

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

WEDNESDAY, THE 7TH DAY OF SEPTEMBER 2016/16TH BHADRA, 1938

ITA.No. 1261 of 2009 ()

AGAINST THE ORDER/JUDGMENT IN ITA 49/2008 of I.T.A.TRIBUNAL,COCHIN
BENCH DATED 19-12-2008

APPELLANT(S)/APPELLANT/ASSESSEE:

MOIDU'S MEDICARE PVT. LTD.
INDIRA GANDHI ROAD, KOZHIKODE, REP. BY ITS MANAGING
DIRECTOR DR. K.MOIDU.

BY ADVS.SMT.MEERA V.MENON
SRI.MAHESH V.MENON

RESPONDENT(S)/RESPONDENTS/REVENUE:

1. THE COMMISSIONER OF INCOME TAX (APPEALS)-I
AAYAKAR BHAVAN NORTH BLOCK, 4TH FLOOR, MANANCHIRA,
KOZHIKODE-673 001.
2. THE ASSISTANT COMMISSIONER OF INCOME
TAX CIRCLE-(1) AAYKAR BHAVAN,
NEW ANNEXE BUILDING NORTH BLOCK, MANANCHIRA,
KOZHIKODE-673 001.

R1 BY ADV. SRI.JOSE JOSEPH, SC, FOR INCOME TAX

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON
07-09-2016, ALONG WITH I.T.A.NOS. 1262, 1319 & 1310 OF 2009,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

: 2 :

APPENDIX

PETITIONER'S ANNEXURES:

- ANNEXURE A : TRUE COPY OF ASSESSMENT ORDER DATED 29.12.2006
ISSUED BY THE 2ND RESPONDENT, FOR THE ASSESSMENT
YEAR 2001-2002.
- ANNEXURE B : TRUE COPY OF COMMON ORDER DATED 24.10.2007 OF
THE 1ST RESPONDENT IN I.T.A. NOS. 114 & 115/R-1/CIT
(A)/CLT/06.07.
- ANNEXURE C : TRUE COPY OF COMMON ORDER DATED 19.12.2008 OF
THE INCOME TAX APPELLATE TRIBUNAL COCHIN BENCH IN
I.T.A. NO. 49 & 50/COCH/2008 FILED BY THE APPELLANT
AND IT.A. NOS. 119 & 120/COCH/2008 FILED BY THE
REVENUE.

RESPONDENTS' ANNEXURES: NIL

//TRUE COPY//

P.A. TO JUDGE.

ANTONY DOMINIC & DAMA SESHADRI NAIDU, JJ.

I.T.A. Nos. 1261, 1262, 1319 & 1310 of 2009

Dated this the 7th day of September, 2016.

JUDGMENT

Antony Dominic,J.

These appeals are filed by the assessee aggrieved by the orders passed by the Income Tax Appellate Tribunal, Cochin Bench in I.T.A. Nos. 49 & 50 of 2008 and 199 and 198 of 2006 pertaining to the assesment years 2001–2002, 2002–2003, 2000–2001 and 1999–2000 respectively.

2. The assessee is a hospital. Contending that its hospital building is a plant, the assessee claimed depreciation at the rate of 25%. Insofar as the assessment years 1999–2000 and 2000–2001 are concerned, the Assessing Officer allowed depreciation at the rate of 25% as claimed by the assessee. However, the Commissioner assumed jurisdiction under Section 263 of the Income Tax Act, taking the view that the assessment orders were prejudicial to the interest of the Revenue. According to the Commissioner, that part of the building used for general purposes and that used for specific hospital purposes should be distinguished and depreciation at the rate of 25% can be allowed only for such portion of the building

used as operation theatre, X-ray rooms etc. and the other portion of the building or part of the building used as administrative blocks, patient rooms, visitors' room etc. would be eligible for depreciation at the rate of 10% only. On that basis, he set aside the orders of assessment and the Assessing Officer was directed to redo the same. Accordingly, assessment orders were passed and the same were confirmed by the first appellate authority and the Tribunal. It is these orders which are challenged by the assessee in I.T.A. Nos. 1319 and 1310 of 2009.

3. Insofar as the assessment years 2001–2002 and 2002–2003 are concerned, though the assessee had claimed that the hospital building being one designed to run a hospital, the building in its entirety is a plant entitling the assessee for depreciation at the rate of 25%, the Assessing Officer allowed 25% only for a portion of the building and the remaining portion occupied by administrative rooms, patient rooms etc. were held to be eligible for depreciation at the rate of 10% also. These orders were confirmed by the first appellate authority and the Tribunal. It is in these backgrounds, I.T.A. Nos. 1261 and 1262 of 2009 are filed.

4. The common questions of law framed in these appeals for

the consideration of this Court are the following:

1. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is justified in law in affirming the orders of the authorities below and in holding that the entire hospital building of the appellant is not eligible to be treated as a plant for the purpose of granting depreciation under the Income Tax Act, 1961?
2. Whether there were materials for the Appellate Tribunal to hold that the appellant's hospital building has to be classified as partly as plant and partly as general building in view of the decision of the Supreme Court in Dr. B. Venkata Rao's case and Karnataka Power Corporation's case?
3. Whether there were materials for the Appellate Tribunal to classify the appellant's hospital building partly as plant and partly as general in view of the fact that the building is to be used in tandem for the business of running the hospital?

5. We heard the learned counsel for the assessee and the learned Senior counsel appearing for the Revenue.

6. Before we deal with the matter on merits, we may deal with a preliminary objection raised by the learned Senior Counsel for the Revenue. According to him, the assessee did not appeal against the order under Section 263 of the Act passed by the Commissioner in relation to the assessment years 1999–2000 and 2000–2001 and the said order has become final and binding on the Assessing Officer, the assessee and the Department. Therefore, it is not open to the assessee to challenge the assessment order passed in compliance

thereof. In support of these plea, the learned Senior Counsel placed reliance on the judgment of the Bombay High Court in *Hardillai Chemicals Ltd. v. Commissioner of Income Tax*¹. Though it is true that such a plea is seen to have been accepted by the Bombay High Court, we find that an exactly similar plea raised in the context of Kerala General Sales Tax Act was considered and rejected by a Full Bench of this Court in the judgment in *M. Syed Alavi and others v. State of Kerala*². Therefore, respectfully following the dictum laid down by the Full Bench, we overrule the preliminary objection raised by the learned Senior Counsel for the Revenue.

7. Turning to the merits of the case, we find that under the Income Tax Act, the provision for depreciation is contained in Section 32 of the Act and if a hospital or part thereof qualifies to be a plant, it would be eligible for depreciation at the rate of 25%; whereas that part of the hospital which is to be treated as a building shall be eligible for depreciation only at the rate of 10%. It is true that in *Commissioner of Income Tax v. Dr. B. Venkata Rao*³, the Honourable Supreme Court considered the case of a Medical Practitioner running a nursing home. In that case, the Tribunal has held the nursing home to be a plant

1 221 ITR 194

2 1981 KLT 548

3 243 ITR 81

and the same was affirmed by the High Court. In the appeals, the Supreme Court held that since the nursing home is equipped to enable the sterilisation of surgical instruments and bandages to be carried on and it was reasonable to assume that nursing home was equipped with operation theater, the finding of the High Court should be accepted. Subsequently, this Court in the judgment in Commissioner of Income Tax v. Dr. Ganga R Menon, Palghat Poly Clinic⁴ after making reference to Venkata Rao (supra) and relying on the judgment of the Apex Court in Commissioner of Income Tax v. H. Link⁵ took a different view by holding thus:

“We find that both the Tribunal and the High Court decided the issue in favour of the assessee on the basis of sterilization facility available in the hospital to constitute the building also as a part of the plant. In a nursing home or hospital, the operation theatre has to be kept sterilized all through to prevent germs entry, and therefore the theatre room may be called a plant, and hence it has to be treated differently from other parts of the hospital building which building has consultation rooms, accommodation for patients, canteen resting place, etc. This may be the position with regard to the X-ray plant, which is also to be insulated to prevent any kind of pollution and to prevent X-rays escaping outside. Therefore, while the entire building does not constitute plant, some parts of the building may be treated as plant, depending upon its use. It is, therefore, a matter to be claimed and proved by the assessee before the Assessing Officer. This issue is not considered by the Tribunal or any other authority in these lines. A blanket order of the Tribunal following some decisions without going into the details is not tenable. We, therefore, set aside the order of the Tribunal and since findings

4 259 ITR 661

5 244 ITR 93

on facts are required we remand the matter to the Officer for deciding the matter afresh after calling for details from the assessee and the officer will decide the matter in the light of the decisions above referred and our above observations and grant depreciation at the rate applicable to plant only to so much of the area qualifying as 'plant'."

8. Subsequently, the Apex Court in Commissioner of Income tax v. Karnataka Power Corporation⁶ referred to the judgment in Commissioner of Income Tax v. Anand Theaters⁷ and held that where it is found as a fact that the building has been so planned and constructed so as to serve the assessee's special technical requirements, the building will qualify to be treated as a plant. Paragraph 5 and 6 of the judgment reads thus:

"5. Our attention has been drawn by the learned counsel for the revenue to the judgment of this Court in CIT v. Anand Theatres [2000] 244 ITR 192/110 Taxman 338. He submits that, in that judgment, this Court has held that, except in exceptional cases, the building in which the plant is situated must be distinguished from the plant and that, therefore, the assessee's generating station building was not to be treated as a plant for the purpose of investment allowance.

6. It is difficult to read the judgment in the case of Anand Theatres (supra) so broadly. The question before the Court was whether a building that was used as a hotel or a cinema theatre could be given depreciation on the basis that it was a 'plant' and it was in relation to that question that the Court considered a host of authorities of this Country and England and came to the conclusion that a building which was used as a hotel or a cinema theatre could not be given depreciation on the basis that it was a plant. We must add that the Court said, 'To differentiate a

6 247 ITR 268

7 244 ITR 192

building for grant of additional depreciation by holding it to be a plant in one case where a building is specially designed and constructed with some special features to attract customers and the building not so constructed but used for the same purpose, namely, as a hotel or theatre would be unreasonable.' This observation is, in our view, limited to buildings that are used for the purpose of hotels or cinema theatres and will not always apply otherwise. The question, basically, is a question of fact, and where it is found as a fact that a building has been so planned and constructed as to serve an assessee's special technical requirements, it will qualify to be treated as a plant for the purpose of investment allowance."

9. Similar view has been taken by the Allahabad High Court in its judgment in Commissioner of Income Tax, Ghaziabad v. Shri Shashi Nursing Home Ltd.⁸, in which it is held in paragraph 8 thus:

"8. We have given our thoughtful consideration to the various pleas raised by the learned counsel for the parties. We find that in the case of Dr.B. Vankata Rao (supra), the Apex Court upheld the decision of this Court in the case of S.K. Tulsi & Sons v. CIT [1991] 187 ITR 685/54 Taxman 100 wherein this Court has held that functional test ought to have been applied for claiming depreciation in respect of building structure. The Apex Court has held that if it was found that the building or structure constituted an apparatus or a tool of the taxpayer by means of which business activities were carried on, it amounted to a "plant"; but where the structure played no part in the carrying on of those activities but merely constituted a place wherein they were carried on, the building could not be regarded as a plant. In case of Dr B. Vankata Rao (supra) the Apex Court found that the assessee's nursing home is equipped to enable the sterilisation of surgical instruments and bandages to be carried on which cover 250 sq. ft. and that nursing home is also equipped with an operation theater. Therefore the plant and nursing home stated as plant and machinery and the depreciation should be allowed on it accordingly. In the present case, we find that the nursing home of

8 269 CTR 99 (Allahabad)

the respondent is equipped with operation theater, pathological laboratory, x-ray plant, plant for sterilization of clothes, plant for sterilization of other surgical equipments, an air conditioning plant etc. Thus the said decision of the Apex Court in case of Dr.B Vankata Rao (supra) would be squarely applicable in the present case. The plea of Sri. Chopra that the decision of the Apex Court in the case of Anand Theaters (supra) which is a subsequent decision ought to have been applied cannot be applied for the reason that the case of Anand Theatres did not relate to nursing home whereas decision of the Apex Court in the case of Dr. B. Vankata Rao (supra) directly related to nursing home and therefore the principle laid down in case of Dr. B. Vankata Rao (supra) ought be applied in the present case. Moreover, we find that in the earlier assessment year and subsequent assessment year the Income Tax Officer has allowed the depreciation on the building treating it as part of plant and machinery.”

10. A reading of the above judgments, therefore, show that the question to be examined is whether as held by the Apex Court in Karnataka Power Corporation (supra) the building has been so planned and constructed as to serve an assessee's special technical requirements. On such consideration, if a factual finding has been arrived at in favour of the assesses, then the building would qualify to be a plant with consequential depreciation at the applicable rate. Insofar as these cases are concerned, from the assessment order itself, we find that it was the case of the assessee that the hospital building is a specifically designed and planned one to meet its requirements as a hospital. However, without any further verification, this contention has been brushed aside and the assessment has been

completed merely following the principles laid down in Venkata Rao (supra). In the light of the subsequent judgment in Karnataka Power Corporation (supra), we are unable to sustain such assessments.

11. Therefore, we set aside the assessment orders and the orders of the first appellate authority and the Tribunal and remit the matters to the Assessing Officer to pass fresh orders in the light of the principles laid down by the Apex Court in Karnataka Power Corporation.

Answering the questions of law in favour of the assessee and against the Revenue, the matters are remitted to the Assessing Officer to pass fresh orders.

ANTONY DOMINIC,
JUDGE.

DAMA SESHADRI NAIDU,
JUDGE.

Rv

