

***THE HON'BLE SRI JUSTICE L.NARASIMHA REDDY
AND
*THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM
+ I.T.T.A.No.239 of 2003**

% Dated 27.11.2014

The Commissioner of Income Tax.

....Appellant

\$ Live Well Home Finance (P) Ltd.

....Respondent

! Counsel for the appellant : Sri S.R.Ashok

^ Counsel for respondent : Sri A.V.Shiva Karthikeya

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? CASES REFERRED:

1. (2011) 332 ITR 0235(AP)
2. (1989) 175 ITR 0154 (AP)
3. (1998) 229 ITR 0776 (All)
4. (2002) 256 ITR 0320
5. (1971) 082 ITR 0044(SC)
6. 2004(4) ALT 781

**THE HON'BLE SRI JUSTICE L.NARASIMHA REDDY
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JUDGMENT: (Per LNR,J)

The respondent herein undertakes several business activities. One of it is to acquire the shuttering material, which is used in the process of construction of buildings and to lease the same to the intending users. In its returns of income submitted

for the assessment year 1995-96, it claimed depreciation of RS.28,85,450/- being the cost of the shuttering material. Its plea was that the cost of each item of the shuttering material is less than Rs.5,000/- and accordingly, it is entitled for the depreciation of 100% under Section 32(1)(ii) of the Income Tax Act, 1961 (for short 'the Act'). The Assessing Officer did not accept the claim, but allowed depreciation only to the extent of 25%. Aggrieved by that, the respondent filed an appeal before the Commissioner of Income Tax (Appeals). Through his order, dated 22.03.1997, the Commissioner allowed the appeal. Assailing that order, the appellant herein i.e., Department filed I.T.A.No.224/Hyd/98 before the Hyderabad Bench of the Income Tax Appellate Tribunal. The appeal was dismissed by the Tribunal, through its order, dated 11.06.2002. Hence, this further appeal under Section 260-A of the Act.

Sri S.R.Ashok, learned senior Standing counsel for the appellant submits that the matter is no longer *res integra* and recently a Division Bench of this Court, in ***Commissioner of Income Tax vs. Raghavendra Constructions***^[1] held that components of shuttering material cannot be treated as independent items and the cost of the entire material acquired by an assessee must be treated as a unit. He contends that whatever may have been the justification for the Tribunal in taking the view as it did through the order under appeal, the same is not tenable in view of the judgment of this Court. On merits also, he submits that it is difficult to treat each component of shuttering material as a unit and 100% depreciation cannot be allowed for them.

None appeared for the respondent. We requested Sri A.V.Shiva Karthikeya, learned counsel to assist this Court. He submits that the various High Courts all over the Country as well as this Court have taken the view that in the context of extending the benefit under Section 32(1)(ii) of the Act, each unit needs to be taken into account to verify whether the cost of the same is less than Rs.5000/- and the judgment of this Court in ***Raghavendra Constructions***' case (1 supra) runs contrary to

the predominant judicial opinion. He submits that in ***Commissioner of Income Tax vs. Sri Krishna Bottlers Pvt. Ltd.***^[2], a Division Bench of this Court dealt with the concept of 100% depreciation on individual units in detail and took the view that even the bottles in which the soft drink is supplied and the shells, in which they are placed qualify for 100% depreciation, and though the said judgment was taken note of by this Court in ***Raghavendra Constructions***'s case (1 supra), a crucial paragraph in the judgment of ***Sri Krishna Bottlers Pvt. Ltd.***'s case (2 supra) was treated as though it was not in existence at all. He submits that in a way, the judgment in ***Raghavendra Constructions***' case (1 supra) deserves to be treated as rendered in *sub silentio* of an otherwise binding precedent. Learned counsel has drawn our attention to the judgments of the other High Courts on the same subject relating to the same material, as well as the comment made in relation to the judgment of this Court in ***Raghavendra Constructions***'s case (1 supra) in the treatise 'Income Tax by Kanga & Palkhivala'.

The only question that arose for consideration in the appeals before the Commissioner as well as the Tribunal was as to whether the shuttering material purchased by the respondent, in the assessment year 1995-96 qualified for 100% depreciation. Section 32 of the Act is relevant in this context. The provision as it stood then, reads:

32. Depreciation- (1) In respect of depreciation of buildings, machinery, plant or furniture owned by the assessee and used for the purposes of the business or profession, the following deductions shall, subject to the provisions of section 34, be allowed-

- (i) *****
- (ii) in the case of any block of assets, such percentage on the written down value thereof as may be prescribed:

Provided that where the actual cost of any machinery or plant does not exceed five thousand rupees, the actual cost thereof shall be allowed as a deduction in respect of the previous year in which such machinery or plant is first put to use by the assessee for the purposes of his business or profession

From this, it is evident that in case, the cost of an item which answers the description of 'plant', is less than Rs.5,000/- depreciation is permitted to the extent of 100%. That the shuttering material answers the description of 'plant' is beyond any pale of doubt. Almost all the High Courts and this Court in ***Raghavendra Constructions***' case (1 supra) have taken such view. The question as it appears before us is as to, what constitutes a unit thereof.

It is a matter of common knowledge that shuttering and centering material comprises of steel plates or wooden planks of stipulated sizes and wooden or steel planks to provide horizontal support and steel pipes or wooden polls to provide vertical support. Once manufactured, the material is capable of being reused on quite large number of occasions and works. One does not find any instance of a person proposing to construct a house or building, acquiring the material exclusively for that purpose or the material not being used for other similar works. Small and independent units are either purchased, or taken on lease and put to use for providing support to erect columns and to lay the RCC slab. The lack of uniformity in this behalf is so glaring that in the same building, the sizes of rooms are different and the beams or pillars are not uniform. Material of the required size and dimension needs to be chosen. Another aspect is that if a particular builder constructs a multi-storied building, the entire construction does not take place at once, even if the shuttering material, which is required for the entire proposed constructed area, is available. The construction has to progress gradually and without exception, the material that is used in one floor is taken to the other floor for providing support. All this discussion is undertaken only to drive home the point that the shuttering material of any particular area cannot be treated as a unit. It is not only supplied, but also is used, in small units.

In the context of availing the benefit under Section 32(1)(ii) of the Act, identification of a unit of 'plant' becomes essential. Though the Act and the precedents on the subject are silent about this, the safest way is to identify the 'irreducible minimum' of the plant or machinery, which in turn can be put to

independent use. The mere fact that the number of such units can be clubbed together to achieve the result in a greater magnitude by itself does not result in merger into the larger one or loss of their identity. In this behalf, individual plates of sizes of about 3ft. x 3ft. for providing support for slab or 10ft x 3ft. or 2ft. for providing support to the beams or pillars can safely be treated as units. If the slab of 1000 ft. is to be laid, the builder or the meson must put to use, the required number of steel plates or wooden planks of the typical size to use. Nowhere we come across the instances of the shuttering material, of the size of the room or the building either being ordered or manufactured much less being put to use. These and other aspects were taken into account by various High Courts and it was held that each of the bits must be taken as a unit.

In ***Harijan Evam Nirbal Varg Avas Nigam Ltd. vs. Commissioner of Income Tax***^[3], the Allahabad High Court explained the concept as under:

“Shuttering is normally used to support the roof when concrete is being laid on it. These are not items of consumable stores, for they are retrieved after the roof has been laid, and used again elsewhere. It is like any other tool with the help of which construction is done, say, Karni, Tasla, Kudel, or Spade. It is not, therefore, correct to hold that shuttering material is not plant or machinery. In our opinion, it is plant and machinery just as a concrete mixer or any other tool, with which the Karigars and masons work would be. The assessee is, therefore, entitled to depreciation on shuttering material and the same be allowed to it.”

The Punjab and Haryana High Court in ***Commissioner of Income Tax vs. Akal Construction and Engineering Co***^[4] observed as under:

“Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in allowing depreciation on wooden shuttering at the special rate i.e., 100 per cent, under the first proviso to section 32(1) (ii) of the Income-Tax Act, 1961, and thus treating that each single item or constituent part of wooden shuttering material form independent plant, i.e., “wooden shuttering”, within the meaning of Section 32(1) of the Act?

It is not in dispute that the assessee had purchased

various items for being used in the construction work. Individual bills had been filed. The value of each item was belong Rs.5,000. On this basis, the Tribunal has accepted the assessee's claim. We find that the action is in conformity with the provisions of section 32(1)(ii) of the Income-Tax Act, 1961, which permits 100 per cent. Allowance. The finding recorded by the Tribunal is purely one of fact. No substantial question of law arises.

In **Raghavendra Constructions'** case (1 supra), recently this Court has taken a different view. The two judgments referred to above and certain others were cited before it. However, the Bench expressed its inability to concur with them.

The judgment of this Court in **Sri Krishna Bottlers Pvt. Ltd.**'s case (2 supra) was cited extensively before the Bench that heard **Raghavendra Constructions'** case (1 supra). One of the questions that was dealt with in **Sri Krishna Bottlers Pvt. Ltd.**'s case (2 supra) was whether each bottle that is used for serving a soft drink and the shells, in which they are arranged qualify for 100% depreciation under Section 32 of the Act. The matter was discussed in detail, obviously because the subject was almost untouched by that time. The judgment of the Supreme Court in **Commissioner of Income Tax vs. Taj Mahal Hotel**^[5] and various judgments of the Courts in India and Foreign Countries were discussed at length to draw support for the conclusions. The purport of almost each and every judgment that was cited before their lordships was taken note of. As regards bottles and shells, their lordships observed

"The bottles containing the soft drink cannot be stock-in-trade inasmuch as the bottle by itself is not the subject of sale. The customer or the retailer returns back the bottle to the assessee after the soft drink is consumed. Likewise, the shells which are sent to the customer or dealer also come back with the empty bottles and they cannot also be stock-in-trade. What is the function these bottles and shells perform in the assessee's trade ? Are they essentially tools in the assessee's business ? In our opinion, yes. The bottles are essential tools of the trade for it is through them that the soft drink is passed on from the assessee to the customer. Without these bottles, the soft drink cannot be effectively transported, like the silos in Schofield v. R. and H. Hall Ltd. [1974] 49 TC 538 (CA), which are used to store grain and to empty the same, performing a

trade function. As pointed out in *Dixon v. Fitch's Garage Ltd.* [1975] 50 TC 509 (Ch D), the bottles and the contents are "totally interdependent." So are the shells. The bottles and shells also satisfy the durability test for it is nobody's case that their life is too transitory or negligible to warrant an inference that they have no function to play in the assessee's trade. They are therefore "plant" for the purposes of the Act.

The principle that a "setting" in which the trade is conducted is not attracted to the facts of the case of all. The bottles and shells have nothing to do with the building in which the trade is conducted nor with the "setting" in which it is conducted. Each bottle and each shell is an entity by itself and they cannot be broken down into pieces for considering whether they have any part to play in the business of the assessee. The bottles and shells are gross matter and, in fact, gross materiality is not a requirement at all for a thing to be treated as plant.

For the aforesaid reasons, we agree with the decision of the Rajasthan High Court in *CIT v. Jai Drinks (P.) Ltd.* . That case also related to bottles and shells, the assessee being a seller of soft drinks. The learned judges, after referring to the two Supreme Court judgments referred to above, also referred to the decision of the Delhi High Court in *CIT v. National Air Products Ltd.* and of the Calcutta High Court in *CIT v. Steel Rolling Mills of Hindusthan (P.) Ltd.* , wherein it was held that "gas cylinders" fall within the definition of "plant". The fact that in the latter two cases, gas could not otherwise be transported especially by cylinders made for that purpose makes no difference."

At the end, the reference was answered in favour of the assessee and against the Department.

However in ***Raghavendra Constructions***'s case (1 supra), another Division Bench of this Court observed as under:

"Applying the above principles, this Court held that the bottles and shells used by soft drinks bottling industry is "plant". The Division Bench nowhere observed that each bottle or each shell would also be a plant for the purpose of section 32(1)(ii)."

It was proceeded as though in ***Sri Krishna Bottlers Pvt. Ltd.***'s case (2 supra), each bottle and shell was not treated as unit qualifying for depreciation under Section 32(1)(ii) of the Act. This does not appear to be correct. The underlined portion of the Judgment in ***Sri Krishna Bottlers Pvt. Ltd.***'s case (2 supra) makes this clear.

Two difficult questions that crop up in this behalf are (a) choosing an appropriate precedent and (b) identification of the

ratio laid therein. In fact, both happen to be different facets of the doctrine of *stare descis*.. The binding nature of a judgment rendered by a superior Forum in a legal system, can hardly be the subject matter of discussion. Slight difficulty arises mostly in relation to the precedents coming from the Courts of co-equal jurisdiction. The precedent rendered by a Court is followed by another Court of same status or jurisdiction, almost, as a matter of course. However, law does provide for making deviation from a precedent of that nature, in case it is found that it was rendered either *per encurium* or *sub silentio*. Instances are not lacking, where these two doctrines are invoked, even in respect of the precedents of superior Courts.

The precedents can be treated as having been rendered *sub silentio*, if an otherwise binding precedent or a specific provision of law was not taken note of. Generally, we do not come across the instances of a judgment being treated as *sub silentio*, if the binding precedent is taken note of. However, if the *ratio* emerging from a binding precedent was treated as non-existing and the judgment was rendered contrary to what was decided in the precedent, a situation may arise, where the judgment so rendered almost resembles, the one done in *sub silentio*.

It has already been demonstrated that the ratio in ***Sri Krishna Bottlers Pvt. Ltd.***'s case (2 supra), which is to the effect that each bottle and shell deserve to be treated as independent units and qualify for 100% depreciation was treated as non-existent at all in ***Raghavendra Constructions***' case (1 supra). Since both the judgments referred to above were rendered by Division Benches only, we are faced with the problem of choosing, since there is conflict of views.

Sir John Salmond in his Treatise on Jurisprudence, opined as under:

“where in fact a precedent is disregarded, this may take two forms. The court to which it is cited may either overrule it, or merely refuse to follow it. Overruling is an act of superior jurisdiction. A precedent overruled is definitely and formally deprived of all authority. It becomes null and void, like a repealed statute, and a new principle is authoritatively substituted for the old. A refusal to follow a precedent, on the

other hand, is an act of co-ordinate, not of superior, jurisdiction. Two courts of equal authority have no power to overrule each other's decisions. Where a precedent is merely not followed, the result is not that the later authority is substituted for the earlier, but that the two stand side by side conflicting with each other. The legal antinomy thus produced must be solved by the act of a higher authority, which will in due time decide between the competing precedents, formally overruling one of them, and sanctioning the other as good law. In the meantime the matter remains at large, and the law uncertain."

He proceeded to explain the doctrine of *sub silentio* as under:

"A decision passes *sub silentio*, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind. The court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass *sub silentio*."

In Shan Zahoor and others Vs.Vijayawada Municipal Corporation^[6], one of us (LNR,J) discussed some facets of concept of precedent as under:

A judgment of a Court operates as a precedent only for what it decides, known as ratio decidendi and not for its general or casual observations, called obiter dicta. However, discerning or culling out the ratio decidendi of judgment is by no means a simple or easy task. Many a time, it would be difficult to state, with a semblance precision as to which portion of the judgment represents the ratio decidendi and which, the obiter dicta. The angle from which a precedent is examined makes a substantial difference. In the process of answering the main issue or dealing with the core of the dispute, passing observations are bound to be made by the Court, here and there. Once the central issue involved in the case is identified, the view expressed by the Court on that issue deserves to be treated as the ratio decidendi. The observations in the process of reasoning, or disposal of inconsequential and subsidiary issues, fall into the category of obiter dicta. Where, the ultimate conclusions are summed up at the end of the precedent; the Court before, which it is cited, is

relieved of the difficulty in this regard. It is beneficial to refer to the view of some jurists, in this context.

Sir John Salmond, in his treatise on jurisprudence, aptly explained the difficulties in identifying the ratio decidendi in a precedent. He wrote as under:

"While it is fairly simple to describe what is meant by the term ratio decidendi, it is far less easy to explain how to determine the ratio of any particular case. Though we know that it is the rule the Judge acted on, we cannot always tell for certain, what that rule was. In some cases all we are presented with is an order or judgment unsupported by reasons "of any sort. In others we are furnished with lengthy judgments in which may be embedded several different propositions, all of which support the decision. Another difficulty is that any general rule of law must ex hypothesi relate to a whole class of facts similar to those involved in the case itself: but just what this class is will depend on how widely we abstract the facts in question."

Edgar Bodenheimer, in his book on jurisprudence, described the significance, and method of identification of ratio decidendi as under:

"(A) case is not controlling as a precedent for the sole reason that similarities and parallels between the facts of the earlier and later cases can be discerned. The ratio decidendi must be discovered by relating the facts of the two cases to a principle of legal policy which reasonably covers both situations. In many instances, this principle of policy will not spring into existence as a finished creature the first time it is expressed by a Court. It will often have been stated by the Court in a tentative and groping fashion, and its true import and scope will not be capable of being ascertained until other Courts have had a chance to correct the inadequacies of the first formulation and to graft exceptions, qualifications, and caveats upon the principle. In this way the ratio decidendi of a case often develops its true and full meaning slowly and haltingly, and it may take a whole series of decisions involving variations of the situation presented in the first case until a full-blown rule of law, surrounded perhaps by a cluster of exceptions, replaces the tentatively and inadequately formulated generalization found in the initial decision. In short, a whole course of decisions will gradually mark out the outer limits of a legal principle left indeterminate by the first decision attempting to give form to it."

The difficulty in distinguishing ratio decidendi from obiter

dicta is explained by C.K. Allen, in his celebrated work "Law in the Making", in the following terms:

"One of the greatest difficulties in its conception is the distinction which is constantly drawn between ratio and dictum, the essential and the inessential. In the course of the argument and decision of a case, many incidental considerations arise which are (or should be) all part of the logical process, but which necessarily have different degrees of relevance to the central issue. Judicial opinions upon such matters, whether they be merely casual, or wholly gratuitous, or (as is far more usual) of what may be called collateral relevance, are known as obiter dicta, or simply dicta, and it is extremely difficult to establish any standard of their relative weight."

Even where a ratio decidendi is identified in a precedent, it is not as if it is to be imported in its entirety to the case on hand. An effort needs to be made to fit the ratio decidendi into the facts of the case under adjudication. An amount of elasticity exists in this regard, which, in turn, would depend on the variation as to facts and circumstances. Dias, an acknowledged English Jurist compared the ratio in a precedent to a pellet of clay, and observed as under:

"The ratio of a case may be likened to a pellet of clay, which a potter can stretch and shape within limits. If he wants to stretch it, he can; or he can press it back into a pellet. A ratio cannot be stretched indefinitely any more than clay, for there is a limit beyond which the generalization of the statement of specific facts cannot go."

In a way, the situation referable to the discussion in the preceding paragraphs obtains in the instant case also.

In *Young Vs. Bristol Aeroplane Company Limited* (1944) 2 All ER 293, the House of Lords held that the Rule of stare decisis has three exceptions namely;

- (1) If two decisions are in conflict, the Court of Appeal must choose between them.
- (2) If a decision, although not overruled, is inconsistent with a decision of the House of Lords or of the Judicial Committee of the Privy Council, the Court of Appeal is not bound by it.
- (3) If a decision was given *per incuriam*, ie in ignorance of a statute or other binding authority, the Court of Appeal is not bound by it; nor may it be bound where the previous Court

had followed an incomplete report of a still earlier case. The *incuria* rule does not apply where the previous Court, which is alleged to have overlooked an earlier case, had in fact alluded to it; nor does it apply where the earlier of the conflicting cases exerted only persuasive authority.

In his treatise on Jurisprudence, R.W.M. Dias expressed the following view:

“More serious is the implication of saying that two decisions are in conflict. Logically the exception contradicts the rule. For, if the Court of Appeal propounds a rule in one case and a different rule in another, the later of the two must either have been decided in ignorance of the earlier, in which event it falls under the third exception and is accordingly invalid; or it must have violated the rule that the Court is bound, in which event also it is invalid. To assert that the Court may choose between them and perhaps prefer the later case is in effect to escape from the rule itself by according validity to the very case which has violated it.”

The discussion can be further prolonged on academic lines. The effort is only to drive home the point that if a Court is placed with two precedents rendered by itself, one in conflict with the other, it has every right to choose as between the two and by doing so, it does not do any violence to the other. At the most, it may be an occasion for the superior Court to resolve the rule on ostensible conflict. Applying these principles, we prefer to follow the ratio in the judgment of this Court in ***Sri Krishna Bottlers Pvt. Ltd.***’s case (2 supra) than to be guided by the judgment in ***Raghavendra Constructions***’ case (1 supra).

A legally binding precedent has its own strength and it does not depend upon the views of the Authors of Books and other persons connected with law. However, the view expressed in an otherwise respected Treatise cannot be ignored altogether. Though it may not effect the binding nature of the precedent, it may appeal in its own way to the Courts, wherever such a precedent is cited. It hardly needs any emphasis that Kanga & Palkhivala’s ‘The Law and Practice of Income Tax’ is a highly respected Treatise on the subject. In the Tenth Edition of the book at page No.735, the judgment of this Court in ***Raghavendra Constructions***’ case (1 supra) was referred to and the following observation was made:

“The High Courts held that shuttering and centering material constitutes a “plant” but the Andhra Pradesh High Court took a contrary view. Its reasoning is, it is submitted contrary to elementary and well settled principles of what is a plant. The court observed: “If a thing is durable and functional utility in the business of the assessee, it is a plant. If it is durable but cannot effectively stand alone without functional integration with other similar or other dissimilar components or units, it would not qualify a ‘plant’. It is difficult to make any sense of this wholly unwarranted new test of functional integration.”

Though we concede to the authors the right to express their reservation about the correctness of a Judgment, with due respect to them, we are of the view that the disagreement could have been expressed in more delicate manner, notwithstanding their concern about uncertainty in law. On our part, we are only making an effort to recognize certain aspects of law, which have already been propounded, than pointing out mistakes.

On merits also, we are convinced that the ‘irreducible minimum’ for the shuttering material is the individual plates, for providing support to the reinforced concrete and cement or the poles and bars that are used at the time of formation. We choose to fall in line not only with the judgment of this Court in ***Sri Krishna Bottlers Pvt. Ltd.***’s case (2 supra), which in turn has drawn its conclusion based upon the judgment of the Supreme Court in ***Commissioner of Income Tax vs. Taj Mahal Hotel***, but also the judgments rendered by the other High Courts.

We accordingly dismiss the appeal.

The miscellaneous petition filed in this appeal shall also stand disposed of. There shall be no order as to costs.

L.NARASIMHA REDDY, J

**CHALLA KODANDA
RAM, J**

Date: 27.11.2014
Note: L.R.Copy to be marked.
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***THE HON’BLE SRI JUSTICE L.NARASIMHA REDDY
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