

IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH 'D' NEW DELHI

BEFORE : SHRI H.S. SIDHU, JUDICIAL MEMBER &
SHRI L.P. SAHU, ACCOUNTANT MEMBER

ITA No. 3332/Del./2014
Asstt. Year : 2010-11

KLA India Public Ltd.,
(Now BRK Company India Ltd.),
21/3, G.F. Geeta Mandir Marg,
Rajinder Nagar, Delhi.
(PAN: AABCK 7701 L)
(Appellant)

vs.

J.C.I.T., Rohtak Range,
Rohtak.

(Respondent)

Appellant by : Sh. Gautam Jain, Advocate
Respondent by : Sh. Umesh Chand Dubey, Sr. DR
Date of hearing : 23.03.2017
Date of pronouncement : 30.03.2017

ORDER

Per L.P. Sahu, Accountant Member:

This is an appeal filed by the assessee against the order dated 18.03.2014 of Id. CIT(A), Rohtak for the assessment year 2010-11 on the following grounds :

"1. That the learned Commissioner of Income Tax (Appeals), Rohtak has grossly erred both in law and on facts in upholding disallowance of Rs. 5,65,440/- out of claim of depreciation made in the year under consideration by the appellant company.

1.1 That while upholding the disallowance the learned Commissioner of Income Tax (Appeals) has factually and legally erred in concluding

that generator and sortex machine were not put to use in the instant year.

1.2 That without prejudice to the above the learned Commissioner of Income Tax (Appeals) has failed to appreciate even if the asset is "ready for use" and not actually used, the same entitles an assessee to claim depreciation.

1.3 That the learned Commissioner of Income Tax (Appeals) has even otherwise failed to appreciate that sortex machine and generator were also plant and machinery and therefore once an asset forms part of block of asset there can be no justification to disallow part of depreciation from the said block of assets and as such denial of claim of deduction is legally and factually misconceived and hence untenable."

2. By means of all the above grounds, the assessee has challenged the disallowance of depreciation of Rs.5,65,440/-made by the Id. CIT(A) on Generator and Sortex Machine installed during the year.

3. The brief facts of the case are that the assessee is engaged in the business of trading of rice, iron ore and other commodities. He filed return of income on 29.09.2010 declaring total income at Rs.1,68,40,424/-. During the assessment proceedings, the AO noticed that the assessee installed new plant & machinery, the details of which are as under :

Description	Quantity	Date put to use	Cost (Rs.)	Depreciation
New Plant	1	18.01.2010	2,53,82,751	19,03,706
Generator	1	14.03.2010	23,88,957	5,65,440
Sortex	1	12.03.2010	51,50,236	
Total			3,29,21,944	24,69,146/-

The Assessing Officer however observed that depreciation of Rs. 24,69,146/- claimed on the above machinery was not eligible for deduction on the ground that they were not actually put in use during the year under consideration. The assessee assailed the assessment order in appeal before the Id.CIT(A), who partly allowed the claim of assessee, inasmuch as the depreciation of Rs. 19,03,706/- was allowed but denied the claim of deduction of Rs. 5,65,440/- with the following observations :-

"4. I have examined the submissions made by the assessee and the facts on record. It is a fact that production took place from 18.01.2010 to 21.01.2010 evidence for the same has been filed even before the AO. Hence, there was no reason or disallowing the depreciation on Plant and I delete the addition on account of depreciation on Plant & Machinery. As far as the generator and sortex concerned, these equipments were installed on 14.3.2010. The business continued although there was no production after 21st January 2010, the generator and sortex machinery, although installed could not have been put to use. Hence depreciation on these 2 items is not allowable. I, therefore, delete the disallowance of depreciation on plant only amounting to Rs.19,03,706/- and confirm addition of Rs.5,65,440/-. The appellant gets a relief of Rs.19,03,706/-."

4. Aggrieved by the order of the Id. CIT(A), the assessee is in appeal before the Tribunal.

5. The Id. AR of the assessee, challenging the order of the Id. CIT(A), submitted that the Id. CIT(Appeals) has not disputed that the entire

equipment was installed on 14.3.2010 and it is also not disputed that there was production between 18.1.2010 and 21.1.2010 and yet he has denied the claim of deduction on the ground that generator and sortex machine although installed could not have been put to use after 21.1.2010. It is submitted that actual use is not a relevant material for determining the claim of depreciation. It is well settled law that all what is relevant is whether machinery was ready for use and once machinery was ready to use and if not actually used, the assessee is eligible for depreciation. In other words, even "passive use" distinct from "active use" is the determinative test for claim of depreciation.

Reliance is placed on the following decisions :

- i) CIT v. Geo Tech Construction Corporation, 244 ITR 452 (Ker)
- ii) CIT vs. Oswal Woollen Mills Ltd., 206 CTR 141 (P&H)
- iii). CIT vs. Nahar Export Ltd., 296 ITR 419, 296 ITR 419 (P&H)
- iv). Capital Bus Service (P) Ltd. v. CIT, 123 ITR 404.
- v). CIT v. Oswal Agro Mills Ltd., 341 ITR 467
- vi). CIT v. Insilco Ltd., 320 ITR 322
- vii). CIT v. Radio Today Broadcasting Ltd., 382 ITR 42 (Del.)
- viii). CIT v. Soughern Petrochemical Industries Corpn. Ltd. 292 ITR 362

6. It was also submitted that even otherwise the Id. CIT(A) failed to appreciate that sortex machine and generator were also plant and machinery and form the part of block of asset and therefore, there is no justification to disallow part of depreciation from the said block of assets.

7. On the other hand, the ld. DR relied on the order of the first appellate authority and urged for its sustenance.

8. We have considered the rival submissions and have gone through the entire material on record. We find that the only question which needs adjudication in this appeal is whether, under the facts and circumstances of the case, the ld. CIT(A) was justified in disallowing the depreciation of Rs.5,65,440/- claimed by assessee on Generator valuing Rs.23,88,957/- and sortex Machine valuing Rs.51,50,236/- installed on 14.03.2010 and 12.03.2010 respectively on the ground that the same were not put to use during the year under consideration. We find complete answer of this question in various decisions relied by the assessee, wherein various Hon'ble courts have held as under :

CIT v. Geo Tech Construction Corporation, 244 ITR 452 (Ker):

"Section 32 of the Act deals with depreciation. There is no requirement that the assets should be used for the whole of the assessment year in question. The term used in section 32(1) is 'owned by assessee', but that does not bring in a requirement that the assessee should have remained the owner of the asset in question for the entire previous year in question. The object of the Legislature, in granting depreciation allowance under section 32, is to give due allowance to the assessee for wear and tear suffered by the asset used by him in his business so that the net income (total income) is duly arrived at. There is no factual dispute that the assets in question were owned by the assessee. In Machinery Mfrs. Corpn. Ltd, v. CIT[1957] 31 ITR 203 (Bom.), it was observed that the expression 'used' in section 10(2)(v/) of the Indian Income-tax Act. 1922 ('the 1922 Act') corresponding to section 32 of the

1961 Act has to be given a wider meaning. The expression includes passive as well as active user. In CIT v. Dalmia Cement Ltd [1945] 13 ITR 415 (Pat.) and CIT v. Wisvanath Bhaskar Sathe [1937] 5 ITR 621 (Bom.), it was observed that depreciation might be allowed in certain cases even though the machinery was not in use or was kept idle. The question whether the word 'used' would include both passive as well as active user was left open by the Apex Court in Liquidators of Pursa Ltd, v. CIT [1954] 25 ITR 265 . The word 'used' for the purposes of the business is capable of a larger and a narrower interpretation. If the expression 'used' is construed strictly, it can be taken as connoting or requiring the active employment or the actual working of a machinery, plant or building in the business. On the other hand, the wider meaning will include not only cases where the machinery, plant, etc., are actively employed but also cases where there is, what may be described as. a passive user of the same in the business. An asset can be said to be in use when it is kept ready for use.

CIT v. Oswal Woollen Mills Ltd. 206 CTR 141 (P&H)

"As regards first question in ITA No 1360/Chd/1987, reliance is placed on judgment of this Court in CIT v. Pepsu Road Transport Corporation(2002) 172 CTR (P&H) 72: (2002) 253 ITR 303 (P&H) taking the view that the machinery which is kept ready for use but may not be actually used, will qualify for normal depreciation as there is normal depreciation of value even when a machine is merely kept in a store. It is pointed out that this judgment has been followed by the Allahabad High Court in CIT v. Swarup Vegetable Products India Ltd. (2005) 196 CTR (All) 595: (2005) 277 ITR 60 (all). No contrary view has been shown on behalf of the revenue. Accordingly following judgment of this court in Pepsu Road Transport (supra), We answer this question in favour of the assessee and against the revenue.

CIT v. Nahar Exports Ltd., 296 ITR 419 (P&H)

4. Learned counsel for the revenue submitted that unless the machinery is actually used, no depreciation should be allowed. However, we find that similar contention was considered by this Court in the case of Pepsu Road Transport Corpn. (supra) wherein it was held that even where the machinery is kept ready for use and could not be put to use, the assessee would be entitled to depreciation as everything ages with the passage of time and even if the machinery is kept ready for use.

there is a normal depreciation of value. Accordingly, the question being covered by the judgment of this Court, we answer the same against the revenue and in favour of the assessee.

Capital Bus Service (P) Ltd. v. CIT 123 ITR 404

Though it is true that a machinery generally depreciates with actual user, the decisions indicate that it is not necessary to import this concept in interpreting the expression "used" in 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 or its non-availability. In the present case, e.g., the four buses in question were admittedly in working order and the assessee was keeping them ready for being operated upon if and when some tourist contract materialised. They were not actually run on the road not because they were under repair or were unfit for use for one reason or the other, but only because there were not enough contracts during the year to ply the buses for more than 30 days each. This does not mean that so far as the assessee was concerned he did not employ the trucks for the purposes of the business. They were kept ready for operation and they- were there only in the business and for use in that business. In these circumstances, in our opinion, it can be said, without straining the language of the statute and the context in which it is employed, that the buses were used for the purposes of the business throughout the year though they were not actually plied on the roads for more than 30 days.

CIT v. Oswal Agro Mills Ltd. 341 ITR 467

12. It cannot be disputed that by catena of judgments, it stands settled that the assessee should have used the asset for the whole of assessment year in question to claim full depreciation. Passive user of

the asset is also recognized as 'user for purpose of business'. This passive user is interpreted to mean that the asset is kept ready for use. If this condition is satisfied, even when it is not used for certain reason in the concerned assessment year, the assessee would not be denied the depreciation. This was so discussed and restated, after taking stock of various judgments, by a Division Bench of this Court in CIT v. Refrigeration & Allied Industries Ltd [2001] 247 ITR 12. In that case, the assessee owned a cold storage at Karnal. The machinery installed, was not put to use during the whole of the previous year. The non-user was on account of the fact that there was very weak crop of potatoes available in the season and potatoes did not come from the hirers in the cold storage. Therefore, there was no business from cold storage. Accordingly claim for depreciation on cold storage machinery was disallowed. In appeal, Appellate Assistant Commissioner (in short 'the AAC) observed that the plant was kept in operational condition so that the facility can be availed of by any one as and when necessity arises. It was observed that the word "user" embraces passive as well as active user and depreciation was allowable even though machinery had not actually worked during the accounting period. It was noted that the case was not one where it was the first year of operation of company's business and it was a case where the business was only inactive or dormant because of circumstances prevailing in the year in question on account of fact situation indicated above.

CIT v. Insilco Ltd 320 ITR 322

17.4 The Division Bench of the Madras High Court after noting the judgment of the Bombay High Court in Viswanath Bhaskar Sathe 's case (supra), and of its own court in Vayilhri Plantations Ltd. 's case (supra) held that the assessee was entitled to depreciation on spare parts which are stand-by items even though they were not used during the accounting year. The important point to be noticed here is that the case pertained to assessment year 1986-87 much prior to the issuance of the revised Accounting Standard (AS) 2 by the Council of the ICAI. A Division Bench of our Court in the case of Capital Bits Service (P.) Ltd. (supra) has observed as follows:—

"The words 'used for the purposes of the business' are capable of a larger and a narrower interpretation. If the expression 'used' is construed strictly, it can be taken as connoting or requiring the active employment or the actual working of a machinery, plant or building in

the business. On the other hand, the wider meaning will include not only cases where the machinery, etc., is actively employed but also cases where there is, what may be described as, a passive user of the same in the business.

The above survey of the decisions on the subject clearly shows that the consensus of judicial opinion is in favour of adopting the liberal interpretation. We are also of opinion that in the context in which the expression occurs and also having regard to the various types of cases that could arise, the wider interpretation has to be placed on this expression. The decided cases, which have been earlier referred to, have arisen in different contexts which clearly indicate that the wider and more liberal interpretation of the provisions would in the context of section 10(2)(vi) and (vii) may be appropriate.

Though it is true that a machinery generally depreciates with actual user, the decisions indicate that it is not necessary to import this concept in interpreting the expression 'used' in 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. In the present case, e.g., the four buses in question were admittedly in working order and the assessee was keeping them ready for being operated upon it and when some tourist contract materialised. They were not actually run on the road not because they were under repair or were unfit for use for one reason or the other, but only because there were not enough contracts during the year to ply the buses for more than 30 days each. This does not mean that so far as the assessee was concerned he did not employ the trucks for the purposes of the business. They were kept ready for operation

and they were there only in the business and for use in that business. In these circumstances, in our opinion, it can be said, without straining the language of the statute and the context in which it is employed, that the buses were used for the purposes of the business throughout the year though they were not actually plied on the roads for more than 30 days." (p. 412)

17.5 The same view has been expressed by another Division Bench of our Court in Refrigeration & Allied Industries Ltd's case (supra). The Division Bench in that case reiterated the position that the expression "used" for the purposes of business should be given a wider meaning and should include an asset which is kept ready for use. The Division Bench went on to hold that the efficacy of any asset declines with use and time. In determining the income of an assessee from business or profession for levy of tax it would be appropriate to make a provision for proper recompense of such diminution in the value of an asset to give a correct picture of income earned from business or profession. The Court observed that depreciation is the inherent decline in the value of asset for any cause whatsoever. It went on to say that the depreciation is the measure of an effective life of an asset owing to use or obsolescence during a given period. The object of providing for depreciation is to spread the expenditure incurred on the asset over its effective lifetime, and the amount written off during an accounting period is intended to represent the proportion of such expenditure which has expired during the period. The Court noted that the principle factors responsible for reduction in the value of capital asset and, therefore, responsible for depreciation are (i) ordinary wear and tear (ii) unusual damage (iii) inadequacy and (iv) obsolescence. These factors include not only those relating to physical deterioration but also those referring to the suitability of the asset as an economically productive unit after a period of time. The depreciation allowance under section 32 is, however, a statutory allowance not confined expressly to diminution in value of the asset by reason of wear and tear. The allowance can be claimed, if the asset in question is shown to be capable of diminishing in value on account of any factor known to the prevailing accounting or commercial practice.

17.6 In view of the ratio of the judgments referred to hereinabove we are of the considered opinion that the expression 'used for the purposes of business' appearing in section 32 of the Act also takes into account

emergency spares which even though ready for use are not as a matter of fact consumed or used during the relevant period, as these are spares specific to a fixed asset and will in all probability be useless once the asset is discarded. In that sense, the concept of passive user which is applied by the aforementioned cases to standby machinery will be applicable to emergency/insurance spares.

17.7 In the instant case, the Assessing Officer has even while accepting the stand of the assessee that the spares in issue were emergency spares and that they were capital assets limited the depreciation to a sum of Rs. 5,49,806 by referring it to the cost of spares actually consumed during the relevant year, i.e., Rs. 31,76,187 as against the total cost of spares capitalized by the assessee amounting to Rs. 1,41,64,495.

CIT v. Radio Today Broadcasting Ltd. 382 ITR 42 (Del)

35. Turning to Question No. 2, it is seen that the fact is that the Assessee kept ready for use the intangible assets in respect of three radio stations at Jodhpur, Amritsar and Patiala. This has not been denied even by the Revenue. The order of the AO recorded as under:

"4.6.5 The Assessee has further submitted vide his letter dated 22.12.2010, that depreciation has not been claimed on any of the other assets in case of the other three stations, i.e., Patiala, Amritsar and Jodhpur, apart from One Time Entry Fee. This is not in consonance with the Assessee's statement of his written submission dated 2nd December, 2010, wherein he has that stated that depreciation was claimed because of the existing case laws in his knowledge. He has stated that based on the decisions of the above cited case laws, depreciation has been claimed on assets kept ready to use and on which trial run was being done. This being the case, the Assessee has not given any reason why depreciation has been claimed on the Licence Fee, but not on the tangible assets also being used on trial runs." (Emphasis supplied) 36. The above passage reveals that the AO was not questioning the fact that the intangible asset has been kept ready for use. The AO disallowed it because depreciation was claimed on the licence fee, i.e. a non-intangible asset and not on a tangible asset. The order of the CIT (A) also proceeded on the same footing. No provision of the Act has been brought to the notice of the Court which states that an

Assessee would be denied the claim of depreciation on intangible assets only because there was no claim also on the tangible asset.

37. For the purpose of Section 32 it is sufficient that assets be kept ready for use in order to claim depreciation thereon. This has been reiterated by this Court in the two decisions relied upon by the Assessee, i.e. Refrigeration & Allied Ind. Ltd's case (supra) and Capital Bus Service (P.) Ltd's case (supra). In the former decision it was held that an asset can be said to be 'used' when it is kept 'ready for use'. Likewise in Capital Bus Service Pvt. Ltd.'s case (supra) it was held that while interpreting the expression 'used' it would be more appropriate to envisage the expression as comprehensive 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 or its non-availability."*

CIT v. Southern Petrochemical Industries Corpn. Ltd 292 ITR 362

3.6.2 In such circumstances, this Court, after elaborately discussing the point, held as follows :

". . . the machinery could be 'used' for the purposes of the business so long as it is kept ready for such user. Any 'forced idleness' of the machinery cannot disentitle the assessee from getting the benefit of the allowance. In the present case, from the directors' report, which have already been extracted and the contents of which are not at all in dispute, it is clear that the assessee was prevented from using the machinery because of the frequent labour unrest. In these circumstances, we consider that, in the present case, the assessee would be eligible for the allowance as the machinery was kept ready for use and in that sense had been 'used' for the purpose of that business, as contemplated under the provision." (p. 681) 3.7 Applying the ratio as laid down above to the facts of the case, we are of the view that the assessee is entitled to depreciation on spare parts which are stand-by items even though they were not taken for use during the accounting year. Accordingly, the 1st question of law is answered in the affirmative and against the revenue."

9. In view of these decisions, the assessee is entitled to get benefit of depreciation on such plant and machinery, which were not put to use actively. Apart from above, it is also worth consideration that sortex machine and generator, being plant and machinery, also form the part of block of assets and therefore, it is not justified to allow part of depreciation from the said block of assets and to make part disallowance thereof. A perusal of the impugned order further shows that the assessee also made a submission before the Id. CIT(A) that Sortex Machine was put to use on 12.03.2010 and 5.77 quintal of rice was processed through this machine on trial basis. However, the Id. CIT(A) appears to have given no finding on this submission of assessee.

10. In view of what has been discussed above, we are of the considered opinion that the Id. CIT(A) was not justified in disallowing the depreciation on generator and sortex machine, as claimed by the assessee. Accordingly, the appeal of the assessee deserves to succeed.

11. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 30.03.2017.

Sd/-
(H.S. SIDHU)
Judicial Member

Sd/-
(L.P. SAHU)
Accountant Member

Dated : 30.03.2017

*aks/-