IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri Sanjay Arora, Accountant Member and
Shri Manomohan Das, Judicial Member

ITA No. 213/Coch/2023
(Assessment Year: 2015-16)

Diadora Shoes Pvt. Ltd. VKC Tower, Kolathra P.O Calicut 673655 [PAN:AABCD9692D]	vs.	Asst. CIT, Circle - 2 Calicut 673001
(Appellant)		(Respondent)

Appellant by:	Shri M.V. Venugopal, CA
Respondent by:	Smt. J.M. Jamuna Devi, Sr. D.R.

Date of Hearing:	16.01.2024
Date of Pronouncement:	28.03.2024

O R D E R

Per: Sanjay Arora, AM

The instant Appeal by the Assessee agitates the dismissal of it's appeal by the Commissioner of Income-Tax (Appeals), Income Tax Department [CIT(A)] contesting it's assessment under section 143(3) of Income Tax Act, 1961 (the Act) dated 18.07.2017 for Assessment Year 2015-16, vide it's Order dated 03.03.2023.

2. The sole issue arising in the instant appeal is if the amendment by way of insertion of the third *proviso* to section 32(1)(ii) by Finance Act, 2015, w.e.f. 01.04.2016, is retrospective in nature? While the assessee before us relies on the decisions in the following cases, the Revenue relies on the decision in *Pr. CIT vs. Era Infrastructure(India) Ltd.* [2022] 141 taxmann.com 289 (Del) (copy on record), rendered relying on the decision in *Sedco Forex International Drill Inc. v. CIT* [2005] 279 ITR 310 (SC):

i. *CIT vs. Aztec Auto Pvt. Ltd.* TCA No., 267 of 2020 (Mad) Mentions that SLP in the case of Brakes India was dismissed by the Hon. Supreme Court.

ii. *Brakes India Ltd. vs. Dy. CIT*, ITA 1464 of 2019, (Mad)

iii. *CIT &Anr. vs. Rittal India Pvt. Ltd*. [2016] 380 ITR 423 (Bom)

iv. *Pr. CIT vs. Godrej Industries Ltd.* ITA No. 511 of 2016 (Bom)

v. *CIT vs. Shri TP Textiles Pvt. Ltd.* TCA No. 157 of 2017 (Mad)

3. We have heard the parties, and perused the material on record.

3.1 To begin with, in terms of the law of precedence, the decision by only the Hon'ble Apex Court or the Hon'ble jurisdictional High Court is binding on the Tribunal (*Suresh Desai & Ass. v. CIT* [1998] 230 ITR 912 (Del); *CIT v. Thana Electricity Supply Co. Ltd*. [1994] 206 ITR 727 (Bom)(FB)). In case of conflict of opinion between the decisions by the non-jurisdictional High Court, it is the view that appeals to the judicial mind and conscience of the Tribunal that would prevail. Rather, that would the case even in the absence of any contrary view inasmuch as the view of the non-jurisdictional High Court, without doubt carrying a strong persuasive value, is not binding. We consider it relevant to clarify this in view of the parties relying on contrary decisions, none by the Hon'ble Apex or jurisdictional High Court.

3.2 The relevant provision reads as under:

Depreciation.

32. (1) In respect of depreciation of—

(*i*) buildings, machinery, plant or furniture, being tangible assets;

(*ii*) know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998,

owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall 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:

Provided .....

Provided further that where an asset referred to in clause (*i*) or clause (*ii*) or clause (*iia*) or the first proviso to clause (*iia*), as the case may be, is acquired by the assessee during the previous year and is put to use for the purposes of business or profession for a period of less than one hundred and eighty days in that previous year, the deduction under this sub-section in respect of such asset shall be restricted to fifty per cent of the amount calculated at the percentage prescribed for an asset under clause (*i*) or clause (*ii*) or clause (*iia*), as the case may be:

(*iia*) in the case of any new machinery or plant (other than ships and aircraft), which has been acquired and installed after the 31st day of March, 2005, by an assessee engaged in the business of manufacture or production of any article or thing or in the business of generation, transmission or distribution of power, a further sum equal to twenty per cent of the actual cost of such machinery or plant shall be allowed as deduction under clause (*ii*) :

Provided that….

A third *proviso* was inserted to section 32(1)(ii) by Finance Act, 2015, w.e.f. 01.04.2016, reading as under:

Provided also that where an asset referred to in clause (*iia*) or the first proviso to clause (*iia*), as the case may be, is acquired by the assessee during the previous year and is put to use for the purposes of business for a period of less than one hundred and eighty days in that previous year, and the deduction under this sub-section in respect of such asset is restricted to fifty per cent of the amount calculated at the percentage prescribed for an asset under clause (*iia*) for that previous year, then, the deduction for the balance fifty per cent of the amount calculated at the percentage prescribed for such asset under clause (*iia*) shall be allowed under this sub-section in the immediately succeeding previous year in respect of such asset: (emphasis, supplied)

3.3 The decisions relied upon by either side stand perused. In *Rittal India Pvt. Ltd*. (supra), the Hon'ble High Court was of the view that the provision being a one-time benefit with a view to encourage industrialisation, it is to be construed reasonably, liberally and purposefully. Reading it in a manner to allow the balance 50% depreciation in the following year would thus be in order. This was followed in *Brakes India Ltd*. (supra), which in turn was followed in *Aztec Auto Pvt. Ltd*. (supra). In *TP Textile Pvt. Ltd*. (supra), the amendment was held clarificatory and, thus, retrospective, in view of the memorandum explaining the amendment, which reads as under:

" ..... To remove the discrimination in the matter of allowing additional depreciation on plant or machinery used for less than 180 days and used for 180 days or more, it is proposed to

provide that the balance 50% of the additional depreciation on new plant or machinery acquired and used for less than 180 days which has not been allowed in the year of acquisition and installation of such plant and machinery, shall be allowed in the immediately succeeding previous year.

This view was adopted in *Godrej Industries Ltd*. (supra), making reference also to *Rittal India Pvt. Ltd*. (supra). The decision in *Era Infrastructure (India) Ltd*. (supra), even as pointed out during hearing by Sh. Venugopal, the ld. counsel for the assessee, is not *qua* the said amendment. The Hon'ble High Court was in that case concerned with the amendment to section 14A by Finance Act, 2022, w.e.f. 01.04.2022. The Hon'ble Court adverted to the decision in *Sedco Forex International Drill Inc*. (supra), wherein the Apex Court was examining the applicability of the *Explanation* to section 9(1)(ii), substituted by Finance Act, 1999, w.e.f. 01.04.2000. The amended explanation widened the scope of the provision, and was accordingly held as not clarificatory, making reference to decisions in *CIT v. Goslino Mario* [2000] 241 ITR 312 (SC); *CIT v. S.R. Pattan* [1992] 193 ITR 49 (Ker); and *CIT v. S.G. Panatale* [1980] 124 ITR 391 (Guj). An assessment, it explained, is to, in terms of the settled law, be made with reference to the law in force at the relevant time. The provision was accordingly held as prospective. Inasmuch as it is the ratio of a decision that has precedential value, we find the Revenue’s reliance as apposite.

3.4 In our view, though, the correct manner of proceeding in the matter is to read the unamended law, and to come to a conclusion as to the clarificatory or otherwise nature of the amendment, on that basis, as was also undertaken by the Hon'ble Court in *TP Textiles Pvt. Ltd*. (supra) (para 11.5). Reference in this context may also be made to the decision in *CWT v. B.R. Theatres &Indl. Concerns P. Ltd*. [2005] 272 ITR 177 (Mad). The test to be applied for deciding as to whether a later amendment should be given a retrospective effect, despite the legislative declaration specifying a prospective date as the date from which the amendment is to come into force, it was explained therein, is as to whether without the aid of the subsequent amendment the

unamended provision is capable of being so construed as to take within its ambit the subsequent amendment. If the unamended law could be held in a manner consistent with what the amendment seeks to achieve, the same is clearly clarificatory and, thus, retrospective, else not. *This in fact represents settled law in the matter; the amended provision thereby clearly indicating of it being explanatory or declaratory of what the law always was*. The sole premise of interpretation is to decipher the legislative intent consistent with it's object [*Catholic Syrian Bank v. CIT* [2012] 343 ITR 270 (SC)(also see: *CIT v. Baby Marine Exports* [2007] 290 ITR 323 (SC); *CIT v. Mahindra & Mahindra Ltd*. [1983] 144 ITR 225 (SC)). The legislative intent per s. 32(1)(iia) is to provide additional depreciation (of 20%) *qua* the eligible plant and machinery, with a view to provide a fillip to the industry, where put to use for the purpose. The condition of acquire and put to use, stated in s. 32(1)(iia), is basic to a claim of depreciation and, therefore, is to be read in that context. The law, however, restricting depreciation to 50% of that eligible where the asset under reference is put to use for less than 180 days during the relevant year, puts an artificial curb thereon. This would not be of much consequence in the normal course as the assessee would be, for the following year, entitled to depreciation on the WDV computed by reducing from its cost, thus, the depreciation actually allowed. However, in the case of additional depreciation u/s. 32(1)(iia), a one-time allowance, the said restriction, though applicable inasmuch as the depreciation u/s. 32(1)(iia) is only by way of an addition to that exigible u/s. 32(1)(ii), has no correlation with the WDV, though operates to bar the claim for the balance 50% where the asset is put to use for less than 180 days during the year of it's acquisition, also rendering it discriminatory to the assessee who puts the asset to use for less than 180 days during the year of acquisition. *Without doubt, that could not possibly be the legislative intent*. And it is this that stands rectified per the amendment by way of third *proviso*, also removing the discrimination between the two sets of assessees, i.e., who acquire the asset, on the basis of the number of days it is put to use during the relevant year; clearly, an

irrelevant criterion in the grant of additional depreciation. True, the words in s. 32(1)(iia) are '*acquired and installed*', but then the same, as afore-noted, represent the twin conditions basic to a claim for depreciation, so that nothing turns thereon *per se*. That is, the same furnish the qualifying conditions for additional depreciation, since satisfied in the first year – AY 2014-15 in the instant case, itself. We, therefore, subscribe to the view per the decisions cited by the assessee in it's favour.

3.5 We decide accordingly.

4. In the result, the assessee'sappeal is allowed.

Order pronounced on March 28, 2024 under Rule 34 of The Income Tax (Appellate Tribunal) Rules, 1963

Sd/-	Sd/-
(Manomohan Das)	(Sanjay Arora)
Judicial Member	Accountant Member

Cochin, Dated: March 28, 2024
n.p.

Copy to:

1. The Appellant
2. The Respondent
3. The Pr. CIT concerned
4. The Sr. DR, ITAT, Cochin
5. Guard File

By Order

Assistant Registrar
ITAT, Cochin