

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**TAX APPEAL NO. 41 of 2007****With****TAX APPEAL NO. 526 of 2007****With****TAX APPEAL NO. 527 of 2007****With****TAX APPEAL NO. 699 of 2007****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE KS JHAVERI****and****HONOURABLE MR.JUSTICE K.J.THAKER**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge ?
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SAKUN POLYMERS LTD.....Appellant(s)**Versus****JOINT COMMISSIONER OF INCOME TAX(ASSESSMENT)S.R.-****3....Opponent(s)**

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Appearance:

MR. S.N. SOPARKAR, SENIOR ADVOCATE WITH MRS SWATI SOPARKAR,
ADVOCATE for the Appellant(s) No. 1

RULE SERVED for the Opponent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE KS JHAVERI**
and
HONOURABLE MR.JUSTICE K.J.THAKER

Date : 23/12/2014

COMMON ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE KS JHAVERI)

1. The question of law raised in these appeals are common, therefore, all these appeals are being disposed of by this common judgment.

2. In Tax Appeal No.41 of 2007, the appellant-assessee has challenged the judgment and order dated 02.07.2006 passed by the Income Tax Appellate Tribunal, Ahmedabad [for short "the Tribunal"] in ITA No.284/Ahd/2001, whereby the appeal filed by the revenue was partly allowed by the Tribunal.

3. In Tax Appeal No.526 of 2007, the appellant-assessee has challenged the judgment and order dated 28.09.2006 passed by the Tribunal in ITA No.2425/Ahd/2004, whereby the appeal filed by the assessee was partly allowed by the

Tribunal

4. In Tax Appeal No.527 of 2007, the appellant-assessee has challenged the judgment and order dated 29.09.2006 passed by the Tribunal in ITA No.851/Ahd/2002, whereby the appeal filed by the revenue was partly allowed by the Tribunal.

5. In Tax Appeal No.699 of 2007, the appellant-assessee has challenged the judgment and order dated 28.09.2006 passed by the Tribunal in ITA No.2603/Ahd/2002, whereby the appeal filed by the assessee was dismissed by the Tribunal.

6. The facts of all these case are similar, therefore, we discuss the facts of Tax Appeal No.41 of 2007 for our convenience.

7. The facts, in brief, are that the assessee had filed its return on 28.11.1996 for the Assessment Year 1996-96, declared total income at Rs.43,49,320/-. Thereafter the return was processed under Section 143(2) of the Income Tax Act. The Assessing Officer passed his order under Section 143(3) of the Act. Against the said order, the assessee filed an appeal before the Commissioner of Income Tax (Appeals). The CIT(A) allowed the appeal of the assessee.

7.1 Being aggrieved and dissatisfied with the order of the CIT(A), the revenue filed an appeal before the Tribunal. The Tribunal vide impugned order dated 02.07.2006, partly allowed the appeal of the revenue. Hence, this appeal is filed at the instance of the revenue.

8. While admitting Tax Appeal Nos. 41 of 2007, 526 of 2007 and 527 of 2007, the Court had formulated the following substantial question of law:-

"Whether in the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in law in holding that depreciation, whether claimed or not, has to be foisted upon the assessee even prior to insertion of Explanation 5 to S.32(1) of the Act with effect from 01/04/2002, while calculating deduction under Chapter VI-A of the Act ?"

9. While admitting Tax Appeal No.699 of 2007, the Court had formulated the following substantial question of law:-

"Whether on the facts the Tribunal is right in law in interpreting Section 80IA and the explanation inserted with

effect from 01.04.2002 to section 32 of the Income Tax Act, 1961 for the purpose of deduction under Chapter VIA of the Income Tax Act, 1961 ? ”

10. Learned advocate for the appellants has contended that question of law involved in these appeals is already concluded by this Court in favour of the assessee in Tax Appeal No.93 of 2000 [Dy. CIT(Asst) vs. Sun Pharmaceuticals Ind. Ltd].

11. We have heard learned advocate for the appellants and perused the material on record. We have also perused the decision relied upon by the learned advocate for the appellant and found that the issue raised in these appeals is already concluded in favour of the assessee and against the revenue. Paragraph Nos. 6 to 12 of the aforesaid decision read as under:-

“6. The learned counsel for the appellant felt that as the aforesaid question was not raised in this appeal should be raised in this appeal afresh after many years that the issue involved in the present case, requires re-consideration, and therefore, Civil Application being OJ CA No. 546 of 2010 was filed after Tax Appeal No. 2/2002 was decided, and pursuant to the order passed in OJCA No. 546 of 2010, vide order dated 26.11.2014, the following

substantial question of law has been framed by this Court, which reads as under:

Whether, the Appellate Tribunal is right in law and on facts in holding that depreciation not claimed for by the assessee, cannot be allowed as a deduction despite the introduction of the concept of block assets ?

6. We have heard the learned counsels appearing for the parties and considered the submissions. Mr. Soparkar learned counsel at the out set submitted that the question no. 2 cannot be re-agitated as it is covered by the decision of this Court in **Tax Appeal No. 175 of 2001** as well as **Tax Appeal No. 2/2002** decided on 17.11.2014. However, Mr. Parikh learned counsel for Revenue submitted that the question of law as raised in this case was never decided in those matters, and therefore, he requested that the question of law be decided afresh. As both the questions of law are interconnected are decided together.

7. We have heard the learned counsel appearing for the parties at length. According to the learned counsel Mr. Parikh, the decision of the Full Bench of the Bombay High Court in the case of **Plastiblends India Limited v. Additional Commissioner of Income-tax & Ors., reported in [2009] 318 ITR (Bom)[FB]** will have to be applied to the facts of this case. Ld. Counsel has relied on the grounds of challenge raised in this appeal as it original was and amended.

8. In contra, learned counsel Mr. Soparkar for revenue has drawn our attention to the decision of the Honble

Supreme Court in the case of **Commissioner of Income Tax v. Mahendra Mills, reported in [2000] 243 ITR 56** and the decision of this Court in **Tax Appeal 2/2002** and **Tax Appeal No. 175/2001**. It is submitted that the questions of law are concluded, but no elaborate reasons are to be given in view of the finding of fact and the question also having been answered in the case of **Manehdra Mills (supra)**, and therefore, the decision of the Honble Supreme Court will enure for the benefit of the present assessee as the amendment is after 2000 and not prior thereto.

9. The decision cited by the learned counsel for the Revenue of the Bombay High Court (*supra*) cannot be applied in the facts of this case and as far as this question of law is concerned.

10. This takes us to the original first question wherein also the learned counsel for the appellant has placed reliance on the decision of the Full Bench of Bombay High Court **Plastiblends India Limited v. Additional Commissioner of Income-tax & Ors., reported in [2009] 318 ITR (Bom)[FB]** and submitted that this appeal should be allowed.

11. As far as this aspect is concerned, the finding of fact recorded by the CIT(Appeals) which reads as under:

3. The contentions of the appellant and the reasons given by the Assessing Officer in allowing full depreciation are considered. The decision of CIT v. Mother India Refrigeration (P) Ltd. (*supra*) relied on by the assessing Officer

is not applicable in the instant case as the issue as to whether depreciation is optional or not was never before the Supreme Court. The second decision of Madras High Court in the case of Dasa Prakash Bottling Co. v. CIT (supra) will also not be applicable as the Gujarat High Court, which is jurisdictional High Court in the case of CIT v. Arun Textiles 192 ITR 700 did not agree with this decision. In the case of Arun Textiles (supra), the Gujarat High Court held that there is nothing in the provisions of section 32(1) read with section 29 of the Income-tax Act, 1961, to indicate that even when no claim is made for allowing deduction in respect of the depreciation under section 32(1), the Income-tax Officer is bound to allow a deduction. Under the scheme of the Act, income is to be charged regardless of depreciation on the value of the assets and it is only by way of an exception that section 32(1) grants an allowance in respect of depreciation on the value of the capital assets enumerated therein. There is intrinsic evidence under section 43(6)(b) of the Act in the expression less all depreciation actually allowed to show that it is not as if all allowable deductions are to be granted by the Income-tax Officer even when the assessee does not want the same. Sub-section (2) (a) of Section 143(3) of the Act provides that an assessee can object to such deduction made under section 143(1). Therefore, the assessee can come forward in such a case and make clear its intention that it does not want to compute depreciation on the

assets and wants no benefit of claiming any depreciation in respect thereof. The Circular of CBDT 29 D (XIX-4) of 1965 (F. No. 45/239/65-ITJ), dated 31.8.1996) directed that, where the required particulars have not been furnished by the assessee and no claim for depreciation has been made in the return, the Income-Tax Officer should estimate the income without allowing depreciation allowance. Respectfully following the decision of the Gujarat High Court, I hold that the depreciation is optional to the assessee and once he chooses not to claim it, the Assessing Officer cannot allow it while computing the income. Further, once the depreciation is option, applying the same ratio of Gujarat High Court and other Courts, it will be optional for block of assets also. It is not necessary that the depreciation is allowable not allowable as a whole. The assessee can claim it partly also in respect of certain block of assets and not claim in respect of other block of assets. I, therefore, direct the Assessing Officer to withdraw depreciation allowance of Rs. 85,24,227/- not claimed by the appellant."

12. Since the issue is already concluded by this Court, no elaborate reasons are required to be assigned by us for disposing these appeals. In that view of the matter, we are of the considered opinion that the present appeals deserve to be allowed and the same are accordingly allowed. The

question of law raised in these appeals is answered in favour of the assessee and against the revenue. Accordingly, we hold that the Tribunal was not right in law in holding that depreciation, whether claimed or not, has to be foisted upon the assessee even prior to insertion of Explanation 5 to S.32(1) of the Act with effect from 01/04/2002, while calculating deduction under Chapter VI-A of the Act.

(K.S.JHAVERI, J.)

(K.J.THAKER, J)

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