IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.1861 OF 2017

Commissioner of Income Tax-LTU ...Appellant

vs.

Rashtriya Chemicals and Fertilizers Ltd. ...Respondent

Mr. Tejveer Singh for Appellant.
Mr. Paras Savla a/w Mr. Harsh Shah i/b Mr. Atul K. Jasani for Respondent.

CORAM : K. R. SHRIRAM AND
AMIT B. BORKAR, JJ.

DATE : 26 OCTOBER 2021

P. C. :

Appellant has proposed the following substantial questions of law for our consideration:

a) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT was right in quashing the order passed under Section 263 of the Act ?

b) Whether, on the facts and in the circumstances of the case and in law, the Hon'ble ITAT was right in extending the benefit of Section 32(1)(iia) of the Act to the next Assessment year, when the Income-tax Act does not provide such carryover, thereby violating the legal principles of "Cassus omissus" which states that the Courts cannot compensate for what the legislature has omitted to enact ?

2. Respondent had preferred an appeal against order passed under Section 263 of the Income Tax Act, 1961 (the Act) on 10/6/2014 before the Income Tax Appellate Tribunal (ITAT). Respondent had challenged jurisdiction of the order passed under Section 263 of the Act as well as on merits of dis-allowance of additional depreciation under Section 32(1)(iia) of the Act.

3. Order under Section 143(3) of the Act was passed by the Assessing Officer on 23/1/2013 by which Respondent was granted additional depreciation @ 30% on new plant and machinery acquired and to be used in the Assessment Year 2009-2010. Respondent had claimed ½ of the additional depreciation in the Assessment Year 2009-2010 since the new plant and machinery was put to use for less than 180 days and balance ½ was claimed in the Assessment Year 2010-2011. Claim of respondent was rejected in the year under consideration, i.e., Assessment Year 2010-2011 by order under Section 263 of the Act, since no new plant and machinery was put to use in that Assessment Year. That order under Section 263 of the Act was subject of appeal before the ITAT. The ITAT allowed the appeal by its order dated 29/6/2016 by relying upon the judgment of Karnataka High Court in ***Commissioner of Income Tax, Bangalore vs. Rittal India***

(P) Ltd. [1]

4. Mr. Singh, counsel for appellant submitted that the IT Act does not provide for carry over of depreciation and therefore, the ITAT should not have passed the order relying upon the judgment of the Karnataka High Court. Mr. Singh also submitted that the first requirement for being eligible for additional depreciation is that it should be on new machinery or plant. Machinery is new only when it is first put to use. Once it is used in the Assessment Year 2009-2010, it is no longer a new machinery and therefore the machinery on which additional depreciation has been claimed for the Assessment Year 2010-2011 can no more be granted.

5. The judgment of Karnataka High Court in *Rittal India (supra)* has been considered by this Court in an unreported order in ***Pr. Commissioner of Income Tax-14 vs. M/s. Godrej Industries Ltd.*** [2] and this Court has followed the view expressed by the Karnataka High Court. This Court in *Godrej Industries Ltd. (supra)* has also relied upon the judgment of Madras High Court in ***Commissioner of Income Tax vs. T. P. Textiles Pvt. Limited,*** [3] wherein Madras High Court has considered the additional proviso which was inserted to Section 32(1)(iia) of the Act and has also concurred with the view of the Madras High Court that said newly added third proviso to clause (ii) of sub-section 1 of Section 32 of the Act being clarificatory in nature would

1 *(2016) 66 taxmann.com 4 (Karnataka)*

2 *Income Tax Appeal No.511/2016 Dated 24/11/2018*

3 *394 ITR 483*

apply to case covering past period also. Paragraph 5 to 10 of *Godrej (supra)* reads as under:

> *"5 Having heard Counsel for the Revenue and for the Assessee, we notice that the Assessee's claim of additional depreciation arises out of clause (iia) of sub-section 1 of Section 32 of the Act. Clause (ii) of sub-section 1 of Section 32 of the Act recognizes the depreciation on block of assets. Clause (iia) grants additional depreciation in case of acquisition and installation of new machinery or plant by an Assessee after 31st March, 2005, the Assessee being engaged in business of manufacture or production of an article or things.*
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> *6 We may also notice that the second proviso to clause (ii) of sub-section 1 of Section 32 of the Act, would restrict Assessee's claim of depreciation to 50% in case, the assets are acquired by the Assessee during the previous year and put to use for the purposes of business or profession for a period less than 180 days in the said previous year.*
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> *7 In the context of such statutory provisions, the Revenue has raised the question – whether when 50% of the additional depreciation is claimed by the Assessee in a particular Assessment Year, since the acquisition and putting in to use of the assets in the previous Year was for less than 180 days, the Assessee can claim the remaining depreciation in the subsequent Assessment Year. Such a question came up for consideration before the Division Bench of Karnataka High Court in Commissioner of Income Tax and Another v/s. Rittal India Pvt. Ltd., reported in 380 ITR 423. The Court, after referring to the statutoryprovisions, held and observed in para 8 as under:-*
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> > *"8:- The aforesaid two conditions, i.e., the undertaking acquiring new plant and machinery should be a new industrial undertaking, or that it should be claimed in one year, have been done away by substituting clause (iia) with effect from April 1, 2006. The grant of additional depreciation, under the aforesaid provision, is for the benefit of the*

assessee and with the purpose of encouraging industrialization, by either setting up a new industrial unit or by expanding the existing unit by purchase of new plant and machinery, and putting it to use for the purposes of business. The proviso to clause (ii) of the said section makes it clear that only 50 per cent of the 20 per cent would be allowable, if the new plant and machinery so acquired is out to use for less than 180 days in a financial year. However, it nowhere restricts that the balance 10 per cent would not be allowed to be claimed by the assessee in the next assessment year.

The language used in clause (iia) of the said section clearly provides that "a further sum equal to 20 per cent of the actual cost of such machinery or plant shall be allowed as deduction under clause (ii)". The word "shall" used in the said clause is very significant. The benefit which is to be granted is 20 per cent additional depreciation. By virtue of the proviso referred to above, only 10 per cent can be claimed in one year, if plant and machinery is put to use for less than 180 days in the said financial year. This would necessarily mean that the balance 10 per cent additional deduction can be availed of in the subsequent assessment year, otherwise the very purpose of insertion of clause (iia) would be defeated because it provides for 20 per cent deduction which shall be allowed.

It has been consistently held by this Court, as well as the apex court, that the beneficial legislation, as in the present case, should be given liberal interpretation so as to benefit the assessee. In this case, the intention of the legislation is absolutely clear, that the assessee shall be allowed certain additional benefit, which was restricted by the proviso to only half of the same being granted in one assessment year, if certain condition was not fulfilled. But,that, in our considered view, would not restrain the assessee from claiming the balance of

> *the benefit in the subsequent assessment year. The Tribunal, in our view, has rightly held, that additional depreciation allowed under Section 32(1)(iia) of the Act is a one-time benefit to encourage industrialization, and the provisions related to it have to be construed reasonably, liberally and purposively, to make the provision meaningful while granting the additional allowance. We are in full agreement with such observations made by the Tribunal.*
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> *In view of the aforesaid, we do not find that any interference is called for with the order of the Tribunal, or that any question of law arises in this appeal for determination by this court."*

After the said judgment of the Karnataka High Court in Rittal India Pvt. Ltd., (supra), legislation has also amended the statutory provisions by adding the third proviso to clause (ii) of sub-section 1 of Section 32 of the Act, which reads as under:-

> *" 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."*

8 The third proviso, thus, now recognizes the right of an Assessee to claim the remaining 50%

depreciation in subsequent year in a case where machinery and plant being acquired and put to use for less than 180 days in the previous year, the depreciation was restricted to 50%. Such a situation as in the present case, was considered by the Division Bench of the Madras High Court in Commissioner of Income Tax v/s. Shri T. P. Textiles Pvt. Ltd., 394 ITR 483, the Court referred to the judgment of the Karnataka High Court in Rittal India Pvt. Ltd., (supra) as well as the addition of third proviso to clause (ii) of sub-section 1 of Section 32 of the Act and observed as under:

> *"10.1: The plain language of section 32(1)(iia) read along with relevant proviso would have us come to the conclusion that, there is no limitation in the assessee claiming the balance 10 per cent of additional depreciation in the succeeding assessment year.*
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> *10.2:- As a matter of fact, with effect from April 1, 20916, the ambiguity, if any, in this regard, in the mind of the Assessing Officer, stands removed by virtue of the Legislature, incorporating in the Statute, the necessary clarificatory amendment.*
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> *10.3 ....*
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> *11: We may only indicate that during the course of the arguments, our attention was drawn to the "Memorandum explaining the provisions in Finance Bill, 2015" whereby, the aforementioned amendment was brought about.*
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> *11.1: The relevant part of the memorandum is extracted hereafter:*
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> *".... To remove the discrimination in the matter of allowing additional depreciation on plant or machinery used for less than 180 days and used for 180 days or more, it is proposed to provide that the balance 50 per cent of the additional depreciation on new plant or machinery acquired and used for less than 180 days which has not been allowed in the year of acquisition and installation of such plant or machinery, shall be allowed in the immediately succeeding previous year. This amendment will take*

effect from 1 st April, 2016 and will, accordingly, apply in relation to the assessment year 2016-17 and subsequent assessment years."

11.2:- A perusal of the extract of the memorandum relied upon would show that the legislature recognized the fact that the manner in which the Revenue chose to interpret the provision, as it stood prior to its amendment would lead to discrimination, in respect of plant and machinery, which was used for less than 180 days, as against that, which was used for 180 days or more itxa-511-2016 11.3:- In our opinion, as indicated above, the amendment is clarificatory in nature and not prospective, as is sought to be contended by the Revenue. The memorandum cannot be read in the manner, in which, the Revenue has sought to read it, which is, that the amendment brought in would apply only prospectively.

11.4:- We are, clearly, of the view that the memorandum, which is sought to be relied upon by the Revenue, only clarifies as to how the unamended provision had to be read all along.

11.5:- In any event, in so far as the court is concerned, it has to go by the plain language of the unamended provision, and then, come to a conclusion in the matter. As alluded to above, our view, is that, upon a plain reading of the unamended provision, it could not be said that the assessee could not claim balance depreciation in the assessment year, which follows the assessment year, in which, the machinery had been bought and used, albeit, for less than 180 days."

9 It could be thus, to seen that the Karnataka High Court in Rittal India Pvt., Ltd.,(supra) even without the aid of the statutory amendment held that remaining 50% unclaimed depreciation would be available to the Assessee in the succeeding Assessment Year. Now the legislation has amended the provision by adding a proviso

> *which, specifically recognizes the said right. The Madras High Court in Shri T. P. Textiles Pvt. Ltd., (supra) ruled that such proviso being clarificatory in nature, would apply to pending cases, covering past period also.*
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> *10 We have no reason to take view different from two High Courts, examining the situation at considerable length. In the result, no question of law arises."*

6. We have no reason to take a different view from the view expressed by our own High Court. In our view, ITAT has not committed any perversity or applied incorrect principles to the given facts and when the facts and circumstances are properly analysed and correct test is applied to decide the issue at hand, then, we do not think that question as pressed raised any substantial question of law.

7. Appeal is devoid of merit and is dismissed with no order as to costs.

(AMIT B. BORKAR, J) **(K. R. SHRIRAM, J.)**

RAJESHWARI SUBODH KARVE

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