



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ITA No. 617 of 2006**
ITA No. 998 of 2008
ITA No.1104 of 2008
ITA No. 1283 of 2008

% Reserved On: OCTOBER 27, 2010.
Pronounced On: DECEMBER 24, 2010.

1) ITA No.617 of 2006

COMMISIONER OF INCOME TAX . . . Appellant

through : Mr. N.P. Sahni, Advocate and Ms.
P.L. Bansal, Advocate.

VERSUS

M/s. OSWAL AGRO MILLS LTD. . . .Respondent

through: Mr. C.S. Aggarwal, Sr. Advocate
with Mr. Prakash Kumar,
Advocate.

2) ITA No.998 of 2008

COMMISIONER OF INCOME TAX, DELHI CENTRAL III . . . Appellant

through : Mr. N.P. Sahni, Advocate and Ms.
P.L. Bansal, Advocate.

VERSUS

OSWAL CHEMICALS & FERTILIZERS LTD. . . .Respondent

through: Mr. C.S. Aggarwal, Sr. Advocate
with Mr. Prakash Kumar,
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OSWAL AGRO MILLS LTD. . . .Respondent

through: Mr. C.S. Aggarwal, Sr. Advocate
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4) ITA No.1283 of 2008



through : Mr. Mr. Sanjeev Sabharwal, ~
Advocate.

VERSUS

OSWAL CHEMICALS & FERTILIZERS LTD. . . .Respondent

through: Mr. C.S. Aggarwal, Sr. Advocate
with Mr. Prakash Kumar,
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CORAM :-

HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE SURESH KAIT

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

For orders, see ITA No.161 of 2006.


(A.K. SIKRI)
JUDGE


(SURESH KATI)
JUDGE

DECEMBER 24, 2010
pmc



(12)

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1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

Yes

A.K. SIKRI, J.

1. In all these appeals, with, the same assessee as respondent, and pertaining to different assessment years, the issue which arises for consideration is the same. It relates to the depreciation in respect of the assessee's unit at Bhopal. The Assessing Officer (AO) had denied the depreciation while passing different assessment orders in respect of all these years on the ground that



the AO were confirmed by the CIT(A). The Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal'), however, reversed those orders and allowed the depreciation. The Revenue feels aggrieved by the impugned order of the Tribunal, as according to it, depreciation was not allowable. It is on this aspect that the matter was heard at length.

(14)

2. Since ITA No.161 of 2006 was treated as lead matter, we take note of the facts from this appeal.
3. In this appeal, which relates to the Assessment Year 1998-99, the assessee had claimed depreciation of ₹9.31 Crores on its various assets. This included the claim of depreciation in respect of closed unit at Bhopal. The AO asked the assessee to explain on what basis the assessee was claiming depreciation on this unit, which remained closed. In response, the explanation of the assessee was that the depreciation was to be allowed as the said assets of Bhopal unit remained part of the block of assets and were ready for passive use, which was as good as real use. The assessee referred to the judgment of the Kerala High Court in case of **Commissioner of Income Tax Vs. Geo Tech Construction Corporation** [(2000) 249 ITR 452]. The AO, however, was not impressed with this position taken by the assessee and disallowed the depreciation on Bhopal Unit which was in the sum of ₹43,41,528.
4. The appeal preferred by the assessee before the CIT(A) was rejected.



(15)

5. Before the Tribunal, in further appeal, the assessee had submitted that the unit at Bhopal remained dormant and could not function due to various reasons. In any case, the argument was that it was a part of block of assets and therefore, depreciation was allowable on the entire block and the assets at Bhopal unit could not be segregated for the purpose of calculating the depreciation. The Tribunal accepted this plea of the assessee in the following terms:

"27. Having carefully examined the order of the authorities below in the light of rival submissions, we find that the unit of the assessee at Bhopal remained closed during the year, but the Revenue could not brought out on record that this unit at Bhopal was finally closed or sold out in the succeeding years. It was also not brought out by the revenue that this unit of the assessee do not form the block of assets. It is a settled position of law, if any of the part of the block of assets is not used during the year, but remaining part of the block of assets were in continuous use, the assessee is entitled for the depreciation on the entire block of assets. It is also a settled position of law that even if the assessee's unit is temporary closed for a year or so its commercial activities are in lull for that period, the assessee cannot be deprived from its claim of depreciation unless and until it is proved that the assessee has closed its business for ever and had no intentions of its revival. In the instant case the assessee is regularly engaged in production activities and its unit at Bhopal was temporary closed, but its closure for a temporary period does not dis-entitle the assessee from claim of depreciation thereon because it admittedly forms a part of the block of assets and other part of the block of assets were remained in use during the year. We, therefore, do not find any justification in disallowance of depreciation on this unit at Bhopal, which was temporary closed. We, accordingly direct the assessing officer to allow depreciation on this Bhopal unit to the assessee. We find support from the various judgments referred to by the assessee. Accordingly, this issue is decided in favour of the assessee."

6. Challenging the aforesaid approach of the Tribunal, the learned counsels for the Revenue, contended that the depreciation was allowable under Section 32 of the Income Tax Act (hereinafter referred to as 'the Act') only if the twin conditions stipulated therein were fulfilled and these were:



- (a) The assets should be owned, wholly or partly by the assessee; and
 - (b) It should be used for the purpose of business or profession.

7. It was a submission of the learned counsel that the second condition in the instant case was not satisfied. They argued that the provisions for depreciation on "block of assets" related to the mode of calculation and merely because the assets formed the part of the assets would not mean that the depreciation was to be allowed on the entire block even when a particular asset from the said block was not used for the purposes of business in the relevant assessment year and the pre-condition stipulated under Section 32 was not satisfied. They further submitted that the expression 'used' mentioned in Section 32 of the Act would include actual use or at least kept ready for use which would mean that non user was for temporary period. On the other hand, in the instant case, the Bhopal unit remained non-functional for six years and when whole unit was non-functional, it cannot be said that the asset of this unit were put to use.

8. Mr. C.S. Aggarwal, learned Senior counsel appearing for the assessee, countered the aforesaid submission by arguing that after the introduction of the concept of 'block assets' by way of amendment introduced with effect from 01.04.1988, the manner in which the depreciation was allowed had undergone sea change. In such case, it was not permissible for the Revenue to see as to whether a particular/specific asset is put to use or not.



depreciation was to be allowed on the entire block. He also submitted that on the facts of this case, even when the Bhopal unit could not function for 5-6 years, it was treated as temporary non-user in a company which was fifty years old and this unit had been functioning earlier. It would, thus, be the case of 'passive' use as explained in the case of **Commissioner of Income Tax - V Vs. Panacea Biotech Ltd. [(2009) 183 Taxman 212(Delhi)]**. He also referred to the decision of the Rajasthan High Court in the case of **Commissioner of Income Tax Vs. Udaipur Distillery Co. Ltd. (No.3) [268 ITR 451]**.

9. We have considered the submission of the learned counsel for the both the sides. On reading the order of the Tribunal, it becomes evident that on two grounds, viz., the depreciation is allowed viz.,
- 1) There was a passive user of the assets at Bhopal Unit, which will be treated as "used for the purpose of business."
 - 2) As it was a case of depreciation on block assessment, the assets of Bhopal unit could not be segregated for the purpose of allowing depreciation and depreciation had to be allowed on entire block of assets.

Whereas the Revenue has challenged the justification on both the counts, the assessee asserts that each of them is valid. We, thus, proceed to discuss them in seriatim.



(1) Whether the assets of Bhopal unit can be treated 'used':

10. It would be apposite to discuss the principle of law which is relevant for deciding the liability of depreciation or otherwise in a given case. For this purpose, we will refer to some of the judgments underlying the relevant principle.
11. There is no quarrel about the legal position that Section 32 of the Act deals with depreciation. It is also clear that in order to avail this depreciation, it is to be proved that the asset was "used" for the purpose of business. Immediate question that arises for consideration is: What is the meaning that is to be ascribed to the "user of asset".
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 **Commissioner of Income Tax Vs. Refrigeration and Allied Industries Ltd. [247 ITR 12 (Del.)]** 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

13. The Tribunal accorded the aforesaid decision and this Court while answering the question in favour of the assessee and upholding the order of the Tribunal, *inter alia*, held as under:

"4.....The object of the Legislature, in granting depreciation allowance under Section 32 of the Act, 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 Manufacturers Corporation Ltd. Vs. CIT* [1957]31ITR203(Bom) , it was observed that the expression "used" in section 10(2)(vi) of the Indian Income-tax Act, 1922 (hereinafter referred to as "the old Act") corresponding to Section 32 of the Act has to be given a wider meaning. The expression includes passive as well as active user. In *CIT Vs. Dalmia Cement Ltd.* [1945]13ITR415(Patna) and *CIT Vs. Viswanath Bhaskar Sathe* [1937]5ITR621(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 Purna Ltd. Vs. CIT*, [1954]25ITR265(SC) . The words "used for the purposes of the business" are capable



"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."

14. The Court gave the rationale for providing depreciation in the following words:

"5. Like every other animate and inanimate object, business premises, machinery, plant or furniture employed by an assessed in the course of his business, profession, etc. have a limited effective life. The vigour, strength, capability, etc., of every such object gradually exhausts by the factors of use and time. These have undoubtedly aided the assessed to earn "income" from such business or profession which is subjected to the levy of tax. Unless provision was made for proper recompense of such diminution in the vigour, strength, capability, etc. the apparent profits from the business, profession, etc. would not give a correct picture. Allowance for depreciation is borne out of necessity for such recompense. "Depreciation", according to Webster's New World Dictionary, means "a decrease in value of property through wear, deterioration or obsolescence: the allowance made for this in book-keeping, accounting, etc.,". Depreciation is the inherent decline in the value of an asset from any cause whatsoever (as observed by William Pickles in Accountancy, page 74). Depreciation is the diminution which takes place in the value of a wasting asset despite the amount expended on it in repairs (as stated in The Business Encyclopedia, Volume II, page 365). Depreciation is the measure of the 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 life-time, and the amount written off during an accounting period is intended to represent the proportion of such expenditure which has expired during the period (as stated by Spicer and Pegler in Book-Keeping and Accounts, 14th edition, page 47)."

15. The Court also observed that for the purpose of determining the true profits in the commercial sense or under the proper principles of accountancy, the wear and tear of the assets utilized by the assessee for the purpose of earning his profit will have to be considered and allowance will have to be made for wear and tear, which is understood as depreciation. The Court also enumerated



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 [See **CIT Vs. Elecon Engineering Co. Ltd.** [1974]96ITR672(Guj) .

16. In the case of **Capital Bus Services Pvt. Ltd. Vs. Commissioner of Income Tax [123 ITR 404 (Delhi)]**, this Court remarked that the words "used for the business" are capable of larger and a narrower interpretation. If the expression "used" is to be 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, etc. On the other hand, wider meaning would include passive user of the same in the business. After taking note of the various judgments, the Court opined that survey of those decisions clearly shows that the consensus of judicial opinion is in favour of adopting the liberal interpretation was provided as under:

"18. Though it is true that a machinery generally depreciates with actual user, the decision indicate that it is not necessary to import this concept in interpreting the expression "used" is 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



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.....”

17. In the facts of that case, while allowing depreciation on four buses, the Court held the view that these buses were in working order and were kept ready for being operated upon if and when some tourist contract materialized. Reason because of which the same could not ply on the road is that they were under repair or were unfit, but there were not enough contracts for the year. The Court, thus, held that depreciation was allowable.
18. In the case of **Commissioner of Income Tax Vs. Panacea Biotech Ltd. [183 Taxman 212 (Delhi)]**, after taking note of various judgments including the aforesaid two judgments, the principle that the expression “used for the purpose of business” was reiterated.
19. What follows from the above is that actual user of the asset in a particular year may not be necessary. Even passive user qualifies for deduction. Passive user is to be understood in the sense that the asset is ready for used, but could not be used for part of a year or even whole year.
20. The learned counsels appearing for the Revenue, however,



submission was that if the property is not put to use for number of years, the assessee should be allowed the benefit of depreciation on the purported ground that it was 'passive user'. In other words, it was argued that in the instant case the entire Bhopal Unit and not a part of the said unit, was non-functional and assets of that unit were not put to use for number of years. A fervent plea was, thus, made that in case like this, principle of 'passive user' cannot be extended.

21. We feel that counsel for the Revenue is right in their submission. In the instant case, the entire Bhopal Unit came to a standstill and there was a complete halt in its functioning from the Assessment Year 1997-98. In that year, the AO still allowed the depreciation treating it to be a 'passive user'. However, when it was found that even in subsequent year, the Bhopal Unit remained non-functional, AO(s) disallowed the depreciation. Present appeals relate to the Assessment Years from 1998-99. In the process six years passed till the last assessment year before us, but there was no sign of this unit becoming functional. The 'passive user', in these circumstances, cannot be extended to absurd limits. Otherwise, the words "used for the purpose of business" will lose their total sanctity. It cannot be the intention of the Legislature that the words 'used' when it is to be interpreted in a wider sense to mean, 'ready to use', the same is stretched to the limits of non-user for number of years.

22. We may point out at this stage that some of the High Courts have taken the view that the expression 'used' should mean actual user



Gelgy Ltd. [133 ITR 884 (Guj.)], Malabar Agricultural Ltd. Vs. CIT [229 ITR 548 (Kar.)], Dineshkumar Gulabchand Agrawal Vs. CIT [267 ITR 768 (Bom.)]. Though we are subscribing in view of the judgments of our own High Court, at the same time we would not like to give the expression a meaning which would make the provision superfluous.

23. Mr. C.S. Aggarwal, learned Senior counsel appearing for the assessee, had highlighted that the assessee was a 50 year old company and non user of the Bhopal Unit for six years or so should be treated as temporary non-user. It is difficult to accept such a plea. As per Mr. Aggarwal himself, the assessee company had closed its Bombay unit, as it was not viable. If it was striving to make Bhopal unit viable and making efforts in that behalf, that may not provide justification to claim depreciation when actual non-user remained for number of years.

(2) Depreciation on Block of Assets:

24. We now proceed on the basis that particular assets, viz., assets of Bhopal Unit were not 'used for the purpose of business' in the concerned Assessment Years. Whether the assessee would still be entitled to depreciation as it has been claiming depreciation on entire 'block of assets'. Counsel for the Revenue had argued that conditions laid down in Section 32 of the Act are to be necessarily satisfied and it has to be shown that asset is used for business. Insofar as concept of 'block of assets' is concerned, it is only a mode of calculation. On the other hand, the learned counsel for the assessee had argued that after the introduction of 'block of



from 01.04.1988, the assessee was entitled to claim depreciat on the entire block of assets and it was no more open to the Revenue as to whether particular asset is put to use or not.

25. We have considered these submissions of the learned counsel for the parties and are of the opinion that the arguments of the learned counsel for the assessee have to prevail. Mr. Aggarwal, learned Senior counsel for the assessee is right in his submission that the position concerning the manner in which the depreciation is to be allowed, has gone a sea change after the amendment of Section 32 by the Taxation Laws (Amendment) Act, 1986. Section 32(1) of the Act allows the depreciation on the written down value of the assets.

26. Section 2 (11) of the Act defines the term 'block of assets' as under:

"2(11) "Block of assets" means a group of assets falling within a class of assets comprising - (a) Tangible assets, being buildings, machinery, plant or furniture;

(b) Intangible assets, being know-how, patents, copyrights, trade-marks, licences, franchises or any other business or commercial rights of similar nature, in respect of which the same percentage of depreciation is prescribed;"

27. Along with the aforesaid amendment, definition of written down value as contained in Section 43(6) has also been amended and the amended provisions read as under:

""43(6) - "Written down value" means -

(a) ** ** **

(b) ** ** **

(c) In the case of any block of assets



- (i) In respect of any previous year relevant to the assessment year commencing on the 1st day of April, 1988, the aggregate of the written down values of all the assets falling within that block of assets at the beginning of the previous year and adjusted, -
 - (A) by the increase by the actual cost of any asset falling within that block, acquired during the previous year; and
 - (B) by the reduction of the moneys payable in respect of any asset falling within that block, which is sold or discarded or demolished or destroyed during that previous year together with the amount of the scrap value, if any, so, however, that the amount of such reduction does not exceed the written down value as so increased; and
- (ii) in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 1989, the written down value of that block of assets in the immediately preceding previous year as reduced by the depreciation actually allowed in respect of that block of assets in relation to the said preceding previous year and as further adjusted by the increase or the reduction referred to in item (i)."

28. Thus, for the assessment year 1998-99, the W.D.V. of any block of assets shall be the aggregate of the W.D.V. of all the assets falling within that block of assets at the beginning of the previous year. From this, the adjustment has to be made for the increase or reduction in the block of assets during the year under consideration. The deduction from the block of assets has to be made in respect of any asset, sold discarded or demolished or destroyed during the previous year.

29. As per amended Section 32, deduction is to be allowed – "In the case of any block of assets, such percentage on the written down value thereof as may be prescribed". Thus, the depreciation is allowed on block of assets, and the Revenue cannot segregate a



particular asset therefrom on the ground that it was not put use.

30. With the aforesaid amendment, the depreciation is now to be allowed on the written down value of the 'block of assets' at such percentage as may be prescribed. With this amendment, individual assets have lost their identity and concept of 'block of assets' has been introduced, which is relevant for calculating the depreciation. It would be of benefit to take note of the Circular issued by the Revenue itself explaining the purpose behind the amended provision. The same is contained in CBDT Circular No.469 dated 23.09.1986, wherein the rationale behind the aforesaid amendment is described as under:

"6.3 As mentioned by the Economic Administration Reforms Commission (Report No. 12, para 20), the existing system in this regard requires the calculation of depreciation in respect of each capital asset separately and not in respect of block of assets. This requires elaborate book-keeping and the process of checking by the Assessing Officer is time consuming. The greater differentiation in rates, according to the date of purchase, the type of asset, the intensity of use, etc., the more disaggregated has to be the record-keeping. Moreover, the practice of granting the terminal allowance as per section 32(1)(iii) or taxing the balancing charge as per section 41(2) of the Income-tax Act necessitate the keeping of records of depreciation already availed of by each asset eligible for depreciation. In order to simplify the existing cumbersome provisions, the Amending Act has introduced a system of allowing depreciation on block of assets. This will mean the calculation lump sum amount of depreciation for the entire block of depreciable assets in each of the four classes of assets, namely, buildings, machinery, plant and furniture."

31. It becomes manifest from the reading of the aforesaid Circular that the Legislature felt that keeping the details with regard to each and every depreciable assets was time consuming both for the assessee and the Assessing Officer. Therefore, they amended



the law to provide for allowing of the depreciation on the entire block of assets instead of each individual asset. The block of assets has also been defined to include the group of asset falling within the same class of assets.

32. Another significant and contemporaneous development, which needs to be noticed is that the Legislature has also deleted the provision for allowing terminal depreciation in respect of each asset, which was previously allowable under section 32(1)(iii) and also taxing of balancing charge under section 41(2) in the year of sale. Instead of these two provisions, now whatever is the sale-proceed of sale of any depreciable asset, it has to be reduced from the block of assets. This amendment was made because now the assesseees are not required to maintain particulars of each asset separately and in the absence of such particular, it cannot be ascertained whether on sale of any asset, there was any profit liable to be taxed under section 41(2) or terminal loss allowable under section 32(1)(iii). This amendment also strengthen the claim that now only detail for "block of assets" has to be maintained and not separately for each asset.

33. Having regard to this legislative intent contained in the aforesaid amendment, it is difficult to accept the submission of the learned counsel for the Revenue that for allowing the depreciation, user of each and every asset is essential even when a particular asset forms part of 'block of assets'. Acceptance of this contention would mean that the assessee is to be directed to maintain the details of each asset separately and that would frustrate the very



essential to point out that the Revenue is not put to any loss adopting such method and allowing depreciation on a particular asset, forming part of the 'block of assets' even when that particular asset is not used in the relevant assessment year. Whenever such an asset is sold, it would result in short term capital gain, which would be exigible to tax and for this reason, we say that there is no loss to Revenue either.

34. The upshot of the aforesaid discussion is that though we are not entirely agreeing with the reasoning of the Tribunal contained in the impugned judgment, we are upholding the conclusion of the Tribunal based on the 'block of assets' as discussed above. The consequence would be to dismiss these appeals. However, there will be no order as to costs.


(A.K. SIKRI)
JUDGE


(SURESH KATI)
JUDGE

DECEMBER 24, 2010
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