

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.405 of 2007

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M/S Cachet Pharmaceuticals Pvt. Ltd. through Lalan Kumar Singh,
Director, Exhibition Road, P.O. Bankipur, P.S. Gandhi Maidan, District
Patna.

.... Assessee / Appellant

Versus

1. Commissioner of Income Tax-1, Patna
2. Dy. Commissioner of Income Tax, Circle-2, Patna.

.... Assessing Officer / Respondents

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Appearance:

For the Appellant/s : Mr. Ajay Kumar Rastogi and
Mr. Parijat Saurav, Advocates.

For the Respondent/s : Mrs. Archana Sinha, Sr. S.C.,
Mr. Alok Kumar and
Ms. Shalini Bihari, Advocates.

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CORAM: HONOURABLE MR. JUSTICE HEMANT GUPTA
and
HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE HEMANT GUPTA)

Date: 16-03-2016

Learned counsel for the appellant has produced a copy of the order dated 03.01.2005, passed by the Commissioner of Income Tax (Appeals)-II, Patna, for the Assessment Year 1999-2000 in terms of the order passed by this Court on 11.03.2016. The revenue has no objection to the said order being part of record. The same is therefore kept on record.

Miscellaneous Appeal No.405 of 2007

1. The assessee is in appeal under Section 260A of the Income Tax Act, 1961 against an order passed by the Income Tax Appellate Tribunal, Patna Bench, Patna (for short, `the Tribunal`) on 13th of April, 2007, arising out of I.T.A. No. 240/Pat. 2005, pertaining to Assessment Year 1999-2000.

2. The assessee filed its return on 3rd of December, 1999 showing total

income of Rs. 1,10,26,490/-. The return was processed under Section 143(1)(a) of the Act. However, the learned Assessing Officer found that the assessee has claimed depreciation on factory building at the rate of 25% instead of allowable depreciation at the rate of 10%. The Assessing Officer also noticed that in subsequent years beginning from Assessment Year 2001-2002, the assessee claimed depreciation at the rate of 10% only. Therefore, the excess depreciation claimed was added back.

3. In an appeal preferred against the order of the Assessing Officer, the learned Commissioner of Income Tax (Appeals) rejected the claim of the appellant for depreciation at the rate of 25% after holding that in the earlier orders there was no categorical finding given by the Assessing Officer that the building in question is completely used for manufacture of medicine. However, such order was rectified by the Commissioner of Income Tax (Appeals) on 24.02.2005 and when the assessee produced Assessment Order for the Assessment Years 1997-1998 and 1998-1999 passed under Section 143(3) of the Income Tax Act holding that the building in question is wholly used for manufacture of medicine and that the factory building in case of the appellant is plant of the assessee and qualifies for depreciation at the rate of 25%. The revenue went in appeal against the rectified order of the Commissioner of Income Tax (Appeals), which appeal was accepted by the Tribunal.

4. The Tribunal noticed the fact, that the Tribunal vide its an earlier order had set aside an order passed by the Commissioner of Income-Tax under Section 263 of the Income Tax Act in respect of the Assessment Years 1997-1998 and 1998-1999; meaning thereby that the order of assessment, as originally framed for the Assessment Years 1997-1998 and 1998-1999, stands restored.

5. This Court has framed the following substantial questions of law:-

“Whether on the facts and in the circumstances of the case, the claim of the assessee that the building which houses the

manufactory is a plant within the meaning of Section 43(3) of the Income Tax Act, 1961 and whether the assessee is entitled to claim the depreciation of the factory building at the rate of 25%?"

6. Learned counsel for the appellant refers to a recent Supreme Court judgment reported as [2015] 379 ITC 335 (SC) -**Assistant Commissioner of Income Tax v. Victory Aqua Farm Ltd.**; the judgment of the Supreme Court reported as [2000] 243 ITR 81 (SC) - **Commissioner of Income-Tax v. Dr. B. Venkata Rao** and also the judgment of the Karnataka High Court reported as [2001] 247 ITR 564 (Kar) - **Deputy Commissioner of Income-Tax v. ASTRA-IDL Ltd.** to contend that the functional test has to be applied to determine whether a particular building was especially designed for the tools of the business, to qualify as plant for higher depreciation at the rate of 25%. It is thus contended that applying the functional test, the assessing officer in two earlier assessment year has held that the building is exclusively constructed for the purpose of manufacture of medicines, therefore, it is plant. Thus there is no reason not to follow the earlier orders passed in the case of assessee alone.

7. On the other hand, learned counsel for the revenue relies upon the judgment reported as [2000] 244 ITR 192 (SC) – **Commissioner of Income-Tax v. Anand Theatres** to contend that building construed cannot be treated as plant.

8. In **Anand Theatres** case, the earlier judgment in **Dr. B. Venkata Rao** case was not brought to its notice. It was held therein that functional test is a decisive test but an item which falls within the category of 'building' cannot be considered to be 'plant'. Buildings with particular specification for atmospheric control like moisture or temperature are not 'plant'. In order to find out as to whether a particular item is a plant or not, the meaning which is available in the popular sense, i.e., the people conversant with the subject-matter would attribute to it, has to be

taken. The building in which the business is carried on cannot be considered to be a 'plant'. In **Dr. B. Venkata Rao** case, the nursing home equipped to enable the sterilization of surgical instruments and bandages was held to be a 'plant' applying the functional test.

9. Considering the judgment in **Anand Theatres** case, the Supreme Court in **Victory Acqua Farm Ltd.** found that it is difficult to read the judgment in the case of **Anand Theatres** so broadly. The question before the Court was whether a building 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 cinema theatre could not be given depreciation on the basis that it was a plant. The Court held-

"6. We find that the judgment dated October 14, 2004, rightly rests this case on "functional test" and since the ponds were specially designed for rearing/breeding of the prawns, they have to be treated as tools of the business of the assessee and the depreciation was admissible on these ponds. We, thus, decide the question in favour of the assessee and as a consequence, the appeals of the Revenue are dismissed and that of the assessee are allowed."

10. Now coming to the facts of the present case, in the order of assessment for the year 1997-1998, the Assessing Officer has recorded the following finding:

"I have considered the contention of the assessee. I have gone through the maps and photographs and also functional use of the building and decisions. Considering all these facts and circumstances there is no doubt that the factory building is plant of the assessee. It qualifies for depreciation @ 25%."

11. The said stand of the assessee was accepted in the subsequent

Assessment Year 1998-1999. Though the said order was interfered with by the Commissioner of Income-tax while exercising the jurisdiction under Section 263 of the Income-tax Act, 1961, but such order has since been set aside by the Tribunal in its order dated 18.12.2002. Since the order of the Commissioner of Income-tax has been set aside, the order of the Assessing Officer becomes operative.

12. Therefore, keeping in view the finding of the Assessing Officer for the previous two years and applying the functional test, we find that the building which is constructed solely for the manufacturing of medicine is a ‘plant’ and is entitled to higher depreciation at the rate of 25%. Thus, the question of law is answered in the affirmative in favour of the assessee and against the revenue.

13. The appeal stands disposed of accordingly.

(Hemant Gupta, J)

(Ramesh Kumar Datta, J)

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