

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
SPECIAL CIVIL APPLICATION No. 12251 of 2002
With
SPECIAL CIVIL APPLICATION No. 489 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI
HONOURABLE MS.JUSTICE HARSHA DEVANI

- =====
- 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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GARDEN FINANCE LTD. - Petitioner(s)
Versus
ASSTT.COMMISSIONER OF INCOME TAX - Respondent(s)

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Appearance :

MR MJ SHAH FOR MR JP SHAH for Petitioner(s) : 1,
MR SUDHIR M MEHTA for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

and

HONOURABLE MS.JUSTICE HARSHA DEVANI

Date : 03/09/2012

ORAL JUDGMENT

(Per : HONOURABLE MR. JUSTICE AKIL KURESHI)

1. These petitions arise out of similar background involving the same assessee. They have been heard together and are disposed of by this common judgement.

2. Brief facts maybe noted as arising in Special Civil Application No.489/2005.

2.1) The petitioner assessee is a company registered under the Companies Act and is regularly assessed to tax. For the assessment year 1996-1997, the petitioner had filed its return of income on 30.11.1996. The petitioner had in that year as in the past claimed depreciation at the rate of 40% on the commercial vehicles purchased by the petitioner from time to time. The opening Written Down Value of such purchases for the assessment year 1996-1997 was Rs.8.50 crores. On such Written Down Value, the petitioner had claimed depreciation at the rate of 40%. In the second half of the year relevant to the assessment year 1996-1997, the petitioner had made fresh purchases of such commercial vehicles and supplied to one Shriram Transport Finance Co. Ltd. on lease. On such purchases of commercial vehicles, the petitioner claimed depreciation at the rate of 20% being 50% of available depreciation for full year.

2.2) The return filed by the petitioner was taken in scrutiny. The Assessing Officer under

his communication dated 21.10.1998 raised several queries with respect to various issues arising out of such return. In particular, with respect to depreciation on the vehicle, he called for following details :

"19. Details of vehicles on which depreciation at the rate of 40% is claimed."

2.3) In response to such queries, the petitioner filed replies. Under reply dated 22.2.1999, the petitioner supplied full details of the depreciation claimed on the purchase of the vehicles. It would be useful to take note of the complete details thereof. The petitioner conveyed as under :

"In reply to your letter dated 21.10.1998, we are submitting herewith a reply of query no.19 as under -

The assessee company is a Non Banking finance company engaged in a business of leasing H.P. and finance. The assessee company had purchased and leased commercial vehicles during Financial years 01.04.1994 to 31.03.1995 and 01.04.1995 to 31.03.1996. The details as under -

A.Y. 1995-96

Addition during the year	11,2500,000
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A.Y. 1996-97

Addition during the year	2222,540
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The assessee company had claimed depreciation at the rate of 40% on commercial vehicles. We have submitted statement of depreciation along with Income tax return filed on 30.11.1996. As per the said statement, we have claimed depreciation on

plant and machineries, commercial vehicles, vehicles, furnitures and equipments and Building(residentials) as per the APPENDIX (I) see rule(5). We have claimed depreciation on commercial vehicles at the rate of 40% and on other vehicles we have claimed depreciation at the rate of 20%. The working is reproduced as under :-

Depreciation of Block of Assets	Cost/Opening W.D.V. Rs.	Rate of Dep.	Depreciation	Closing W.D.V. Rs
Vehicles Commercial				
Addition during Asstt. Year 1995-96	8,5000,000	0.4	34000,000	51000,000
Addition during Asstt. Year 1996-97 eligible for pro-rata Depreciation	2222,540	0.2	444,508	1778,032
Vehicles				
Addition during Asstt. Year 1996-97	2225,222	0.2	445,044	1780,178
Addition during Asstt. Year 1996-97 eligible for pro-rata Depreciation	824,932	0.1	82,493	742,439

We have purchased commercial vehicles and the said vehicles were given on lease. The lessee has used the said commercial vehicles for the business of running them on hire. We also draw your kind attention that, there is no requirement in Section 32 or in the rules there under that the owner of the commercial vehicles shall use the vehicle himself for the business of hire. We rely on following decisions-

1. Shriram Transport Finance Co. ltd. V/s. ACIT 63 ITR 336
2. Shriram Investments Ltd. V/s. ACIT 59 ITD 570

3. Shriram Transport Finance Co. Ltd. V/s. ACIT 63 ITD 336.

You are therefore, allowed the depreciation at the rate of 40% on commercial vehicles."

2.4) In the ultimate assessment that the Assessing Officer framed under section 143(3) of the Act on 24.3.1999, though he made several adjustments; with respect to claim of depreciation of the petitioner referred to above, he made no disallowances.

3. It is this assessment which the Assessing Officer desired to reopen for which he issued notice dated 20.6.2002. We may record in brief that previously the attempt on part of the Assessing Officer to reopen the assessment came up for consideration before this Court in a writ petition filed by the present petitioner. There was a difference of opinion between the two members of the Bench who heard such petition. Such difference was resolved through third member's opinion in case of **Garden Finance Ltd. v. Assistant Commissioner of Income-tax** reported in 268 ITR 48 who permitted the petitioner to raise objections to the proposal of reopening in terms of decision of the Apex Court in case of **GKN Driveshafts(India) Ltd. v. Income-Tax Officer and others** reported in 259 ITR 19. Thereupon the petitioner raised detailed objections before the Assessing Officer which when were turned down the present petition came to be filed.

4. The Assessing Officer had recorded reasons for impugned notice of reopening. Such reasons read as under :

"The assessee company is a non-banking finance company engaged in the business of financing, money lending and trading in shares and financing on lease of motor vehicles. The assessee company has shown source of income viz., lease income, hire purchase income, bill discounting income, profit on sale of long term investment, interest on deposits on loan, loan management fee, merchant banking income and income from other sources.

2. The assessee company filed return of income on 30/11/96 showing taxable income Rs.NIL. Order passed u/s.143(3) of the Act on 24/3/99 determining taxable income at Rs.5,00,35,628/-. While passing the order, depreciation as per rule was allowed at Rs.8,43,27,096.

3. On verification of the depreciation statement attached with the return of income, it is noticed that depreciation of Rs.8,43,27,096/- is inclusive of depreciation of Rs.3,40,00,000 on motor vehicles (commercial) claimed at the rate of 40% on WDV/cost of Rs.8,54,00,000. As per Rule 5, the rate of depreciation on motor vehicle in the second column of the table in Appendix-I are as under :

Block of Assets			Depreciation allowance as per percentage of WDV
III	(1A)	Motor car other than those used in a business of running them on hire acquired or put to use on or after the first day of April, 1990	20%
(2)	(ii)	Motor buses, motor lorries and motor taxies used in a business of running them on hire.	40%

4. The assessee is a leasing company. The assessee company has used the motor vehicles for lease and not for hiring. The assessee company is, therefore, entitled for depreciation at the normal rate of 20% on motor vehicles (commercial) and not at the higher rate of 40% as claimed and allowed while finalizing the assessment. Excess depreciation on motor vehicles (commercial) has been allowed by Rs.1,70,00,000 while computing taxable income, which has escaped assessment to that extent."

5. On the basis of said facts on record, counsel for the petitioner vehemently contended that the notice for reopening which has been issued beyond the period of four years from the end of relevant assessment year is wholly without jurisdiction. The petitioner had made true and full disclosures about its claim for depreciation at higher rate. The Assessing Officer had examined such claim and made no disallowance in the final computation in the scrutiny assessment that he framed. Such assessment cannot be reopened beyond a period of four years for the reasons recorded by the Assessing Officer. Counsel submitted that even in the reasons, the Assessing Officer has nowhere stated that income chargeable to tax had escaped assessment for the failure on part of the assessee to disclose truly and fully all material facts. Counsel lastly submitted that in the reasons, the Assessing Officer recorded that on verification of depreciation statement attached with the return of income, it was noticed that higher depreciation was claimed. It would thus emerge that there was no new material outside of

the assessment proceedings on the basis of which the Assessing Officer could form a belief that income chargeable to tax has escaped assessment. He submitted that notice was thus bad in law and therefore be quashed

6. On the other hand learned counsel for the Revenue made an attempt to suggest that in the original assessment the assessee had not made true and full disclosure. Notice of reopening beyond four years also therefore, was valid. He relied on the reasons recorded by the Assessing Officer to contend that income chargeable to tax had escaped assessment. He pointed out that this Court in case of **Bhagwati Appliance (now Dairyden Ltd.) v. Income-tax Officer** reported in (2011) 337 ITR 286 (Guj.) in terms held that when the vehicle is leased out and thereafter, run on hire by the lessee, higher rate of depreciation would not be available. Counsel pointed out that said decision was subsequently followed in case of **Deputy Commissioner of Income-tax v. Pradip N. Desai(HUF)** reported in (2012) 341 ITR 277 (Guj) and in case of **Commissioner of Income-tax v. Aravali Finlease Ltd.** reported in (2012) 341 ITR 282(Guj.)

7. At the outset we may record that in the present case, we are not concerned with the validity of the belief of the Assessing Officer that income chargeable to tax had escaped assessment. We are far more concerned with the question whether the

income chargeable to tax even if can be stated to have escaped assessment, same was for the reason of assessee not disclosing truly and fully all material facts. This would be relevant because in the present case admittedly the notice of reopening has been issued beyond a period of four years from the end of relevant assessment year.

8. In this context, we may revisit the material on record. The assessee had lodged a claim of depreciation at the rate of 40% on the Written Down Value of commercial vehicles purchased earlier. In addition thereto the petitioner had also claimed part depreciation at higher rate of vehicles purchased in second half of the year and which were leased out to another company. In the scrutiny assessment, the Assessing Officer examined various claims of the petitioner. With respect to depreciation claimed, he raised a specific query and called upon the petitioner to justify the claim by giving details of vehicles on which depreciation at the rate of 40% was claimed. In reply to such question, the assessee made a detailed representation under communication dated 22.2.1999. The petitioner stated that company had purchased and leased commercial vehicles during financial years between 1.4.1994 to 31.3.1995 and 1.4.1995 to 31.3.1996. Details of such purchases were provided. It was also pointed out that the company was claiming depreciation at the rate of 40% on the commercial vehicle. It was stated that

on certain vehicles, the company had claimed depreciation at the rate of 20%. This would have reference to the vehicles purchased by the company during the second half of the year and therefore, half of otherwise available depreciation could be claimed. The company specifically pointed out that **"we have purchased vehicles and the said vehicles were given on lease. The lessee has used the said commercial vehicle for the business of running them on hire. We also draw your kind attention that, there is no requirement in Section 32 or in the rules there under that the owner of the commercial vehicles shall use the vehicle himself for the business of hire. We rely on following decisions"**

9. Thus full facts were laid before the Assessing Officer in context of the petitioner company's claim for depreciation at the higher rate on commercial use for running on hire. The petitioner in fact firmly asserted that though such vehicles were leased out, the lessee had used such vehicles for the business of running them on hire and that therefore, as per the statutory provisions and the decisions of the Courts, the company would still be entitled to higher rate of depreciation. As already recorded, we are not concerned with the validity of company's legal submissions in this respect. We are only drawing a firm conclusion that the company had placed full facts before the

Assessing Officer in the original assessment itself. In addition to filing the return, claiming depreciation at the rate the company thought was applicable, during the course of scrutiny assessment, the company made detailed submissions why despite commercial vehicles have been leased out, higher rate of depreciation was justified. This is therefore, not a case where income chargeable to tax can be stated to have escaped assessment for the reason of assessee failing to disclose truly and fully all material facts. In that view of the matter, the mandatory condition to enable the Assessing Officer to reopen the assessment beyond the period of four years not having been satisfied, impugned notice must be quashed.

10. In Special Civil Application No.12251/2002, we are concerned with later assessment year of 1997-1998. Here also notice for reopening the assessment dated 20.6.2012 which is impugned in this petition, was issued beyond a period of four years from the end of relevant assessment year. In the present case also the assessee had claimed depreciation at higher rate on the vehicles purchased but leased out to another company. Here also during scrutiny assessment, such claim was not disallowed. Here also for identical reasons the Assessing Officer desired to reopen the assessment previously framed after scrutiny beyond a period of four years. Without therefore, recording separate reasons in this case also we

are of the opinion that notice for reopening was not valid.

11. In the result both the petitions are allowed. Impugned notices both dated 20.6.2012 issued under section 148 of the Act are quashed. Rule made absolute. No costs.

(Akil Kureshi, J.)

(Harsha Devani, J.)

(raghu)

