

ITA/102/2012
IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

KHR HOSPITALITY INDIA LIMITED
VERSUS
COMMISSIONER OF INCOME TAX-III, KOLKATA

BEFORE :
THE HON'BLE JUSTICE SURYA PRAKASH KESARWANI
AND
THE HON'BLE JUSTICE RAJARSHI BHARADWAJ
Date : 10th April, 2024.

Appearance:
Mr. J. P. Khaitan, Senior Advocate
Mr. Sanjay Bhowmick, Advocate
Ms. Swapna Das, Advocate
... for the appellant.

Ms. Smita Das De, Advocate
... for the respondent.

1. Heard Sri J. P. Khaitan, learned senior advocate assisted by Sri Sanjay Bhowmick, learned counsel for the appellant/assessee and Ms. Smita Das De, learned senior standing counsel for the respondent.
2. The assessment years involved in the present appeal are Assessment Year 1999-2000 and Assessment Year 2000-01. By order dated 16.08.2012, this appeal was admitted on the following substantial questions of law :-

- 1) *Whether the assessing officer having resorted to section 147 of the Income Tax Act, 1961 on the facts and circumstances of the case, was duty bound to compute such business income after allowing statutory deduction including under section 43B in respect of the interest paid to the financial institutions of Rs.3,63,33,321/- for the assessment year 1999-2000 and Rs.60,50,250/- for the assessment year 2000-01 ?*
- 2) *Whether on a true and proper interpretation of the provisions of section 32 of the Income Tax Act, 1961 depreciation allowance in respect of hotel assets used for the purpose of the business can be reduced in any manner because of temporary closure of the hotel for part of the year and the purported findings of the Tribunal restricting the allowance to 50% is arbitrary, unreasonable and perverse ?*

Facts:-

Facts of Assessment year 1999-2000:

3. Briefly stated facts of the present case are that the appellant/assessee is engaged in business of running hotel. For the assessment year 1999-2000, the assessee filed original return of income on 30.12.1999 showing a **loss** of Rs.2,04,28,436/- under the head “profit and loss of business or profession”. Brought forward **loss** was Rs.3,53,30,569/-. Thus, total loss disclosed was Rs.5,57,59,010/-. During the assessment year in question, the assessee had leased the hotel vide agreement dated 01.11.1998. Lease rent received by the assessee for the period from 01.11.1998 to 31.3.1999 was Rs.15,00,000/-. The

assessee filed a revised return of income on 30.11.2000 showing income of Rs.11,25,000/- under head “income from house property” i.e., lease rent Rs.15,00,000/- less Rs.3,75,000/- as deduction under Section 24(1)(i) of the Income Tax Act, 1961 (hereinafter referred to as the ‘Act, 1961’). Thus, in the revised return the assessee disclosed income of Rs.11,25,000/- under the head ‘income from house property’ and loss of Rs.2,19,28,436/- under the head “profit or gain from business or profession”.

4. On 07.11.2002, the assessee filed a revised computation of income pursuant to the letter of the ACIT, Mumbai dated 16.08.2002 in which he disclosed a loss of Rs.5,67,61,657/- which included interest of Rs.3,63,33,221/- actually paid by the assessee during the previous year 1998-99 as per OTS which was not claimed in earlier years. The depreciation was computed at Rs.1,14,95,443/- as per Income Tax Rules. The total loss carried forward was Rs.12,54,21,003/-. The depreciation was claimed on the block assets which are mentioned in Schedule-5 (fixed assets) to the balance-sheet. The assessing officer has not passed any assessment order on the basis of returns filed by the assessee. Instead, subsequently, he issued a notice under Section 148 of the Act, 1961 and passed an **assessment order** dated 20.12.2002 under Section 143(3) r.w.s. 147 of the Act, 1961 whereby he did not allow interest paid by the assessee on the ground **that “re-assessment proceedings are initiated for the benefit of the revenue**

and it is not open to the assessee to claim certain deductions which were neither claimed nor allowed in the original assessment.” He also referred to the judgment of Hon'ble Supreme Court in **CIT v. Sun Engineering Works (P) Limited (1992) 4 SCC 363** and accordingly the claim of the assessee for interest of Rs.3,63,33,221/- as deductible expenditure was rejected under Section 43B of the Act, 1961. However, the assessing officer accepted the income from leasing of the hotel as income under the head “profits and gains from business and profession” and allowed depreciation restricting it to 50% of the claimed amount i.e. 50% of Rs.1,14,95,443/- on the ground that the hotel was leased vide agreement dated 01.11.1998 and thus was put to use for less than 180 days during the previous year.

Facts of Assessment Year 2000-01

5. For the assessment year 2000-01, the assessee filed original return on 30.11.2000 disclosing Rs.31,50,000/- income under the head “income from house property” and **loss** of Rs.5,57,59,010/- under the head “profits and gains of business or profession”. He filed a revised return on 30.01.2002 disclosing the same amount of income under the head “house property” and loss under the head “business or profession”, but the loss carried forward was shown to be Rs.10,44,04,602/-. He also filed a letter dated 09.11.2002 in response to the letter of the ACIT,

Mumbai dated 09.09.2002 stating that it was by mistake and oversight that the income of leasing hotel has been shown in the return under the head “income from house property” and deduction in respect of such income has been wrongly claimed under Section 24. Accordingly, he requested the said income to be treated as income under the head “income from business or profession”. He also claimed interest of Rs.60,50,250/- as deductible expenditure being interest paid on loans to financial institutions during the previous year 1999-2000 as per OTS, which was not claimed or provided in earlier years. The depreciation was also claimed as per Section 32 of the Act, 1961 read with Rule 5 of the Rules. No assessment order was passed by the assessing officer on the basis of returns filed by the assessee. Instead, the assessing officer issued notice under Section 148 and passed an **“assessment order”** dated 16.12.2002 under Section 143(3) r.w.s. 147 of the Act, 1961. He allowed the depreciation, treated the income from leasing under the head “business or profession” but rejected the claim of interest of Rs.60,50,250/- as deductible expenditure. Thus, the income was assessed as loss of Rs.1,38,92,820/-. The carrying forward of losses was not disputed.

6. Aggrieved with the aforesaid two assessment orders for the assessment years 1999-2000 and 2000-01, the appellant assessee filed two separate appeals before the Commissioner of Income Tax (Appeals) – IX, Mumbai,

which both were allowed by order dated 27.12.2010 in which the C.I.T.(A) concluded as under:-

“3.4 I have carefully considered the findings of the Assessing Officer and submissions of the appellant. I have also gone through the various case laws relied by the Assessing Officer as well as appellant. The Assessing Officer has accepted the claim of business income which was made in revised return. However, he has denied the claim of interest expenditure with the plea that interest expenditure is related to earlier years and secondly reassessment proceedings are not made for the benefit of appellant. It is seen from the various facts and statements that revised return was filed by the appellant on 30/11/2000 which was a valid return in view of section 139(5) because as per section 139(5) last date of filing revised return was 31/03/2001. The last date for issuing notice under section 143(2) was 31/12/2000 which was not issued by the Assessing Officer in spite of filing the revised return and he has chosen to issue notice under section 148 on 10/12/2001. Order under section 143(3) read with section 147 was passed on 20/11/2002. The Assessing Officer himself has accepted lease rent income as business income. Thus, the Assessing Officer has accepted one part of the revised return by accepting the rental income as business income; but he has refused allow business expenditure on technical ground that reassessment is not made for the benefit of assessee. In fact in this case, time for issuing notice under section 143(2) was available with the Assessing Officer after filing the revised return but instead of that he has issued notice under section 148. Therefore, I find force behind the arguments of the appellant that the appellant should not

suffer for the fault of the Assessing Officer who has not issued 143(2) notices for taking the assessment under scrutiny. Further, though the assessment was completed under section 143(3) read with section 147 but for practical purposes it was first scrutiny assessment because earlier the returns were processed under section 143(1) only. The case of appellant is supported by the decision of Madras High Court in the case of M/s. India Forge and Drop Stamping Limited Vs. CIT (1998) 223 ITR 112 (Mad), the Hon'ble Supreme Court has also held in the case of Collector of Land Acquisition Vs. Mstr. Katiji & ors. 167 ITR 471 that when substantial justice and technical consideration are pitted against each other, the cause of substantial justice deserves to be preferred for the other side cannot claim to have vested rights for injustice being done. The case of appellant is also supported by the CBDT Circular No.14 dated 11/04/1995, wherein it was observed that officers of the department must not take advantage of ignorance of an assessee as to his rights. It is one of their duties to assist a taxpayer in every reasonable way particularly in the matter of claiming and securing reliefs and in this regard the officer should take the initiative in guiding a taxpayer where proceedings or other particulars before them indicate that some refund or relief is due to him. The case of appellant is also supported by several other decisions which have been cited by the appellant in the aforesaid submissions. Further, the Assessing Officer as accepted the of income claim of appellant regarding carry forward business losses in subsequent scrutiny assessments. This fact is also not disputed by the Assessing Officer that the interest liability was disputed with the banks and was settled during this year in a onetime settlement with the banks and thus the interest liability has

crystallized in this year. Though it was related to earlier years but the liability has crystallized this year and Assessing Officer has assessed the rental income as business income he was supposed to allow legitimate business expenditure and the liability which has crystallized this year only. The Madras High Court in the case of M/s. CIT Vs. TCP Limited (2010) 232 ITR 346 (Mad) has held that in case 143(2) notice was not issued in time by Assessing Officer then the assessee should not suffer or should not be held responsible for the laxity on the part of the Assessing Officer. The facts of the case and arguments of the appellant suggest that it was a commercial exploitation of business asset i.e. building and entire assets which were given on lease and thus the receipt in question was business receipts, the same was by mistake claimed as rental income and was correct in time in revised return. The appellant was not intended to close down its business; but it has exploited its commercial asset in a prudent manner at the lackdrop of its poor financial position. So it was a temporary lull in the business and business was again started in full form which is evident from the results of subsequent years. The income earned from commercial exploitation of business asset is assessable as business income this view is supported by several decisions which are as under:

- 1) 114 ITR 778 (Cal) M/s. Everest Hotel Limited VS. CIT
- 2) 84 TTJ (Del) 776 M/s. Onkar Engineers Private Limited Vs. ITO
- 3) 46 ITR 181 (Bom) M/s. C.P. Pictures Limited Vs. CIT
- 4) (1981) 128 ITR 402 (Del) Addl. CIT Vs. M/s. Rajindra Flour & Allied Industries Private Limited and several other decisions.

3.5 The appellant has also given several decisions to support its claim that liability of prior period is allowable in the year of

crystallization. So, in view of all these facts and case laws and the facts that the Assessing Officer himself has accepted the rental income as business income. The Assessing Officer is directed to all the claim of interest as business expenditure. Thus, this ground of appeal is allowed.

...

6. *I have considered the findings of the Assessing Officer and submissions of the appellant. The Assessing Officer has denied the 50% depreciation because the assets were used for less than 180 days. While, doing so the Assessing Officer has overlooked the facts that entire assets given on lease were old asset and depreciation was allowed, fully depreciation on those asset in earlier years. Further the claim of the appellant is supported by the DCIT Vs. Finolex Cables Limited (2008) 114 TTJ (Pune) 785, wherein the Hon'ble ITAT has said that the depreciation was allowed in respect of flats in question in earlier years that depreciation was allowable on entire block of assets in second year even though such flats were lying vacant and not put to use during the year in question. The claim is also supported by the Punjab & Haryana Court in the case of CIT Vs. Pepsee Road Transport Corporation 253 ITR 303, CIT Vs. Refrigeration and Allied Industries Limited 113 TAXMAN 103 (Del) and CIT Vs. M/s. G.N. Agrawal (1994) 75 TAXMAN 30 (Bom). So, in view of all aforesaid facts and case laws relied by the appellant; I am of the view that Assessing Officer was not correct in denying 50% depreciation to the appellant he is directed to allow the full claim of the appellant."*

7. Aggrieved with the order of the CIT(A), the revenue filed ITA Nos.539 and 540/Kol/2011 (assessment years 1999-2000 and 2000-01) which

have been allowed by the impugned order dated 22.03.2012 passed by the Income Tax Appellate Tribunal, Bench-A, Kolkata.

8. Aggrieved with the aforesaid order of the ITAT, the assessee has filed the present appeal.

Submissions:-

9. Learned counsel for the appellant submits that the interest paid to financial institutions/banks during the previous years in question, is allowable expenditure under Section 43B of the Act, 1961 which was claimed by the assessee. Pursuant to the returns filed by the assessee, no assessment order was passed by the assessing officer. Therefore, the order passed by the assessing officer under Section 143(3) r.w.s. 147 of the Act, 1961 is an assessment order. The ratio of decision in the case of Sun Engineering Works (P) Limited (supra) has been erroneously applied by the assessing officer inasmuch as the order passed by the assessing officer is not a re-assessment order but an assessment order which is very much evident from the facts afore-noted. The assessee claimed deduction and agitated before the assessing officer to allow it which could not have been rejected. He submits that for the assessment year 1999-2000 depreciation could not be restricted to 50% inasmuch as the entire block of assets were old and not acquired during the previous year relevant to the assessment year 1999-2000. Therefore, disallowing 50% depreciation is in conflict

with the provisions of Section 32 of the Act read with Rule 5 of the Income Tax Rules, 1962.

10. Learned counsel for the respondent has supported the impugned order of the ITAT.

Decision and Findings

11. We have carefully considered the submissions of the parties and perused the paper book.

Substantial Question of Law (i)

12. It is undisputed that the assessee filed original return as well as revised return of income much prior to the issuance of **any notice under Section 148 of the Act, 1961**. He claimed deduction of interest paid to financial institutions/banks during the previous year relevant to the assessment year in question. Even no intimation under Section 143(1)(a) of the Act was sent by the assessing officer as alleged by the assessee. Even assuming that the acknowledgment of return was treated to be an intimation under Section 143(1)(a) of the Act, 1961, yet it was not an assessment order. Reference in this regard may be had to the judgment of Hon'ble Supreme Court in the case of Assistant Commissioner of Income Tax Vs. Rajesh Jhaveri Stock Brokers Private Limited, (2008) 14 SCC 208 (paras 14 to 16) in which Hon'ble Supreme Court held as under :

“14. It is to be noted that the expressions "**intimation**" and "**assessment order**" have been used at different places. The contextual difference between the two expressions has to be understood in the context the expressions are used. Assessment is used as meaning sometimes "the computation of income", sometimes "the determination of the amount of tax payable" and Sometimes the whole procedure laid down in the Act for imposing liability upon the taxpayer".

15. In the scheme of things, as noted above, **the intimation under Section 143(1)(a) cannot be treated to be an order of assessment.** The distinction is also well brought out by the statutory provisions as they stood at different points of time. Under Section 143(1)(a) as it stood prior to 1-4-1989, the assessing officer had to pass an assessment order if return, but under the amended provision, the requirement of passing of an assessment order has been dispensed with and instead an intimation required to be sent. Various circulars sent by the Central Board of Direct Taxes spell out the intent of the legislature i.e. to minimise the departmental work to scrutinise each and every return and to concentrate on selective scrutiny of returns. These aspects were highlighted by one of us (D.K. Jain,J.) in *Apogee International Ltd. v. Union of India*.

16. It may be noted above that under the first proviso to the newly substituted Section 143(1), with effect from 1-6-] 1999, except as the provision itself, the acknowledgment of the return shall be deemed to be an intimation under Section 143(1) where (a) either no sum is payable by assessee, or (b) no refund is due to him. It is significant that the acknowledgment is not done by any assessing officer, but mostly by ministerial staff. Can it be said that any 'assessment" is done by them? The reply is an emphatic "no". The intimation under Section 143(1)(a) was deemed to be a notice of demand under Section 156, for the of making machinery provisions relating to recovery of tax applicable. By

*apparent such application only recovery indicated to be payable in the intimation purpose became permissible. And nothing more can be inferred from the deeming provision. **Therefore, there being no assessment under Section 143(1)(a), the question of change of opinion, as contended, does not arise.***

13. The expression “**assess**” used in Section 147 of the Act, 1961 refers to a situation where assessment of income of an assessee for a particular year is, for the first time made by resorting to the provisions of Section 147 because the assessment had not been made in a regular manner under the Act. The expression “**reassess**” refers to a situation where an assessment has already been made but the Income Tax Officer has, on the basis of information in his possession, reason to believe that there has been under assessment on account of existence of any of the grounds contemplated by the provisions of Section 147(b). Reference may be had in this regard to the provisions of Section 147 itself as well as the law laid down by Hon’ble Supreme Court in the case of Sun Engineering Works P. Ltd. (supra) vide paragraph 39 (SCC) in which Hon’ble Supreme Court held as under –

“39. As a result of the aforesaid discussion, we find that in proceedings under Section 147 of the Act, the Income Tax Officer may bring to charge items of income which had escaped assessment other than or in addition to that item or items which have led to the issuance of notice under Section 148 and where reassessment is made under Section 147 in respect of income which has escaped tax, the Income Tax

Officer's jurisdiction is confined to only such income which has escaped tax or has been under-assessed and does not extend to revising, reopening or reconsidering the whole assessment or permitting the assessee to reagitate questions which had been decided in the original assessment proceedings. It is only the under-assessment which is set aside and not the entire assessment when reassessment proceedings are initiated. **The Income Tax Officer cannot make an order of reassessment inconsistent with the original order of assessment in respect of matters which are not the subject-matter of proceedings under Section 147.** An assessee cannot resist validly initiated reassessment proceedings under this Section merely by showing that other income which had been assessed originally was at too high a figure except in cases under Section 152(2). **The words "such income" in Section 147 clearly referred to the income which is chargeable to tax but has "escaped assessment" and the Income Tax Officers' jurisdiction under the Section is confined only to such income which has escaped assessment.** It does not extend to reconsidering generally the concluded earlier assessment. Claims which have been disallowed in the original assessment proceeding cannot be permitted to be reagitated on the assessment being reopened for bringing to tax certain income which had escaped assessment because the controversy on **reassessment is confined to matters which are relevant only in respect of the income which had not been brought to tax during the course of the original assessment. A matter not agitated in the concluded original assessment proceedings also cannot be permitted to be agitated in the reassessment proceedings unless relatable to the item sought to be taxed as 'escaped income'.** Indeed, in the reassessment proceedings for bringing to tax items which had escaped assessment, it would be open to an assessee to put forward

claims for deduction of any expenditure in respect of that income or the non-taxability of the items at all. Keeping in view the object and purpose of the proceedings under Section 147 of the Act which are for the benefit of the Revenue and not an assessee, an assessee cannot be permitted to convert the reassessment proceedings as his appeal or revision, in disguise, and seek relief in respect of items earlier rejected or claim relief in respect of items not claimed in the original assessment proceedings, unless relatable to 'escaped income', and reagitate the concluded matters. Even in cases where the claims of the assessee during the course of reassessment proceedings relating to the escaped assessment are accepted, still the allowance of such claims has to be limited to the extent to which they reduce the income to that originally assessed. The income for purposes of 'reassessment' cannot be reduced beyond the income originally assessed."

14. In the case of Sun Engineering Works P. Ltd. (supra) Hon'ble Supreme Court had dealt with a reassessment proceeding and in that context held that the Income Tax Officer cannot make an order of reassessment inconsistent with the original order of assessment in respect of matters which are not the subject matter of proceedings under Section 147. In the reassessment proceedings it would be open to an assessee to put forward claims for deduction of any explanation in respect of that income or the non-taxability of the items at all relating to escaped income. The object and purpose of the proceedings under Section 147 of the Act is for the benefit of the revenue and not an assessee and the assessee cannot be permitted to convert the reassessment proceedings

as his appeal or revision in disguise and seek relief in respect of items earlier rejected or claim relief in respect of **items not claimed in the original assessment proceedings, unless relatable to escaped income and reagitate to conclude matters.** In the present set of facts since there was no original assessment proceeding and no assessment order, therefore, the question of reassessment does not arise. The orders passed by the assessing officer were the assessment orders passed on original and revised return and claims made by the assessee during the assessment proceedings and, as such, the interest paid to financial institutions/banks being an allowable expenditure under Section 43B of the Act, 1961 was bound to be allowed.

15. In the case of **Commissioner of Income Tax, Mumbai Vs. Wallfort Shares and Stock Broker Pvt. Ltd. (2010) 8 SCC 137 (para 8)** Hon'ble Supreme Court considered the scheme of Sections 30 to 37 of the Act and held that the scheme of Sections 32 to 37 is that the profits and gains must be computed subject to certain allowances for deductions/expenditures. The charge is not gross receipts. It is on profits and gains. Profits have to be computed after deducting losses and expenditures incurred for the business. **A deduction for expenditure or loss which is not within the prohibition must be allowed if it is on facts of the case a proper debit item to be charged against incomings of the business in ascertaining the true profits.**

16. In the present set of facts it is undisputed that the interest paid by the assessee during the assessment year in question was an allowable expenditure under Section 43B of the Act, 1961. The expenditure claimed by the assessee was rejected by the assessing officer and upheld by the ITAT on a misconceived ground that it could not have been claimed or allowed in **reassessment proceedings** whereas the fact was that **the order passed by the assessing officer was not a reassessment order but an assessment order** pursuant to the original and revised return filed by the assessee and claims made during assessment proceedings.
17. The judgment of the Hon'ble Supreme Court in Sun Engineering Works P. Ltd. (supra) has been explained by the High Court of Karnataka in Karnataka State Co-Operative Apex Bank Ltd. Vs. Deputy Commissioner of Income-tax, Circle 3(1) Bangalore (2021) 283 Taxmann 98 (Karnataka) and it was held as under :

*“11. In the instant case, **admittedly, there is no original assessment order in the case of the assessee** and it was only an intimation under section 143(1) of the Act, which cannot be treated to be an order in view of decision of the Supreme Court in Rajesh Jhaveri (supra). **Therefore, the question of reassessment of the income of the assessee by the Assessing Officer does not arise.** In the proceeding under section 148 of the Act, it was the first assessment and the same could have been done considering all the claims of the assessee. Therefore, the decision rendered by the Supreme Court in Sun Engineering Works (P.) Ltd. had no application to the fact situation of the case. Even assuming for the sake of argument that if an intimation*

under section 143(1) of the Act is considered to be an order of assessment, in the subsequent reassessment proceeding, the original assessment proceeding get effaced and the Assessing Officer was required to consider the proceeding de novo and to consider the claim of the assessee.”

18. Thus, we are of the considered view that there being no original assessment order in the case of the assessee, there was no question of reassessment by the assessing officer. The order passed by the assessing officer was assessment order. The assessee claimed interest as deductible expenditure under Section 43B of the Act 1961 and its admissibility was not disputed by the assessing officer. The proceedings before the assessing officer not being reassessment proceedings, the assessee lawfully claimed interest as a deductible expenditure which the assessing officer was bound to allow. The charge of income tax is on the income and not on gross receipts. It is the profits and gains of business or profession which has to be computed after deducting losses and expenditures incurred for business. Since the interest claimed by the assessee is not within the prohibition, it must have been allowed by the assessing officer in the facts of the present case. The tribunal has committed a manifest error of law and passed the impugned order without application of mind on the presumption that the proceeding before the assessing officer was reassessment proceeding whereas proceeding before the assessing officer was the assessment proceeding and the order passed by him was assessment order. Therefore, the ratio

of decision in the case of Sun Engineering Works P. Ltd. (supra) was not applicable on facts of the present case. The substantial question of law (i) deserves to be answered in favour of the assessee and against the revenue.

19. The impugned order of the ITAT in so far as it upheld the rejection of interest, deserves to be set aside.

Substantial Question of Law (ii)

20. Section 32 of the Act, 1961 provides for allowing deductions in respect of depreciation on certain assets owned wholly or partly by an assessee and used for the purpose of business or profession, as may be prescribed. Rule 5(1) of the Income Tax Rules, 1962 provides that subject to the provisions of sub-rule (2), the allowance under clause (ii) of sub-section (1) of section 32 in respect of depreciation of any block of assets shall be calculated at the percentages specified in the second column of the Table in Appendix I to these rules on the written down value of such block of assets as are used for the purposes of the business or profession of the **assessee at any time during the previous year.**

21. The expression “**block of assets**” has been defined in Section 2(11) of the Act, 1961 to mean a group of assets falling within a class of assets comprising **(a)** tangible assets being building, machinery, plant or furniture; **(b)** intangible assets being knowhow, patents, copyrights,

trademarks, licences, franchises or any other business or commercial rights of similar nature in respect of which the same percentage of depreciation is prescribed. Second and third proviso to Section 32(1) of the Act, 1961 provide that if an asset **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 180 days** in that previous year, the deduction under the said sub-section in respect of such asset, shall be restricted to 50% of the amount calculated at the percentage prescribed for an asset.

22. In the present set of facts, it is an admitted fact that the block of assets on which the depreciation has been claimed by the assessee are old and none of it were acquired during the previous year relevant to the assessment year in question. Therefore, the second and third proviso to sub-Section (1) of Section 32 shall not apply. The assets in question on which the depreciation has been claimed was being used for the purpose of business or profession from earlier years and was also used during the assessment years in question and, as such, there was no question to disallow 50% of the depreciation claimed. Section 32 of the Act, 1961 read with Rule 5 of the Rules, 1962 does not prohibit allowing of depreciation for the whole of the previous year where asset has been used for the purposes of business or profession by the assessee **at any time** during that previous year. Lesser depreciation is allowable where the asset has been acquired during the previous year and is put to use

for less than 180 days in that previous year. Therefore, in view of the law settled by the Hon'ble Supreme Court in the case of *Wallfort Shares & Stock Brokers Pvt. Ltd. (supra)* the deduction for expenditure claimed by the assessee being not prohibited under law, must have been allowed by the assessing officer. It is not in dispute that the block of assets on which the appreciation for the whole year has been claimed was ready to use during the entire year.

23. Thus, the substantial question of law No. (ii) deserves to be answered in favour of the assessee and against the revenue and the impugned order of the ITAT to that extent deserves to be set aside.
24. For all the reasons afore-stated, the impugned order passed by the ITAT cannot be sustained and is hereby set aside. Both the substantial questions of law are answered in favour of the assessee and against the revenue. The order of the CIT(A) is accordingly affirmed.
25. The appeal (ITA/102/2012) is allowed to the extent indicated above.

(SURYA PRAKASH KESARWANI, J.)

(RAJARSHI BHARADWAJ, J.)