previous year, be deemed to be the allowance for that previous year, and so on for the succeeding previous years.

18 It is contended that the Supreme Court, in the matter of **Mahendra Mills** (*supra*), has held that the depreciation cannot be thrust upon the assessee not only in view of the form prescribed under Section 34(1) of the Income Tax Act, but also since <u>depreciation had to be claimed in order to be allowed</u>. It is also contended that the claim for depreciation is for the benefit of the assessee and if he does not wish to avail of the benefit for some reason, the benefit cannot be forced upon him. The Supreme Court has approved earlier judgment of the Bombay High Court in the matter of **Commissioner of Income Tax Vs. Arun Textiles**.

19 It is further contended that *Explanation* (5) to Section 32 does not apply since it was enacted and applied subsequently. It is contended that merely because it is styled as an *"explanation"*, it does not mean that it is retrospective. Reliance is placed on the judgment of the Madras High Court in the matter of

Commissioner of Income Tax Vs. AirCel, reported in (2008) 296 ITR 85; as well as judgment of the Kerala High Court in the matter of **Commissioner of Income Tax Vs. Kerala Electric Lamp Works**, reported in (2003) 261 ITR 721. It is further contended that in the matter of **Commissioner of Income Tax Vs. Vatika Township (P) Ltd**., reported in (2014) 367 ITR 466, the Supreme Court has held a similar clarificatory explanation to be prospective. It is contended that Section 29 of the Income Tax Act pertains to computation of income and same has to be read with other provisions of the enactment. The computation of income/total loss cannot be stretched to mean that depreciation has to be deducted so as to render Section 32(2) of the Income Tax Act otiose.

20 In **Mahendra Mills**' case, the Supreme Court has observed that language of the provisions of Section 32 and 34 of the Income-tax Act is specific and admits of no ambiguity. Section 32 allows depreciation as deduction subject to the provisions of section 34. Section 34 provides that deduction under section 32 shall be allowed only if the prescribed particulars have been furnished. We have seen Rule 5AA of the Income-tax Rules, 1962. which, though since deleted, provided for the particulars required for the purpose of deduction under Section 32. Even in the absence of Rule 5AA, the return of income in the form prescribed itself requires particulars to be furnished if the assessee claims depreciation. These particulars are required to be furnished in great detail. There is a circular of the Board dated August 31, 1965, which provides that depreciation could not be allowed where the required particulars have not been furnished by the assessee

and no claim for the depreciation has been made in the return. The Income-tax Officer in such a case is required to compute the income without allowing depreciation allowance. If bar contained in section 34 is not satisfied and the particulars are not furnished by the assessee, his claim for depreciation under section 32 cannot be allowed. Section 29 is thus to be read with reference to other provisions of the Act. It is not in itself a complete code. It is observed in the judgment that, a thing is "allowed" when it is claimed. It is observed that we get support from earlier decision of this Court in **Dharampur Leather Co.Ltd.'s** case (1966) 60 ITR 165. Allowance of depreciation is calculated on the written down value of the assets, which written down value would be the actual cost of acquisition, less the aggregate of all deductions "actually allowed" to the assessee for the past years. "Actually allowed" does not mean "notionally allowed". If the assessee has not claimed deduction of depreciation in any past year, it cannot be said that it was notionally allowed to him. A subtle distinction is there when we examine the language used in section 16 and that of sections 34 and 37 of the Act. It is rightly said that <u>a privilege cannot be to a disadvantage and an option cannot become an obligation</u>.

21 An identical view has been taken by the Division Bench of Madras High Court in the matter of **Commissioner of Income Tax Vs. AirCel**, reported in (2008) 296 ITR 85; as well as judgment of the Kerala High Court in the matter of **Commissioner of Income Tax Vs. Kerala Electric Lamp Works**, reported in (2003) 261 ITR 721. The question posed was identical, as to whether on the facts and in the circumstances of the case and when the assessee did not make a claim or a request for allowance

of depreciation, whether the Assessing Officer would be justified in allowing deduction? Dealing with the issue, the Kerala High Court has held that depreciation cannot be thrust upon when it is not claimed.

22 Considering the argument in respect of retrospective application of *Explanation* 5 to Section 32, the Division Bench held that the *explanation* has no retrospective effect. It ought to be considered that the amendment to Section 32 is made effective from 1st April, 2002 specifically and as such, it cannot be said that it is retrospective in operation. The effect of *explanation*, added with effect from a particular date, has come up for consideration before the High Courts. In the matter of **Commissioner of Income Tax Vs. Rajasthan Mercantile Co.Ltd.**, reported in (1995) 211 ITR 400, the Delhi High Court considered the provision by way of *explanation* added to the entertainment expenditure. The *explanation* was added merely for removal of doubts with effect from 01.04.1976. The Court held that a fiscal legislation cannot be interpreted without reference to the language employed by the statute which brought it into existence. When the statute enacting an amendment or introducing a new provision states that the provision is to be read "with effect from" a particular date, normally the Court cannot travel beyond that date along with the new provision while interpreting words used prior to that date, unless the natural meaning of the relevant words was totally ignored earlier and the newly added declaratory provision embodies the ordinary and natural meaning of those words. When the Legislature has made the *explanation* operative prospectively by words expressed therein, it's operation shall have to be

confined to the future date. Similar is the view taken in the matter of **Commissioner of Income Tax Vs. S.R. Patton**, reported in (1992) 193 ITR 49.

23 The Supreme Court, in the matter of **Commissioner of Income Tax Vs. Vatika Township (P) Ltd**., reported in (2014) 367 ITR 466, overruled the Division Bench judgment in the matter of **Commissioner of Income Tax Vs. Suresh N. Gupta** (2008) 297 ITR 322/166 Taxman 313 (SC), treating the proviso as clarificatory and giving it retrospective effect.

24 In the case of **Dabur India Ltd. Vs. Commissioner of Income Tax**, reported in (2008) 219 CTR 152 (Delhi), reference to the observations made in the case of **Indian Rayon Corporation Ltd. Vs. Commissioner of Income Tax** (2003) 261 ITR 98, has been made. It is observed thus:

> "In the above judgments of the Bombay High Court to which one of us (Kapadia, J.) was a party, it has been held, inter alia, that Chapter VI-A of the Income-tax Act deals with special deductions. That, Chapter VI-A, for the purposes of computing such deductions, constituted a separate code by itself. In order to compute the total taxable income of the assessee, deductions computed under section 80HH have to be reduced from the gross total income of the assessee. The question basically in this matter is concerning computation of deduction under Chapter VI-A in which section 80HH falls. Profits and gains of a newly established undertaking, therefore, have got to be computed as per the provisions of section 29 to section 43A and if the assessee claims relief under Chapter VI-A of the Act, then it is not

> open to the assessee to disclaim depreciation allowance. This is because Chapter VI-A is an independent code by itself for computing these special types of deductions. In other words, one must first calculate the gross total income from which one must deduct a percentage of incomes contemplated by Chapter VI-A. That such special incomes were required to be computed as per the provisions of the Act, viz., section 29 to section 43A, which included section 32(2). Therefore, one cannot exclude depreciation allowance while computing profits derived from a newly established undertaking for computing deductions under Chapter VI-A. Therefore, the appellants claim for allowance of deduction under section 80HH, without taking into consideration the current depreciation will have to be rejected.
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> We are in agreement with the ratio of the decision of the Bombay High Court in the case of Indian Rayon Corporation Ltd. (supra).

25 It is, thus, clear that while computing profit derived from newly established undertaking, one cannot exclude depreciation allowance. In the instant matter, the distinguishing feature is that there is no profit, but a total loss. As such, question of claiming depreciation does not arise at all.

26 The judgment of the Delhi High Court in the case of **Dabur India Ltd**. *(supra)* was in relation to a claim made for deduction from profits, that too, under Chapter VI-A of the Income Tax Act, which is distinguishable from the instant matter. Accepting argument of the Revenue, would render Section 32(2) of the Income Tax Act otiose. The explanation (5) to Section 32, for the reasons recorded above, shall have to be held as prospective.

Same cannot be read so as to aid the interpretation put up by the Revenue. Hence, appeal of the Revenue is devoid of substance.

27 In the result, Tax Appeal stands dismissed. There shall be no order as to costs. Civil Application, if any, does not survive and stand disposed of.

F.M.REIS
JUDGE

R.M.BORDE
JUDGE

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