#16 to 18

% 05.04.2011

Present: Mr. Sanjeev Sabharwal, Sr. Standing Counsel for the appellant/Revenue.
None for the respondent.

(***Common Orders***)

+**ITA No.293/2011**
ITA No.420/2011
ITA No.421/2011
*

Nobody has appeared on behalf of the respondent-assessee, though served. The matter is called out second time in the post-lunch session. We may record that in the notice issued to the respondent, it was specifically stated that these appeals shall be decided finally on the next date of hearing, i.e., today. In spite thereof when the respondent does not put appearance, we are constrained to proceed the matter on merits.

The dispute is as to whether the Golf Course managed by the assessee is to be treated as hotel building on which depreciation is to be allowed @20% or it is to be treated as plant on which depreciation @25% is to be allowed.

This is clear from the following discussions contained in the impugned order passed by the Income Tax Appellate Tribunal (for brevity 'the Tribunal'):

> "2.5 We have heard both the counsels and perused the records. The AO in this case has treated the golf course akin to hotel building and allowed 20% depreciation for A.Y. 2002-03 and 2003-04. For the

A.Y. 2005-06, he has allowed depreciation as applicable to building @10%. It is settled law that Tribunal cannot take away the relief that AO has given. Now further we find that on the same set of facts in assessee's own case, the impugned asset was treated as plant for A.Y. 2001-02 by the AO himself and depreciation @25% was allowed. The assessment was done u/s 143(3) of the I.T. Act.

In the present case, we do not find any change in eh (sic) the circumstances, we refer to Hon'ble Jurisdictional High Court decision in the case of CIT Vs. Dalmia Promoters Developers Pvt. Ltd. 281 ITR 346 wherein it was held that when there is absence of any material change in the facts and law, the view taken for earlier year cannot be disturbed. In the present case we find that no such material change has been brought out before us. Since, the depreciation @25% on the said asset has been allowed for A.Y. 2001-02, we do not see any reason to disturb the rate to 20% as applied by the AO. Accordingly, we uphold the order of the Ld. CIT (A) to allow the depreciation @25%."

To bolster the aforesaid submission, the learned counsel for the appellant has produced before us the copies of the orders passed by the AO under Section 154 of the Act in respect of the Assessment Year 2001-02 as well as the copy of the order passed in appeal setting aside that order.

On going through these orders, we are convinced that the AO had taken steps immediately after the passing of the assessment order pertaining to the Assessment Year 2001-02 by reducing the depreciation granted earlier @20-25%. However, for doing this, the AO invoked wrong provision, viz., Section 154 of the Act as it was not a case of clerical mistake, which could be corrected by invoking provision of Section 154 of the Act. Therefore, on this technical

ground, the order of the AO was passed under Section 154 of the Act is set aside.

The fact remains that in view of the aforesaid development, the Tribunal could not have rested its decision on the basis of original order passed in respect of Assessment Year 2001-02 and should have considered the issue on merits, viz., whether the golf course managed by the assessee is to be treated as hotel building or it is to be treated as plant entitling 20% or 25% depreciation thereupon, as the case may be.

Since this aspect is not considered and decided on merits, we set aside the impugned order passed by the Tribunal for fresh consideration specifically dealing with the aforesaid aspect on merits.

These appeals are disposed of in the aforesaid terms.

A.K. SIKRI, J.

M.L. MEHTA, J.

APRIL 05, 2011
pmc