

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on November 26, 2014

Judgment delivered on December 12, 2014

+ **ITA No. 90/2003**

THE COMMISSIONER OF INCOME TAX, DELHI-IV Appellant

Through: Mr.N.P.Sahni, Sr.Standing
Counsel with Mr.Nitin Gulati,
Mr.Judy James, Advocates

versus

M/S. ESCORTS TRACTORS LTD. Respondent

Through: Mr.Simran Mehta with
Mr.Prabhat Kalia, Advocates

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

1. In this appeal, under Section 260A of the Income Tax Act, 1961 ('Act' in short) filed by the revenue challenging the order dated July 15, 2002 of the Income Tax Appellate Tribunal ('Tribunal' in short), the following substantial questions of law fall for our consideration:-

1. *Whether the finding recorded by the Tribunal is perverse?*
2. *Whether in the absence of any evidence to the effect that the machine was put to use before the closure of the financial year and in the absence of documentary evidence in this behalf, the Tribunal was justified in arriving at a conclusion that any amount of depreciation and investment allowance could be deducted?*

2. The Assessment Year is 1987-88. On June 30, 1987, the assessee had filed the return declaring the income as Rs. 1,66,17,084/-. The assessee claimed normal depreciation, amounting to Rs.23,93,038/- on the plant and machinery. The Assessing Officer disallowed depreciation on the following items:-

ITEM	AMOUNT IN RS.	CLAIMED DATE OF INSTALLATION
Widia Special Six Spindle Drilling & Reaming Machine	20,94,355/-	29.12.1986 (Machine handed over for try out)
500 lb air horses	76,513/-	29.12.1986
Conveyor	2,07,517/-	29.12.1986
Electrical Tester	14,653/-	26.12.1986
TOTAL	23,93,038/-	

3. Insofar as this appeal is concerned, we are concerned with the item at serial No. 1 above. The Assessing Officer disallowed the depreciation on the ground that the said machine was not installed before the close of the Accounting Year 31.12.1986 for the purpose of production/manufacture of goods. While coming to the said conclusion, the Assessing Officer was of the view that one Krishan who had signed the report on commissioning/trying out of machines was not produced and further the production sheets in respect of the machines were not produced by the assessee in support of its contention.

4. The appeal filed by the assessee before the Commissioner of Income Tax (Appeals) was dismissed by observing that apart from the

facts noted by the Assessing Officer; the assessee had not produced any evidence to the effect that the machine was put to use before the end of the accounting year; the most important witness who had signed the commissioning/try out report for the machines was not produced before the Assessing Officer; and no production sheet or log sheet in respect of the machine, to show that the machine was put to use for production before the close of the year, were filed.

5. The assessee, who had filed an appeal before the Tribunal succeeded inasmuch the Tribunal, vide order dated July 15, 2002, held that material placed before the Assessing Officer and the Commissioner of Income Tax (Appeals) was sufficient to show that the machine was installed before the close of the year. We note below the facts as found and accepted by the Tribunal.

6. The machine namely Widia Special Six Spindle Drilling Machine was received on 24.12.1986. The foundation of the machine was already laid on 22.12.1986 in Hall No. 1 and electrical connections were completed on 27.12.1986. The machine in full working order was handed over for trying out on 29.12.1986 to the manufacturing engineering department. The Tribunal concluded as under:

“13.6. We have considered the rival submissions and perused the record carefully. The

material placed before the AO and CIT(A) was sufficient to show that machine was installed before the end of the financial year and it was used for trial and once this is certified by the factory manager and others then assessee was justified in claiming depreciation and we direct the AO to allow the depreciation in respect of the machines mentioned in the earlier part of the order”.

7. Learned counsel for the appellant-revenue would submit that no evidence was filed by the respondent assessee to show that the production had commenced to ascertain the use of machine in the business of the assessee. In other words, it is the revenue's case that machine should have been actually used in commercial sense to make the claim of depreciation. Mr. Simran Mehta, learned counsel appearing for the respondent assessee would reiterate the facts as noted by the CIT (Appeals) and the Tribunal. According to him, the machine after installation was handed over to the manufacturing engineering department on 29.12.1986 for trial run, which would demonstrate that machine was duly installed and was ready to be used. He would submit, the appellant revenue is interpreting the provisions narrowly. According to him, there is no requirement of actual production having taken place before the end of the previous year.

8. Having heard the learned counsel for the parties, we note that the

appellant-revenue has stated in para ‘d’ of the grounds of appeal, which is reproduced as under:

“d) For claiming depreciation, it is mandatory to establish that plant and machinery were owned and used for its business for production and manufacturing. Admittedly, in the present case the machines were handed over to the production department only for the purpose of trial just two days before the end of the previous year and not for the purpose of production and manufacturing”.

9. The above would show that the appellant revenue has conceded to the fact that the machine was handed over to the production department for the purpose of trial two days before the end of the previous year i.e. 29.12.1986. The appellant revenue qualifies its stand by stating that the same was not for the purpose of production and manufacture. It is not the stand of the appellant revenue that the machine was not installed for trial purposes. Given the finding of the Tribunal as reproduced above, it must be inferred and accepted that the machine was installed. Once the machine is installed, it is fit to be used for manufacturing and production. The trial run was to ensure that the machine was working in perfect condition following the installation and could be used henceforth for production and manufacturing purposes.

10. Even Section 32 of the Act which has been referred to by the appellant revenue in para ‘j’ in the grounds of appeal, does not

contemplate that manufacturing or production should have actually commenced nor does it contemplate that the assets should be used for the whole of the assessment year. The requirement under Section 32(1) is “owned by assessee” which suggest that the assessee should be the owner in the previous year in question. The second requirement is that the machine should have been used. The purpose of Section 32 is to give due regard to the wear and tear suffered by the assets used by the assessee so that net income is duly arrived.

11. In ***Machinery Manufacturers Corporation Ltd. vs. CIT [1957] 31 ITR 203 (Bombay)***, it was observed that the word used in the Income Tax Act of 1922 corresponding to Section 32 of the Act of 1961, should be given wider meaning. It is settled position of law that the expression “used” includes passive as well as active user. This Court in the case of ***Capital Bus Services Pvt. Ltd. vs. Commissioner of Income Tax 123 ITR 404 (Delhi)*** has held as under:-

“Though it is true that a machinery generally depreciates with actual user, the decision indicate that it is not necessary to import this concept in interpreting the expression "used" is the statute. In the first place, a machinery may well depreciate even where it is not used in the business and even due to non-user or being kept idle. Secondly, a very strict correlation between the actual use

of machinery and the concept of depreciation would lead to several anomalies and difficulties, for a machinery cannot be used throughout the day and night or even throughout the working hours or even during the days when the business is in full scale operation. Thirdly, there will be no strain on the statutory language by interpreting it widely and not limiting it to the actual working or actual employment of the machinery in the business. On the other hand, it would be more appropriate to envisage the expression as comprehending cases where the machinery is kept ready by the owner for its use in the business and the failure to use it actively in the business is not on account of its incapacity for being used for that purpose of its non-availability.”

12. From the above it is seen that the terminology used would envisage comprehending cases where the machinery is installed, checked and made fully operational. Thus, depreciation is not denied on the ground of non “use” when trial has taken place. On this aspect, we note for benefit the judgment of the Madhya Pradesh High Court in the case of ***Commissioner of Income Tax Vs. Vindhyachal Distilleries Pvt. Ltd., [2005] 272 ITR 583***, wherein the assessee claimed that it installed and put to use a bio gas plant at the cost of Rs. 90,41,057/- in May, 1992. In the return for the assessment year 1993-94, it claimed depreciation. The Income Tax Officer while passing the order of assessment; restricted the

depreciation to 50% on the ground that the bio gas plant was commissioned and put to use for less than 180 days; that is only from October 9, 1992. The Commissioner (Appeals) upheld the disallowance. The Tribunal found that the bio gas plant was installed and put to use in May 1992, as was evident from the assessee's letter dated May 19, 1992, to the supplier of the bio gas plant that during trial run, it developed some leakage and other problems, that there was some correspondence with the supplier of the plant in July and August, 1992, and thereafter, the plant was repaired and leakage and other teething problems were solved and normal flaring of methane gas started in October 1992. The Tribunal recorded a finding of fact after examining the relevant documents that the entire equipments had been installed and commissioned and put to use in May 1992. The High Court, while dismissing the appeal of the revenue was of the view that it was not in dispute that the plant was installed in May, 1992 and records clearly shows that on installation, it was commissioned in May 1992 but on account of certain leakage during trial run, repairs had to be carried out and regular production started in October 1992. The assessee was entitled to full depreciation. Similarly, the High Court of Kerala in the case of ***Commissioner of Income Tax Vs. Geo Tech Construction Corporation, [2000] 244 ITR 452*** on similar lines, wherein the Tribunal

held that the margin of time was enough for tippers to move from Pondicherry to the work site and even if it is accepted, as was the case put up by the revenue, there was no actual user, the fact that they were kept ready for use would be enough for grant of depreciation on the principle of passive user of the asset, allowed the claim of the assessee for depreciation.

Suffice to state, from the above two judgments, we note that if plant and machinery is kept ready for use, that would be enough to grant depreciation.

13. In the case in hand, as observed in para No.9 above more particularly keeping in view the conceded position of the appellant revenue, the only dispute that has been raised by the revenue is that there was no material to show that the machine was used for production and manufacturing. On a reading of the evidence before it, if the Tribunal has come to the conclusion that the machine having been installed before the end of the financial year and used for trial in terms of the certificate of factory manager, we are of the view that it is a plausible view that the machine having been used for the purpose of business cannot be interfered with. Moreover such an aspect is pure question of fact. We do not think, it would be appropriate for this Court to interfere with such a finding when the conclusion as drawn by the Tribunal is not perverse or

such which cannot be drawn by any reasonable person or authority on disclosed state of facts.

14. The power of the High Court to interfere with the factual findings of the Tribunal is well settled. The Supreme Court in the case of ***Ishwar Dass Jain Vs. Sohan Lal***, AIR 2000 SC 426 has noted two situations where findings of fact can be interfered with, which are as under:

(i) The first situation is, when material or relevant evidence is not considered which, if considered, would have led to an opposite conclusion, while

(ii) The second situation in which interference is permissible is where a finding has been arrived at by placing reliance on inadmissible evidence which if it was omitted, an opposite conclusion was possible.

15. Neither of the above two situations arise in the present case inasmuch, it is not a case, when material or relevant evidence was not considered. That apart, it is also not the case of the appellant-revenue that the finding of fact has been arrived at by the Tribunal, relying upon the inadmissible evidence. The off shoot of the above discussion is that machine has been duly installed and was in a working condition before the end of the previous year.

16. In view of the above, we are of the view that the questions of law need to be answered against the appellant-revenue and in favour of the

respondent assessee. The appeal is dismissed with no order as to costs.

(V.KAMESWAR RAO)
JUDGE

(SANJIV KHANNA)
JUDGE

DECEMBER 12, 2014
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