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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 24.01.2017

+ **ITA 13/2012**

+ **ITA 14/2012**

SONY INDIA PVT LTD

..... Appellant

versus

CIT

..... Respondent

Through : Sh. Nageswar Rao and Sh. Purushottam
Anand, Advocates, for appellants.

Sh. Zoheb Hossain, Sr. Standing Counsel with Sh.
Deepak Anand, Jr. Standing Counsel.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE NAJMI WAZIRI

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

1. The following questions of law arise for consideration in both these cases:

"(i) Whether the Income Tax Appellate Tribunal was right in holding that the appellant is not entitled to depreciation under Section 32 of the Income Tax Act, 1961, in respect of the balance written down value relating to Daru Hera unit, forming part of the block of assets?"

"(ii) Whether the appellant is entitled to depreciation in respect of the assets, which were part of the Daru Hera unit, even if the assets had not been put to use during the assessment year 2005-2006 and had been sold prior to the end of the accounting year?"

2. The appellant, a wholly owned subsidiary of Sony Corporation, Japan was engaged in the assembling and distribution of colour televisions, audio products and high-end electronic goods, including DVDs and handycams. It

inter alia imported goods from its associated enterprises (AEs) and also rendered advisory services and software development services to such AEs. The assessee had filed transfer pricing reports which were subjected to examination by the Transfer Pricing Officer (TPO) after which the Assessing Officer (AO) completed the assessment. In the period covered by AY 2005-06 (FY 2004-05), the assessee had sold its Daru Hera unit; it completely closed down its manufacturing activity in Daru Hera plant. Its assets were sold and transferred. The assets were part of a block of assets; the assessee/appellant claimed ₹4,42,22,475/- as depreciation. The AO disallowed the claim, holding that the assessee was neither owner of the plant and machinery nor used it for the purpose of business. The assessee's appeal to the CIT(A) was unsuccessful. The Income Tax Appellate Tribunal (ITAT), in its decision affirmed the findings of the CIT(A) and *inter alia* held as follows:

“11.5 Having considered the facts and the jurisprudence in the matter, it may be mentioned that neither the building nor the machinery or plant in Dharuhera unit were owned by the assessee or used by it on account of closure of the unit and transfer of the assets in this year. As held earlier, it has not been established by the assessee that the business of manufacturing and trading constituted one composite business. The aforesaid two blocks of assets in respect of Dharuhera unit ceased to exist on transfer of all the assets in these blocks. It is true that for the purpose of computing the deduction of depreciation, the assessee had prepared a consolidated statement including all the assets of all units under respective blocks. This however cannot be accepted as a basis that the respective blocks of Dharuhera unit, carrying on manufacturing business, did not stand exhausted. The facts of the case of Inductotherm (India) Ltd. are distinguishable as some assets had been discarded but scrap value was not ascertained. The block of assets had not

thus come to an end. The facts of Nathani Steels Ltd are also distinguishable as it was a case of installation of a new unit whose assets had not been used at all. It was not a case of closure of one of the unit, where the assets have been used earlier to the closure. The facts of the case of SRF Ltd. are also distinguishable because the assets could not be used in a particular year although they were used in preceding and subsequent years and the Tribunal came to the conclusion that the principle of passive user could be applied. In the case of Yamaha Motor (India) Pvt; Ltd. the question was regarding the year in which monies payable in respect of discarded assets could be reduced from the block of assets and, thus, the facts are distinguishable. Position in respect of Vinyl Chemicals (India).Ltd. is also similar. The facts of the case of Dineshkumar Gulabchand Aggarwal are also distinguishable in as much as the newly acquired asset had not been actually used in the business.

11.5 In the instant case, the question is not regarding passive user of the assets of the business or regarding the year in which sale consideration or the scrap value had to be reduced from the WDV of the blocks of buildings and machinery and plant on Dharuhera unit. These assets were transferred by the assessee in this year. Therefore, these assets' neither belonged to the assessee nor used for the purpose of business of the assessee of manufacturing goods. We have already mentioned that the assessee has not established that this unit was only a part of overall business of manufacturing and trading activities. Therefore; the provisions contained in section 32 regarding ownership, and user come into play. As the assessee is neither the owner of the assets nor the assets have been used in the business of the assessee, the assessee is not entitled to deduct depreciation.

11.6 Section 50 regarding "Special provision for computation of capital gain in 'case of depreciable assets" deals inter-alia with a situation where any block of assets ceases to exist for the reason that all the assets in the block have been transferred

during the previous year. It is provided that income received or accruing as a result of such transfer shall be deemed to be the capital gains arising from the transfer of short-term capital asset. We are of the view that the case of the assessee falls within the ambit of this sub-section because the word "income" includes within its ambit the "loss" also. The AO is directed to hear the assessee in this matter and compute the loss as provided in section 50(2).

11.7 In the result, the ground is treated as partly allowed as discussed above."

3. The assessee contends that with the introduction of the Finance Act, 1988 and the changes brought about to Section 43 as well as Section 50, wherever an assessee maintains several capital assets which form a block, the composite nature of the asset block and its tax treatment cannot be dependent upon whether the whole exists or parts thereof are sold-off or transferred. In aid of its submission, the assessee relies upon the ruling of this Court in *CIT v. Oswal Agro Mills Ltd.* (2012) 341 ITR 467 (Del) and the subsequent judgment in *CIT v. Ansal Properties and Infrastructure Limited* (2012) 207 Taxmann 61 (Del). Learned counsel also relied upon the previous ruling in *CIT v. Bharat Aluminium Co. Ltd.* (2010) 187 Taxmann 111 (Del).

4. Learned counsel for the respondents/Revenue resisted the appeals and relied upon his textual interpretation of Section 32(1). He argued that once the Daru Hera unit was sold and it ceased to exist, it could not be, therefore, said to have been owned or used by the assessee during the relevant assessment years. Consequently, it could not claim the benefit of depreciation. He relied upon the previous ruling of this Court in *Allied Electronics and Magnetics Ltd. v. CIT* (2008) 304 ITR 160.

5. The relevant provisions of the Income Tax Act, 1961 are reproduced as follows:

6. Section 2(11) defines the term “block of assets” and reads as follows:

"block of assets" means a group of assets falling within a class of assets comprising—

(a) tangible assets, being buildings, machinery, plant or furniture;

(b) intangible assets, being know-how, patents, copyrights, trade-marks, licences, franchises or any other business or commercial rights of similar nature, in respect of which the same percentage of depreciation is prescribed ;

7. Section 2(42A) defines capital assets as follows:

“short-term capital asset" means a capital asset held by an assessee for not more than thirty-six months immediately preceding the date of its transfer :

8.. Section 32(1) reads as under:

“Depreciation.

32. (1) In respect of depreciation of—

(i) buildings, machinery, plant or furniture, being tangible assets;

(ii) know-how, patents, copyrights, trade marks, licences, 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 prescribed³¹;

(ii) in the case of any block of assets, such percentage on the written down value thereof as may be prescribed³²:

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Provided further that where an asset referred to in clause (i) or clause (ii) or clause (iia) 33[or the first proviso to clause (iia)], as the case may be, is acquired by the assessee during the previous year and is put to use for the purposes of business or profession for a period of less than one hundred and eighty days in that previous year, the deduction under this sub-section in respect of such asset shall be restricted to fifty per cent of the amount calculated at the percentage prescribed for an asset under clause (i) or clause (ii) or clause (iia), as the case may be :

[**Provided also** that where an asset referred to in clause (iia) or the first proviso to clause (iia), as the case may be, is acquired by the assessee during the previous year and is put to use for the purposes of business for a period of less than one hundred and eighty days in that previous year, and the deduction under this sub-section in respect of such asset is restricted to fifty per cent of the amount calculated at the percentage prescribed for an asset under clause (iia) for that previous year, then, the deduction for the balance fifty per cent of the amount calculated at the percentage prescribed for such asset under clause (iia) shall be allowed under this sub-section in the immediately succeeding previous year in respect of such asset:]

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Provided also that the aggregate deduction, in respect of depreciation of buildings, machinery, plant or furniture, being tangible assets or know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets allowable to the predecessor and the successor in the case of succession referred to in clause (xiii), clause (xiiib) and clause (xiv) of section 47 or section 170 or to the amalgamating company and the amalgamated company in the case of amalgamation, or to the demerged company and the resulting company in the case of demerger, as the case may be, shall not exceed in any previous year the deduction calculated at the prescribed rates as if the

succession or the amalgamation or the demerger, as the case may be, had not taken place, and such deduction shall be apportioned between the predecessor and the successor, or the amalgamating company and the amalgamated company, or the demerged company and the resulting company, as the case may be, in the ratio of the number of days for which the assets were used by them.

Explanation 1.—Where the business or profession of the assessee is carried on in a building not owned by him but in respect of which the assessee holds a lease or other right of occupancy and any capital expenditure is incurred by the assessee for the purposes of the business or profession on the construction of any structure or doing of any work in or in relation to, and by way of renovation or extension of, or improvement to, the building, then, the provisions of this clause shall apply as if the said structure or work is a building owned by the assessee.

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 3.—For the purposes of this sub-section, the expression "assets" shall mean—

(a) tangible assets, being buildings, machinery, plant or furniture;

(b) intangible assets, being know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature.

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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;

(iia) in the case of any new machinery or plant (other than ships and aircraft), which has been acquired and installed after the 31st day of March, 2005, by an assessee engaged in the business of manufacture or production of any article or thing 34[or in the business of generation or generation and distribution] of power, a further sum equal to twenty per cent of

the actual cost of such machinery or plant shall be allowed as deduction under clause (ii) :

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Provided [further] that no deduction shall be allowed in respect of—

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(D) any machinery or plant, the whole of the actual cost of which is allowed as a deduction (whether by way of depreciation or otherwise) in computing the income chargeable under the head "Profits and gains of business or profession" of any one previous year;

(iii) in the case of any building, machinery, plant or furniture in respect of which depreciation is claimed and allowed under clause (i) and which is sold, discarded, demolished or destroyed in the previous year (other than the previous year in which it is first brought into use), the amount by which the moneys payable in respect of such building, machinery, plant or furniture, together with the amount of scrap value, if any, fall short of the written down value thereof :

Provided that such deficiency is actually written off in the books of the assessee.

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9. Section 43(6)(c) reads as follows:

"Definitions of certain terms relevant to income from profits and gains of business or profession.

43. In sections 28 to 41 and in this section, unless the context otherwise requires—

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(6) "written down value" means—

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(c) in the case of any block of assets,—

(i) in respect of any previous year relevant to the assessment year commencing on the 1st day of April, 1988, the aggregate of the written down values of all the assets falling within that block of assets at the beginning of the previous year and adjusted,—

(A) by the increase by the actual cost of any asset falling within that block, acquired during the previous year;

(B) by the reduction of the moneys payable in respect of any asset falling within that block, which is sold or discarded or demolished or destroyed during that previous year together with the amount of the scrap value, if any, so, however, that the amount of such reduction does not exceed the written down value as so increased; and

(C) in the case of a slump sale, decrease by the actual cost of the asset falling within that block as reduced—

(a) by the amount of depreciation actually allowed to him under this Act or under the corresponding provisions of the Indian Income-tax Act, 1922 (11 of 1922) in respect of any previous year relevant to the assessment year commencing before the 1st day of April, 1988; and

(b) by the amount of depreciation that would have been allowable to the assessee for any assessment year commencing on or after the 1st day of April, 1988 as if the asset was the only asset in the relevant block of assets, so, however, that the amount of such decrease does not exceed the written down value;

(ii) in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 1989, the written down value of that block of assets in the immediately preceding previous year as reduced by the depreciation actually allowed in respect of that block of assets in relation to the said preceding previous year and as further adjusted by the increase or the reduction referred to in item (i).

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Explanation 3.—Any allowance in respect of any depreciation carried forward under sub-section (2) of section 32 shall be deemed to be depreciation "actually allowed".

Explanation 4.—For the purposes of this clause, the expressions

"moneys payable" and "sold" shall have the same meanings as in the Explanation below sub-section (4) of section 41.

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Explanation 6.—Where an assessee was not required to compute his total income for the purposes of this Act for any previous year or years preceding the previous year relevant to the assessment year under consideration,—

(a) the actual cost of an asset shall be adjusted by the amount attributable to the revaluation of such asset, if any, in the books of account;

(b) the total amount of depreciation on such asset, provided in the books of account of the assessee in respect of such previous year or years preceding the previous year relevant to the assessment year under consideration shall be deemed to be the depreciation actually allowed under this Act for the purposes of this clause; and

(c) the depreciation actually allowed under clause (b) shall be adjusted by the amount of depreciation attributable to such revaluation of the asset.

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10. Sections 50(1) & (2) reads as follows:

“Special provision for computation of capital gains in case of depreciable assets.

50. *Notwithstanding anything contained in clause (42A) of section 2, where the capital asset is an asset forming part of a block of assets in respect of which depreciation has been allowed under this Act or under the Indian Income-tax Act, 1922 (11 of 1922), the provisions of sections 48 and 49 shall be subject to the following modifications :—*

(1) where the full value of the consideration received or accruing as a result of the transfer of the asset together with the full value of such consideration received or accruing as a result of the transfer of any other capital asset falling within the block of the assets during the previous year, exceeds the aggregate of the following amounts, namely :—

(i) expenditure incurred wholly and exclusively in connection with such transfer or transfers;
(ii) the written down value of the block of assets at the beginning of the previous year; and
(iii) the actual cost of any asset falling within the block of assets acquired during the previous year,
such excess shall be deemed to be the capital gains arising from the transfer of short-term capital assets;
(2) where any block of assets ceases to exist as such, for the reason that all the assets in that block are transferred during the previous year, the cost of acquisition of the block of assets shall be the written down value of the block of assets at the beginning of the previous year, as increased by the actual cost of any asset falling within that block of assets, acquired by the assessee during the previous year and the income received or accruing as a result of such transfer or transfers shall be deemed to be the capital gains arising from the transfer of short-term capital assets.”

11. In *Ansal Properties (supra)*, the facts indicated – in para 4 are that the assessee had sold the entire plant and machinery of its paper division and stopped and seized to carry on its business. Likewise, in *Oswal (supra)* too, the assessee had claimed depreciation of its various assets, including a claim in respect of closed unit at Bhopal. It is thus clear that in both the judgments, the Court had occasion to deal with certain fact situations – in *Ansal Properties (supra)*, the facts were closely proximate to the circumstances of this case. After discussing the relevant provisions in *Ansal Properties (supra)*, the Court stated that Section 50 would apply where any block of assets ceases to exist and stated *inter alia* as follows:

“18. Section 50(2) applies where any block of assets ceases to exist. The term —block of assets‡ therein will mean the assets carrying same rate of depreciation fixed in the schedule. In case the block of assets, i.e., all assets exigible to same rate of

depreciation in the schedule ceases to exist because of transfer/sale, sub-section (2) to Section 50 gets initiated and is accordingly applied. The requirement and pre-condition stipulated is that the block of asset should cease to exist. The block of asset should stand completely depleted and no asset should remain in the block.

19. In the present case, there is no finding of the Assessing Officer or the appellate authorities that the block of assets carrying the same rate of depreciation ceased to exist or that after adding the three elements mentioned in Section 50, there was surplus on the full value of consideration received or accruing as a result of transfer of plant and machinery or the building. It is not the finding of the Assessing Officer that the block of assets entitled to the same percentage of depreciation ceased to exist or there was a surplus in the block of assets carrying the same rate of depreciation. The Assessing Officer has proceeded on the basis that the division itself constitutes a separate and an independent block of assets. Appendix to the Rules as noticed above, is not a unit/division specific but is rate of depreciation specific, as all assets prescribed the same rate of depreciation are clubbed and are a part of the same block of assets. The view we have taken finds resonance and acceptance in two decisions of the Delhi High Court in Commissioner of Income Tax versus Eastman Industries Limited, 174 Taxman 344 and Commissioner of Income Tax versus Oswal Agro Mills Limited, (2012) 341 ITR 467 (Del.).”

12. The Court thereafter took into consideration the Direct Taxes Circular no. 469 issued on 23.09.1986. The same reads as follows:

“6.3 As mentioned by the Economic Administration Reforms Commission (Report No. 12, para 20), the existing system in this regard requires the calculation of depreciation in respect of each capital asset separately and not in respect of block of assets. This requires elaborate bookkeeping and the process of checking by the Assessing Officer is time consuming. The greater differentiation in rates, according to the date of

purchase, the type of asset, the intensity of use, etc., the more disaggregated has to be the record-keeping. Moreover, the practice of granting the terminal allowance as per section 32(1)(iii) or taxing the balancing charge as per section 41(2) of the Income-tax Act necessitate the keeping of records of depreciation already availed of by each asset eligible for depreciation. In order to simplify the existing cumbersome provisions, the Amending Act has introduced a system of allowing depreciation on block of assets. This will mean the calculation lump sum amount of depreciation for the entire block of depreciable assets in each of the four classes of assets, namely, buildings, machinery, plant and furniture."

13. In *Oswal (supra)* and *Ansal Properties (supra)*, it was noticed that the Parliament had deleted the provision for terminal depreciation in respect of each asset that was previously allowed under Section 32(1)(c) and the taxation of balancing charge under Section 41(2) in the year when the sale was concluded. The Court noticed in *Oswal (supra)* as follows:

"Instead of these two provisions, now whatever is the sale proceed of sale of any depreciable asset, it has to be reduced from the block of assets. This amendment was made because now the assesseees are not required to maintain particulars of each asset separately and in the absence of such particular, it cannot be ascertained whether on sale of any asset, there was any profit liable to be taxed under section 41(2) or terminal loss allowable under section 32(1)(iii). This amendment also strengthen the claim that now only detail for "block of assets" has to be maintained and not separately for each asset.

33. Having regard to this legislative intent contained in the aforesaid amendment, it is difficult to accept the submission of the learned counsel for the Revenue that for allowing the depreciation, user of each and every asset is essential even when a particular asset forms part of "block of assets". Acceptance of this contention would mean that the assessee is to be directed to maintain the details of each asset separately and

that would frustrate the very purpose for which the amendment was brought about. It is also essential to point out that the Revenue is not put to any loss by adopting such method and allowing depreciation on a particular asset, forming part of the “block of assets” even when that particular asset is not used in the relevant assessment year. Whenever such an asset is sold, it would result in short term capital gain, which would be exigible to tax and for this reason, we say that there is no loss to Revenue either.

34. The upshot of the aforesaid discussion is that though we are not entirely agreeing with the reasoning of the Tribunal contained in the impugned judgment, we are upholding the conclusion of the Tribunal based on the “block of assets” as discussed above. The consequence would be to dismiss these appeals. However, there will be no order as to costs.”

14. Rejecting the contention similar to the one advanced with respect to interpretation of Section 32, the Division Bench in *Ansal Properties (supra)* observed as follows:

“26. Learned counsel for the Revenue has relied upon Section 32 of the Act and has submitted that the effect of the said Section should be examined while computing short term capital gains and interpreting Section 50. It is not possible to accept the said contention. Capital gains is chargeable to tax under Chapter IV-E. The provisions of the said Chapter are independent and separate. The provisions of the said chapter relating to capital gains have to be examined and interpreted. Only if there is a contradiction or conflict, we have to harmoniously interpret the two provisions. Section 50 incorporates a deeming fiction and has to be given and interpreted accordingly. Section 32 forms part of Chapter IV-D and relates to computation of income from profession and business. It is not the case of the Revenue that the gain on transfer of the block of assets is taxable as business income. The two sections operate in their own field and there is no conflict. In these circumstances, we do not think we should refer and rely

upon Section 32 and accordingly compute and decide whether short term capital gains is payable under Chapter IV-E.”

15. In view of the above discussion, this Court is of the opinion that the reliance placed upon *Allied Electronics (supra)* cannot be of assistance to the Revenue. That did not take into account the changes brought about through the amendment and appears to have been on an appreciation of *Maharashtra Minerals Corporation Ltd. v. CIT* 1995 (216) ITR 575. That decision was in the context of law prevailing in 1972-73 – obviously before the amendments were made to the Act prior to the introduction of the concept of block assets.

15. For the foregoing reasons, both the questions of law are answered in favor of the assessee and against the Revenue. The appeals are accordingly allowed

S. RAVINDRA BHAT
(JUDGE)

NAJMI WAZIRI
(JUDGE)

JANUARY 24, 2017/ajk