

**Court No. - 3****Case :-** INCOME TAX APPEAL No. - 106 of 2015**Appellant :-** Pr. Commissioner of Income Tax -II Lucknow**Respondent :-** M/S U.P.State Bridge Corporation Ltd.16,M.M.M.Marg  
Lucknow**Counsel for Appellant :-** Manish Misra**Counsel for Respondent :-** Pradeep Agrawal**Hon'ble Sudhir Agarwal,J.****Hon'ble Ravindra Nath Mishra-II,J.**

1. Heard Sri Manish Misra, learned counsel for appellant and Sri Pradeep Agrawal, Advocate for respondent.
2. This appeal under Section 260-A of Income Tax Act, 1961 (*hereinafter referred to as the "Act, 1961"*) has arisen from judgment and order dated 30.04.2015 passed by Income Tax Appellate Tribunal, Lucknow Bench 'A', Lucknow (*hereinafter referred to as the "Tribunal"*) in ITA No. 585/LKW/2012. It relates to Assessment Year 2009-10.
3. The disputes relates to question, whether shuttering be treated to be part of plant and will be entitled for 100% deduction or less than that.
4. Sri Manish Misra, learned counsel appearing for Revenue submitted that under Section 32(1) of Act, 1961 all the depreciations are provided and it reads as under:

***"32. Depreciation.--(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 1<sup>st</sup> 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 general 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:

**Provided** that no deduction shall be allowed under this clause in respect of-

(a) any motor car manufactured outside India, where such motor car is acquired by the assessee after the 28th day of February, 1975, but before the 1<sup>st</sup> day of April, 2001, unless it is used-

(i) in a business of running it on hire for tourists; or

(ii) outside India in his business or profession in another country; and

(b) any machinery or plant if the actual cost thereof is allowed as a deduction in one or more years under an agreement entered into by the Central Government under Section 42:

**Provided further** that where an asset referred to in clause (i) or clause (ii) or 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 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 being commercial vehicle is acquired by the assessee on or after the 1<sup>st</sup> day of October, 1998, but before the 1<sup>st</sup> day of April, 1999 and is put to use before the 1<sup>st</sup> day of April, 1999 for the purposes of business or profession, the deduction in respect of such asset shall be allowed on such percentage on the written down value thereof as may be prescribed.

*Explanation—For the purposes of this proviso.--*

(a) the expression ‘commercial vehicle’ means ‘heavy goods vehicle’, ‘heavy passenger motor vehicle’, ‘light motor vehicle’, ‘medium goods vehicle’ and ‘medium passenger motor vehicle’ but does not include ‘maxi-cab’, ‘motor-cab’, ‘tractor’ and ‘road-roller’;

(b) the expressions ‘heavy goods vehicle’, ‘heavy passenger motor vehicle’, ‘light motor vehicle’, ‘medium goods vehicle’ and ‘medium passenger motor vehicle’ ‘maxi-cab’, ‘motor-cab’, ‘tractor’ and ‘road-roller’ shall have the meanings respectively as assigned to them in section 2 of the Motor Vehicles Act, 1988 (59 of 1988):

**Provided also** that, in respect of the previous year relevant to the assessment year commencing on the 1st day of April, 1991, the deduction in relation to any block of assets under this clause shall, in the case of a company, be restricted to seventy- five per cent of the amount calculated at the percentage, on the written down value of such assets, prescribed

under this Act immediately before the commencement of the Taxation Laws (Amendment) Act, 1991:

**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.

*Explanation 4—*For the purposes of this sub-section, the expression "know-how" means any industrial information or technique likely to assist in the manufacture or processing of goods or in the working of a mine, oil-well or other sources of mineral deposits (including searching for discovery or testing of deposits for the winning of access thereto).

*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 31<sup>st</sup>

day of March, 2005, by an assessee engaged in the business of manufacture or production of any article or thing or in the business of generation or general 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):

**Provided further** that no deduction shall be allowed in respect of-

(A) any machinery or plant which, before its installation by the assessee, was used either within or outside India by any other person; or

(B) any machinery or plant installed in any office premises or any residential accommodation, including accommodation in the nature of a guest-house; or

(C) any office appliances or road transport vehicles; or

(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.

*Explanation—For the purposes of this clause,—*

(1) "moneys payable" in respect of any building, machinery, plant or furniture includes—

(a) any insurance, salvage or compensation moneys payable in respect thereof;

(b) where the building, machinery, plant or furniture is sold, the price for which it is sold,

so, however, that where the actual cost of a motor car is, in accordance with the proviso to clause (1) of section 43, taken to be twenty-five thousand rupees, the moneys payable in respect of such motor car shall be taken to be a sum which bears to the amount for which the motor car is sold or, as the case may be, the amount of any insurance, salvage or compensation moneys payable in respect thereof (including the amount of scrap value, if any) the same proportion as the amount of twenty-five thousand rupees bears to the actual cost of the motor car to the assessee as it would have been computed before applying the said proviso;

(2) “sold” includes a transfer by way of exchange or a compulsory acquisition under any law for the time being in force but does not include a transfer, in a scheme of amalgamation, of any asset by the amalgamation company to the amalgamated company where the amalgamated company is an Indian company or in a scheme of amalgamation of a banking company, as referred to in clause (c) of section 5 of the Banking Regulation Act, 1949 (10 of 1949) with a banking institution as referred to in sub-section (15) of section 45 of the said Act, sanctioned and brought into force by the Central Government under sub-section (7) of the section 45 of that Act, if any asset by the banking company to the banking institution.”

5. He also pointed out that pursuant to Section 32, Rule 5 of Income Tax Rules, 1962 has been framed, which reads as under:

**“5. Depreciation—**(1) 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.

(1A) The allowance under clause (i) of sub-section (1) of section 32 of the Act in respect of depreciation of assets acquired on or after 1st day of April, 1997 shall be calculated at the percentage specified in the second column of the Table in Appendix IA of these rules on the actual cost thereof to the assessee as are used for the purposes of the business of the assessee at any time during the previous year :

**Provided** that the aggregate depreciation allowed in respect of any asset for different assessment years shall not exceed the actual cost of the said asset:

**Provided further** that the undertaking specified in clause (i) of sub-section (1) of section 32 of the Act may, instead of the depreciation specified in Appendix IA, at its option, be allowed depreciation under sub-rule (1) read with Appendix I, if such option is exercised before the due date for furnishing the return of income under sub-section (1) of section 139 of the Act,

(a) for the assessment year 1998-99, in the case of an undertaking which began to generate power prior to 1st day of April, 1997; and

(b) for the assessment year relevant to the previous year in which it begins to generate power, in case of any other undertaking :

**Provided also** that any such option once exercised shall be final and shall apply to all the subsequent assessment years.

(2) Where any new machinery or plant is installed during the previous year relevant to the assessment year commencing on or after the 1st day

of April, 1988, for the purposes of business of manufacture or production of any article or thing and such article or thing—

(a) is manufactured or produced by using any technology (including any process) or other know-how developed in, or

(b) is an article or thing invented in,

a laboratory owned or financed by the Government or a laboratory owned by a public sector company or a University or an institution recognised in this behalf by the Secretary, Department of Scientific and Industrial Research, Government of India,

such plant or machinery shall be treated as a part of block of assets qualifying for depreciation at the rate of 40 per cent of written down value, if the following conditions are fulfilled, namely :—

(i) the right to use such technology (including any process) or other know- how or to manufacture or produce such article or thing has been acquired from the owner of such laboratory or any person deriving title from such owner ;

(ii) the return furnished by the assessee for his income, or the income of any other person in respect of which he is assessable, for any previous year in which the said machinery or plant is acquired, shall be accompanied by a certificate from the Secretary, Department of Scientific and Industrial Research, Government of India, to the effect that such article or thing is manufactured or produced by using such technology (including any process) or other know-how developed in such laboratory or is an article or thing invented in such laboratory ; and

(iii) the machinery or plant is not used for the purpose of business of manufacture or production of any article or thing specified in the list in the Eleventh Schedule to the Act.

*Explanation : For the purposes of this sub-rule,—*

(a) “laboratory financed by the Government” means a laboratory owned by any body including a society registered under the Societies Registration Act, 1860 (21 of 1860), and financed wholly or mainly by the Government ;

(b) “public sector company” means any corporation established by or under any Central, State or Provincial Act or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956) ; and

(c) “University” means a University established or incorporated by or under a Central, State or Provincial Act and includes an institution declared under section 3 of the University Grants Commission Act, 1956 (3 of 1956), to be a University for the purposes of that Act.”

6. Appendix 1 referred to in Rule 5 was substituted by Income Tax (Sixth Amendment) Rules, 2005 w.e.f. 02.04.2005 and effective from

Assessment Year 2006-07. It provides in Clause III depreciation at the rate of 15% in respect of machinery and plant and other than those covered by sub-items (2), (3) and (8) below. Learned counsel for Revenue submitted that in view of aforesaid amendment depreciation only to the extent of 15% is admissible.

7. Sri Pradeep Agarwal, learned counsel appearing for respondent submitted that this issue was never raised before Tribunal and hence cannot be allowed to be raised for the first time before this Court.

8. However, we find that if statute permitting depreciation at a particular rate itself has been amended and such amendment is applicable to disputed period of assessment, it is a substantial question of law and can be raised before this Court but since it may also involve some factual investigation, we find it appropriate to remand this matter to Tribunal to look into this aspect and pass a fresh order in accordance with law.

9. In view of above, appeal is allowed partly. Impugned order dated 30.04.2015 is modified only to the extent that parties shall be allowed to address Tribunal on aforesaid question and after giving opportunity of hearing to both parties, Tribunal shall decide such question in accordance with law, expeditiously.

**Order Date :- 12.01.2017**

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