

In the High Court of Judicature at Madras

Dated: 09.09.2014

Coram

The Honourable **Mr.JUSTICE R.SUDHAKAR**
and

The Honourable **Mr.JUSTICE G.M.AKBAR ALI**

Tax Case (A) Nos.330, 333, 509, 510, 511, 512, 516, 529, 583 of 2013,
89, 107, 272, 373, 422, 511, 488 of 2014 and 1011 to 1017 of 2010
& connected M.Ps.

T.C.(A)No.330 of 2013:

Commissioner of Income-tax
Coimbatore.

.... Appellant

Vs.

M/s.Kikani Exports P. Ltd.,
104, West Periasamy Road,
R S Puram, Coimbatore - 641 002.

..... Respondent

APPEAL under Section 260A of the Income Tax Act against the order dated 19th November, 2012 made in I.T.A.No.1671/Mds/2012 on the file of the Income Tax Appellate Tribunal "C" Bench, Chennai.

For Appellant in the above T.C.(A)s : Mr.T.R.Senthil Kumar
Mr.M.Swaminathan
Mr.K.Suresh Kumar
Standing Counsel for Income Tax

For Respondent in T.C.(A)Nos.330, 333,
529 of 2013, 488 and 373 of 2014 : Mr.S.Sridhar

For Respondent in T.C.(A)No.509/13 : Dr.Anita Sumanth

For Respondent in T.C.(A)No.510/13 : Mr.Karthik Raja

For Respondent in T.C.(A)Nos.511/13,
272/14, 1011 to 1017 of 2010 : Mr.R.Vijayaraghavan
& Mr.Venkat Narayanan

For Respondent in T.C.(A)No.529/13 : Mr.J.Balachander

For Respondent in T.C.(A)No.422/14 : Mr.K.Ravi

COMMON JUDGMENT
(Delivered by R.SUDHAKAR,J.)

This batch of Tax Case (Appeals) are filed by the Revenue challenging the orders of the Income Tax Appellate Tribunal on the ground that the assessee in the above Tax Case (Appeals) have not exercised their option to claim depreciation under Section 32 of the Income Tax Act in the manner prescribed under second proviso to Rule 5(1A) of the Income Tax Rules before filing their return of income.

2. Since the issue involved in all the above Tax Case (Appeals) are one and the same, common order is passed in the above matters.

3. The brief facts common to all the above Tax Case (Appeals) are as follows:

The respondent/ assessee in each of the cases, which are companies, have installed wind electric generator and claimed depreciation at the rate

prescribed under Rule 5(1) Appendix -I of the Income Tax Rules. The Assessing Officer was of the view that the assessee in each of the cases should exercise their option in terms of second proviso to Rule 5(1A) prior to the filing of return, which they failed to do and therefore they would not be entitled to depreciation in terms of Rule 5(1) Appendix - I, but only under Rule 5(1A) Appendix - IA of the Income Tax Rules. Rule 5(1A) second proviso reads as follows:

"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 (f) of section 139 of the Act"

4. Aggrieved by the orders of the Assessing Officer, the assessees went on appeal before the Commissioner of Income Tax (Appeals). In some of the cases, it appears, the Commissioner of Income Tax (Appeals) following the decision of the Tribunal in the case of ***M/s.K.K.S.K.Leaner Processors (P) Ltd. V. The Income-tax Officer I.T.A.No.826 and 827 of 2009 dated 20.11.2009*** allowed the appeals and in some cases, the Commissioner of Income Tax (Appeals) dismissed the appeals.

5. Aggrieved by the orders of the Commissioner of Income Tax (Appeals), both the Revenue, as against the granting of relief to the assesseees, as well as the assesseees, as against the dismissal of their appeals, filed appeals before the Income Tax Appellate Tribunal.

6. The Income Tax Appellate Tribunal, uniformly applying the principle laid down in the case of ***M/s.K.K.S.K.Leaner Processors (P) Ltd. V. The Income-tax Officer I.T.A.No.826 and 827 of 2009 dated 20.11.2009***, (subject matter of appeal in T.C.(A)Nos.1011 and 1012 of 2014) allowed the appeals filed by the assesseees and rejected the appeals filed by the Revenue holding that so long as the option of depreciation is exercised by the assesseees in their return of income along with the audit report and books of accounts, it is within the time limit prescribed under second proviso to Rule 5(1A) of the Income Tax Rules and the benefit will flow therefrom.

7. As against the orders of the Income Tax Appellate Tribunal, the Revenue is before this Court by filing the above Tax Case (Appeals).

8. Learned Standing Counsel appearing for the Revenue submits that as per the provisions of Section 32(1)(i) of the Income Tax Act, the undertakings engaged in the generation/generation and distribution of power, the rate of depreciation on machineries engaged for such purposes

are to be allowed on such percentage on the actual cost thereof as may be prescribed. The prescribed rates under Rule 5(1A) of the Income Tax Rules are set out in Appendix IA Schedule. However, the second proviso to Rule 5(1A) provides that the undertaking may be permitted to avail depreciation at the normal rates under sub-Rule (1) read with Appendix I, at the option of the assessee, provided such option has to be exercised before the due date for furnishing the return of income under Section 139(1) of the Income Tax Act. He further submits that the Rule prescribes that the assessee should have to exercise their option before furnishing the return of income. Since the assessee did not exercise their option before furnishing the return of income, they are not eligible to claim depreciation as per Rule 5(1) Appendix I and they are eligible to claim only under Rule 5(1A) Appendix 1A. He submits that when statute prescribes that the assessee has to exercise their option "before" the due date, it means, "only before and not the due date or after the due date". Hence, when the intentment is clear in the provision, it should not be brushed aside to confer benefits. The learned counsel appearing for the Revenue pleaded that the Tribunal is not correct in granting the benefit to the assessee ignoring the language of second proviso to Rule 5(1A) of the Income Tax Rules.

9. Per contra, learned counsels appearing for the assessee submitted that the return of income filed on the due date of filing of returns of income as per Section 139(1) of the Income Tax Act along with the audit reports

showing the claim of the assessee regarding depreciation has to be treated as an option exercised by the assessee in terms of second proviso to Rule 5(1A) of the Income Tax Act. They further submit that there is no prescribed form to exercise the option. The Rule is silent about the procedure to be followed. The claim made by the assesseees for depreciation in the return of income satisfies the requirement of second proviso to Rule 5(1A) of the Income Tax Rules. Hence, the Tribunal is right in granting the benefit to the assessee.

10. Heard Mr.T.R.Senthil Kumar, Mr.M.Swaminathan, Mr.K.Suresh Kumar, learned Standing Counsel appearing for the Revenue and Mr.S.Sridhar, Mrs.(Dr.) Anita Sumanth, Mr.Karthik Raja, Mr.R.Vijayaraghavan, Mr.R.Venkat Narayanan, Mr.J.Balachander and Mr.K.Ravi, learned counsel appearing for the assesseees and perused the materials placed before this Court.

11. Substantial questions of law in different manner were raised by the Revenue on this issue and some of them were admitted by this Court in few cases. We find that the issue is common in all these cases. The only relevant substantial question of law that arises for consideration now in the above Tax Case (Appeals) is as follows:

"Whether the return of income filed by the assessee under Section 139(1) of the Income Tax Act claiming

depreciation can be treated as exercising of option before the due date as prescribed in the second proviso to Rule 5(1A) of the Income Tax Rules."

12. Before going into the merits of the case, it is appropriate to extract the relevant provisions, which are as follows:

Section 139(1) provides filing of return of income:-

"139. Return of income.--(1) Every person, if his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax, shall, on or before the due date, furnish a return of his income or the income of such other person during the previous year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed."

13. Section 32 of the Income Tax Act deals with depreciation, which reads as follows:

"32. Depreciation.--(1) In respect of depreciation of buildings, machinery, plant or furniture owned wholly or partly 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) in the case of assets of an undertaking engaged in generation 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:

14. Rule 5 of the Income Tax Rules deals with depreciation, which read as follows:

“ **5. Depreciation** (1) Subject to the provisions of sub-rule (2), the allowance under clause (ii) of subsection (I) 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 (f) of section 139 of the

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

(emphasis supplied)

15. We notice that depreciation is claimed in different methods and it is set out in the form. Form ITR - 6 contains specific schedules for depreciation. Schedule DOA provides for filing returns claiming depreciation on other assets and Schedule DEP is for summary of depreciation on assets.

Schedule DOA		Depreciation on other assets (Other than assets on which full capital expenditure is allowable as deduction)				
DEPRECIATION ON OTHER ASSETS	1	Block of assets	Building	Furniture and fittings	Intangible assets	Ships

2	Rate (%)	5	10	100	10	25	20
		(i)	(ii)	(iii)	(iv)	(v)	(vi)
3	Written down value on the first day of previous year						
4	Additions for a period of 180 days or more in the previous year						
5	Consideration or other realization during the previous year out of 3 or 4						
6	Amount on which depreciation at full rate to be allowed (3 + 4 -5) (enter 0, if result is negative)						
7	Additions for a period of less than 180 days in the previous year						
8	Consideration or other realizations during the year out of 7						
9	Amount on which depreciation at half rate to be allowed (7-8) (enter 0, if result is negative)						

- 10 Depreciation on 6 at full rate
 11 Depreciation on 9 at half rate
 12 Additional depreciation, if any, on 4
 13 Additional depreciation, if any, on 7
 14 Total depreciation (10+11+12+13)
 15 Expenditure incurred in connection with transfer of asset/ assets
 16 Capital gains/ loss under section 50*
 (5 + 8 -3-4 -7 -15) (enter negative only if block ceases to exist)
 17 Written down value on the last day of previous year* (6+ 9 -14) (enter 0 if result is negative)

Schedule DEP

Summary of depreciation on assets (Other than on assets on which full capital expenditure is allowable as deduction under any other section)

SUMMARY OF DEPRECIATION ON ASSETS		
	1 Plant and machinery	
a	Block entitled for depreciation @ 15 per cent (Schedule DPM - 14 i)	1a
b	Block entitled for depreciation @ 30 per cent (Schedule DPM - 14 ii)	1b
c	Block entitled for depreciation @ 40 per cent (Schedule DPM - 14 iii)	1c
d	Block entitled for depreciation @ 50 per cent (Schedule DPM - 14 iv)	1d
e	Block entitled for depreciation @ 60 per cent (Schedule DPM - 14 v)	1e
f	Block entitled for depreciation @ 80 per cent (Schedule DPM - 14 vi)	1f
g	Block entitled for depreciation @ 100 per cent (Schedule DPM - 14 vii)	1g
h	Total depreciation on plant and machinery (1a + 1b + 1c + 1d + 1e + 1f + 1g)	1h
2	Building	
a	Block entitled for depreciation @ 5 per cent (Schedule DOA- 14i)	2a
b	Block entitled for depreciation @ 10 per cent (Schedule DOA- 14ii)	2b
c	Block entitled for depreciation @ 100 per cent (Schedule DOA- 14iii)	2c
d	Total depreciation on building (2a+2b+2c)	2d
3	Furniture and fittings (Schedule DOA- 14 iv)	3

16. Short of repetition, the issue that arise for consideration is for the purpose of claiming depreciation, whether the assessee should exercise an option before the due date in the manner other than by filing return of income in terms of sub-section (1) of Section 139 of the Income Tax Act. According to the Revenue, each one of the assessee should file a separate application or a letter indicating their intention to avail depreciation in terms

of Section 32 read with Rule 5(1) of the Income Tax Rules and since the assessee in each case has not exercised such an option before the due date for furnishing the return of income, they will not be entitled to the benefit of Rule 5(1) Appendix I, but depreciation only under Rule 5(1A) Appendix 1A.

17. It is relevant to note that while filing the return of income, a procedure has been prescribed for claiming depreciation as pointed out above. The assessee has to set out the manner in which depreciation is claimed for the assessment years in question. All the details required for claiming depreciation under various heads are set out thereunder. Rule 5 of the Income Tax Rules is in relation to determination of profits and gains of business or profession and depreciation forms part of such determination. Therefore, there cannot be an option exercised in isolation (i.e.,) depreciation with regard to determination of profits and gains of business or profession in the manner other than the procedure prescribed under Section 139(1) of the Income Tax Act. The assessee is liable to file the return of income and claim depreciation in accordance with the various provisions and state in exactitude what he claims under different heads of depreciation. Schedules DOA and DEP in Form ITR – 6 contain the break up of various heads under which depreciation can be claimed. All that the second proviso to Rule 5(1A) of the Income Tax Rules states is that the assessee has to exercise the option before the due date for furnishing the return of income. In otherwords, if the option is exercised after furnishing of the return of

income under sub-section (1) of Section 139, it is of no avail. This assumes importance, as no procedure is prescribed for exercising the option. Form ITR- 6 gives the methodology on which depreciation can be claimed and therefore, the statute did not provide for any other method to exercise the option except through filing of return. Therefore, to read something more into the second proviso to Rule 5(1A), that an option should be exercised separately would make the returns filed meaningless.

18. Our view as above is fortified by the reasoning in the decision reported in **229 ITR 772 (CIT Vs. Vijaya Hirasa Kalamkar (HUF)**, the Bombay High Court while dealing with the word "before", held as follows:

"Having regard to the object of the Ordinance and the words used in section 3(1), it seems to us that the declaration received on January 1, 1976, was well within time. In the whole context, the word "before" will have to be construed as "up to" or as "not after". There are various provisions in the Income-tax Act, wherein the expression "before" has been used (sections 139(1)(a)(i), section 139(1)(b) ; section 184 ; section 212). The expression has always been taken to mean "up to". Section 3 specified the period before which a declaration in respect of income has to be made for the purposes of getting a benefit under the Ordinance. It provides a period of limitation within which certain benefits are available. In case of ambiguity the construction which preserves the right to the one which defeats it, has to be preferred. After all, this is a taxing

statute which in case of doubt should be interpreted in favour of a taxpayer. Had the legis-lative intention been to make December 31, 1975, the last day for making the declaration, it could have clearly said so in the proviso. The very fact that the date January 1, 1976, is in terms mentioned indicates that the time limit was up to that date. That in a given case the word "before" in the context of the time can be construed as "not after" is well settled.(R v. Arkwright, [1848] 12 QB 960). This court in the case of PremchandNathmal Kothari v. Kisanlal Bachharaj Vyas, AIR 1976 Bom 82, had read the word "before" in section 3 of the Maharashtra (Vidarbha Region) Agricul-tural Debtors' Relief Act, 1969, as "up to".

19. The Tribunal in the case of ***M/s.K.K.S.K.Leaner Processors (P) Ltd. V. The Income-tax Officer I.T.A.No.826 and 827 of 2009 dated 20.11.2009 (subject matter of appeal in T.C.(A)Nos.1011 and 1012 of 2014)*** following the decision of the Bombay High Court reported in **229 ITR 772 (CIT Vs. Vijaya Hiras Kalamkar (HUF)**, held as follows:

"From the above mentioned decisions, it is clear that the word 'before' would have to be construed as upto or not after. The Hon'ble Bombay High Court has specifically referred to provisions of Section 139 of the Act while explaining the expression of the word 'before'. Therefore, we hold that the option exercised by the assessee on due date by way of making claims of depreciation in the return of income along with audit report and books of account wherein the assessee has adopted the rate as claimed is within time limit prescribed under second

proviso to Rule 5(1A) of Income-tax Rules. Even otherwise as held by the Bombay High Court in the case of CIT vs. Shivanand Electronics (supra) the provision can be understood with reference to the intent of legislature and not upon the language in which the intent is clothed. If the object of enactment will be defeated by holding it as directory it should be construed as mandatory. Whereas if by holding it mandatory, serious general inconvenience will be created to innocent persons without very much furthering the object of the enactment, it should be construed as directory. The limit provided under the second proviso to Rule 5(1A) is only to facilitate the Assessing Officer in discharging its obligations and duties as per the provisions of sub-section (1) of section 32 of the Income-tax Act. Therefore the said requirement cannot be considered as mandatory. Moreover the Assessing Officer cannot act on the option exercised before the return is filed and therefore no fruitful purpose or object can be achieved by mandating exercise of option prior to filing of return on due date."

20. A reading of the above-said decision of the Bombay High Court makes it clear that if the assessee exercised the option in terms of second proviso to Rule 5(1A) of the Income Tax Rules at the time of furnishing of return of income, it will suffice and no separate letter or request or intimation with regard to exercise of option is required. Since the returns are filed in accordance with Section 139(1) of the Income Tax Act and the form prescribed therein make a provision for exercising an option in respect

of the claim of depreciation, no separate procedure is required, as contended by the Department. We are in agreement with the reasoning of the Tribunal.

21. Accordingly, the question of law is answered in favour of the assessee and against the Revenue.

22. In so far as T.C.(A)No.509 of 2013 is concerned, as contended by the learned counsel appearing for the assessee, on the quantum appeal, the Commissioner of Income Tax (Appeals) as well as the Tribunal held in favour of the assessee and there is no appeal on that issue before this Court. Therefore, the question of law raised in this appeal becomes academic, in any event, not required to be answered.

23. In T.C.(A)Nos.1012, 1014 of 2010 and 272 of 2014, the assessee therein filed the return of income belatedly for the subsequent years and claimed the benefit of depreciation. The assessee in these cases filed return of income for the previous assessment year claiming depreciation within the time in accordance with Section 32(1) of the Income Tax Act and the Rules and that will enure to the benefit of the assessee for the subsequent years in view of the third proviso to Rule 5(1A) of the Income Tax Rules, which reads as follows:

"5. Depreciation (1) Subject to the provisions of sub-rule (2),

the allowance under clause (ii) of subsection (I) 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.

.....

.....

.....

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

24. As the third proviso clearly states that the option once exercised will continue to all the subsequent years, the assessee is not required to exercise such option each and every year separately.

25. In view of the foregoing discussions, we pass the following order:

(i) We answer the substantial question of law in favour of the assessee and against the Revenue;

(ii) Consequently, the order of the Tribunal stands confirmed.

In the result, all the above Tax Case (Appeals) are dismissed. No costs. Consequently, connected M.P.s are also dismissed.

Index : Yes/No
Internet:Yes/No
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(R.S.,J) (G.M.A.,J)
09.09.2014

To

1. The Income Tax Appellate Tribunal "C" Bench, Chennai.

R.SUDHAKAR,J.
AND

G.M.AKBAR ALI,J.

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