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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
**4.**
\+ **ITA 190/2015**

CIT-7 ..... Appellant
Through: Mr N. P. Sahni, Senior Standing Counsel with Mr Nitin Gulati, Junior Standing Counsel.

versus

RADIO TODAY BROADCASTING LTD ..... Respondent
Through: Mr Salil Aggarwal and Mr Ravi Pratap, Advocates.

**CORAM:**
**JUSTICE S. MURALIDHAR**
**JUSTICE VIBHU BAKHRU**

**O R D E R**

**% 09.12.2015**

**Dr. S. Muralidhar, J.**

1. This appeal by the Revenue under Section 260A of the Income Tax Act, 1961 ('Act') is directed against the impugned order dated 9th September 2014 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 2186/Del/2012 for the Assessment Year ('AY') 2008-09.

***Questions of law***

2. On 13th March 2015 while admitting this appeal, the following questions of law were framed for consideration:

> "(a) Whether the ITAT fell into error in holding that the Assessee was entitled to additional depreciation for the machinery used by it to broadcast radio programs in the FM channel given the definition of 'manufacture' as it existed at the time the assessment was taken up in this case?
>
> (b) Did the ITAT fall into error in its opinion with respect to depreciation on broadcasting rights for the centres where the assets were not put to use, in the facts and circumstances of the case?"

***Background facts***

3. The facts leading to the filing of the present appeal are that the Respondent-Assessee is engaged in the business of FM radio broadcasting. The Respondent was granted permission on 8th December 2006 for operating FM Radio Broadcasting channels at Delhi, Kolkatta, Mumbai, Jodhpur, Patiala, Amritsar and Shimla against payment of prescribed one Time Entry Fees. Out of 7 stations, the Assessee went on air in AY 2008-09 from three radio stations, i.e., Delhi, Kolkata and Mumbai. The three stations at Jodhpur, Patiala and Amritsar were made ready to go on air by 8th December 2007 but due to unfavourable market conditions, the marketing team of the Assessee decided against going on air for the said stations in AY 2008-09. However, on the advice of the marketing team, the Assessee started taking trial runs by running radio programs within the office premises at Jodhpur, Patiala and Amritsar in AY 2008-09.

4. The Assessee filed its return of income on 28th September 2008 at a loss of Rs. 21,59,67,400. In its return the Assessee claimed additional depreciation amounting to Rs. 1,92,06,254 under Section 32 (1) (iia) of the Act. Apart from the above, the Assessee claimed depreciation in the sum of Rs. 47,25,000 on the One Time Entry Fee (licence fee) paid for the FM channels.

5. The return was picked up for scrutiny and statutory notices were issued to the Assessee. In response to a query by the Assessing Officer ('AO') as to why the additional depreciation should not be disallowed, a written submission was filed by the Assessee on 2nd December 2010 through its authorized representative ('AR') stating as under:

> "As per section 32(1)(iia) for the purpose of additional depreciation the following conditions need to be satisfied:
>
> 1. The assessee is engaged in manufacture/production of article or thing;

2. New plant and machinery is acquired and installed after 31st March 2005;

3. It should be an eligible plant and machinery

The Assessee company is engaged in the business of FM radio broadcasting and following are some of the Radio Programs produced by it during the Financial Year 2007-08:

(a) Medical Meow;
(b) Top Cat;
(c) Sports Cat;
(d) Meow Zindagi;
(e) Meow Matinee;
(f) Mama Meow;
(g) Tutu Meow Meow

Further, during the financial year 2007-08 the Assessee company has purchased only the new plant and machinery and used the same in the production of programs on which additional depreciation has been claimed by it"

***Assessment order***

6. However, the AO rejected the Assessee's contention that the above radio programmes were "the articles or things produced by it". The AO held that "by no stretch of imagination can 'production of radio programmes' be considered as 'production of article or thing'. The additional depreciation claimed was disallowed and added back to the total income of the Assessee.

7. As regards the depreciation claimed on the One Time Entry Fee for stations not operational, the AO observed noted that Note 8 in the accounts submitted by the Assessee stated as under:

"According to the terms & conditions of Grant of Permission Agreement (GOPA) by Ministry of Information & Broadcasting (MIB), Govt. of India for operating FM Radio Broadcasting Channels, the term of the permission has been fixed for 10 year commencing from the date of operationalisation of Channel or upon expiry of one year from the date of grant of the permission,

> whichever occurs first. The company was granted permission f seven stations on 8th December 2006. One against payment of prescribed One Time Entry Fee ('OTEF'). As at the end of the year, three Channels (Delhi, Kolkata, Mumbai) were made operational while other three Jodhpur, Patiala and Amritsar) were made operational subsequent to year end and seventh channel SIMLA could not be made operational because of MIB's inability to provide basic infrastructure. Accordingly, the amount of OTEF for six channels upon getting operational or upon expiry of one year from the date of GOPA has now been considered as License Fee paid for the Licencing Period and has suitably been capitalized as an Intangible Asset in accordance with the Accounting Standard AS-26. The amount of Licence Fee capitalized as Intangible Asset would be written off over the period of the permission/licence i.e. 10 year, in accordance with the Accounting Standard AS-26. The OTEF for the seventh Channel, however, has been considered as an advance as at the end of the financial year as in previous year in view of basic infrastructure not provided by MIB."

8. The AO held that "since the assets under question, that is licence fee for the Jodhpur, Patiala and Amritsar stations, were not put to use during the relevant previous year" depreciation could not be allowed. The plea of the Assessee that "these three stations were made ready-to-use on 8th December 2007 and since when these stations were made ready-to-use the Assessee company had started taking trial runs", was not accepted by the AO on the ground that "depreciation shall not be allowed unless the asset is actually used for the business."

***Order of the CIT (A)***

9. Aggrieved by the above order, the Assessee went in appeal before the Commissioner of Income Tax (Appeals) ['CIT (A)']. By an order dated 10th February 2012 the CIT (A) dismissed the appeal by concurring with the AO that "airing of radio programmes cannot be said to be manufacturing or producing of article or thing as defined under Section 32 (1) (iia) of the Act." The CIT (A) further held as under:

> "In the commercial sense no article or thing can be said to be produc by airing a radio programme as the appellant is not manufacturing or producing any article or thing which can be sold or commercially exploited. The radio programs cannot be regarded as an article or thing as per the definition given by various courts and the process involved for airing the programs cannot be regarded as manufacturing or production. Further, the channels earn revenue from advertisement and not from sale of radio programs. The public does not have to incur any expense to log on to any channel of any radio program. The expenses is only been incurred by the various companies who are providing revenue by advertising their products. Further, the floppy or CD of the radio programs are not tradable there are large number of programmes which are aired live for example cricket matches. All these clearly shows that the appellant cannot be said to be engaged in the business manufacture or production of an article or thing as required under Section 32(1) (iia) for claim of additional depreciation. Therefore, the appellant's claim of additional depreciation is rejected."

10. As regards the disallowing of depreciation on the licence fee, the CIT (A) held that the Assessee had claimed depreciation "only on the licence fee but not on the other tangible asset. If the claim of the Appellant is valid then the Appellant's claim should not have been restricted to claim of depreciation only on licence fee." Further since the Assessee had had not claimed that the programmes were actually aired but had clarified that the airing was postponed, its claim for depreciation on the licence fee could not be permitted.

***Order of the ITAT***

11. The Assessee then appealed to the ITAT by filing ITA No. 2186/Del/ 2012. In the impugned order allowing the Assessee's appeal, the ITAT relied on the decision of the Supreme Court in ***CIT v. Oracle Software India Limited (2010) 320 ITR 546 (SC)*** and held that "the radio programmes consist of editorial and specific stanza of the songs and the same is first recorded then edited and then broadcasted." Further, "guest/callers etc. would have their questions and answers/interviews/suggestions etc. recorded at an

earlier date and the same would subsequently be aired." It was further he that the Assessee "thus uses the plant and machinery in the production of this pre-recorded radio programmes." It was concluded that "in all these processes, some plant and machineries are required for recording, editing and finally for broadcasting through the FM channel." It was found that the case of the Assessee stood on better footing than the one in ***CIT v. Oracle Software India Limited*** (*supra*) where the Assessee after importing master media of the software was duplicating it on blank discs, packing and selling it in the market along with the relevant brochures. Thus it was held that the Assessee was very much eligible for claiming the additional depreciation under Section 32 (1) (iia) of the Act.

12. Turning to the issue of depreciation on the in tangible asset, i.e., the FM Radio licence fee, the ITAT accepted the plea of the Assessee that the AO was not justified in disallowing the claim since the plant and machinery in question was ready to use and was actually run on trial basis at the three stations. The ITAT referred to the decisions in ***CIT v. Reetu Finleys Pvt. Ltd. 286 ITR 652 (Del)*** and ***CIT v. Refrigeration & Allied Ind. Ltd. 247 ITR 12 (Del)***.

***Submissions of counsel***

13. This Court has heard the submissions of Mr. N.P. Sahni, learned Senior standing counsel for the Revenue and Mr. Salil Aggarwal, learned counsel for the Respondent-Assessee.

14. Mr. Sahni sought to distinguish the decision of the Supreme Court in ***CIT v. Oracle Software India Limited*** (*supra*) on the ground that what was involved in the said case was 'processing' of CDs which was envisaged by Section 80-IA of the Act, whereas for the purpose of Section 32 (1) (iia) of the Act it had to be examined whether the equipment in respect of which

additional depreciation was claimed, was in fact used for the main business the Assessee which in this case was broadcasting. In other words, the Assessee was not in fact engaged in the business of manufacture or production of any article or thing and 'broadcasting' was not 'processing'.

15. Mr. Sahni submitted that the definition of 'manufacture' under Section 2 (29BA) would not apply in the present case as it was introduced only with effect from 1st April 2009. Reliance was placed on the decision of the Supreme Court in ***Commissioner of Income Tax v. Tara Agencies (2007) 292 ITR 444 (SC)*** where for the purposes of Section 35B (1A) of the Act (as it then stood) it was held that the process of blending of tea by the Assessee "falls short of either manufacturing or production".

16. Mr. Sahni referred to the definition of 'thing, article and manufacture' in the Black's Law Dictionary. He is submitted that 'manufacture' implies a change, but every change is not manufacture "and yet every change in an article is the result of treatment, labour and manipulation." Reliance was placed on the decision in ***Empire Industries Limited v. Union of India (1985) 3 SCC 314*** to urge that there must be a transformation and that a new and different article must emerge, having a distinctive name, character or use. Further in ***Union of India v. J.G. Glass Industries Limited (1998) 2 SCC 32*** a two-fold test was laid down. It was held that printing on bottles did not amount to manufacture. Reliance was also placed on the decision in ***Gramophone Co. of India v. Collector of Customs (2000) 1 SCC 549*** in which it was held that processing would not qualify as 'manufacture'. The word 'manufacture' had to be interpreted "in the context of the object and the language used in the section." Reliance was also placed on the decisions in ***Collector of Central Excise, Jaipur v. Rajasthan State Chemical Works (1991) 4 SCC 473, Collector of Central Excise v. Technoweld Industries (2003) 11 SCC 798, Marble Industries (P) Ltd. v. Collector of Central***

***Excise (2005) 1 SCC 279*** and ***Aspinwall & Co. Ltd. v. Commissioner Income Tax, Ernakulam (2001) 7 SCC 525.***

17. As regards depreciation on the One Time Entry Fee, it was submitted that both the decisions referred to in the impugned order of the ITAT were distinguishable on facts. Reliance was placed on the decision in ***Deputy Commissioner of Income Tax v. Yellamma Dasappa Hospital (2007) 159 Taxman 58 (Kar)*** in which it was held that "kept ready theory is not available to the Assessee for the purpose of claiming depreciation when the Legislature has chosen to use the word 'used'".

18. Replying to the above submissions, Mr. Salil Aggarwal, learned counsel for the Assessee pointed out that as regards the question of additional depreciation, while there is no dispute that the Assessee did acquire or install new and eligible plant and machinery after 31st March 2005. The only dispute raised by the Revenue was that the Assessee did not 'use' the said plant and machinery for producing or manufacturing an article or thing. The ITAT held that production of radio programmes, since it involves the technical process of recording, editing, copying and then broadcasting, amounted to production of an article or thing and therefore, the Assessee was eligible for additional depreciation.

19. Apart from the decision of the Supreme Court in ***CIT v. Oracle Software India Limited*** (*supra*), reliance was placed on the decision in ***Commissioner of Income Tax-VIII v. Ms. Kiran Kapoor 372 ITR 321 (Del).*** Reference was made by Mr. Aggarwal to the decision of the learned Single Judge of this Court dated 7th October 2013 in CS (OS) No. 1085 of 2005 ***(T.V. Today Network Limited v. Kesari Singh Gujjar)*** to urge that dissemination of news and news reporting would be covered under the goods classified under Clauses 38 and 41 of the Schedule to the Trade Marks Rules. Mr. Aggarwal

also submitted that in the succeeding AYs, i.e., 2009-10 and 2010-11 t claim for additional depreciation on production of radio programmes was allowed by the AO. While the return for AY 2009-10 was processed under Section 143 (1) of the Act, the return for AY 2010-11 was processed under Section 143 (3) of the Act.

20. As regards the second question, in support of his plea that depreciation would be allowed as long as the asset is kept ready and has been used for undertaking trial. Reliance was placed on the decisions in ***CIT v. Refrigeration & Allied Industries Ltd*** (*supra*), ***Capital Bus Service Pvt. Ltd. v. CIT (Del) 123 ITR 404*** and ***Assistant Commissioner of Income Tax v. Ashima Syntex Ltd. 251 ITR 133 (Guj).***

***Question No. 1: Additional Depreciation***

21. The first question concerns the claim of the Assessee to additional depreciation under Section 32 (1) (iia) of the Act. The said provision reads as under:

> 32. **Depreciation** (1) In respect of depreciation of –
>
> (i) buildings, machinery, plant or furniture, being tangible assets;
>
> (ii) know-how, patents, copyrights, trademarks, 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) .....
>
> (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 [19][or in the business of generation or generation and 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 where an assessee, sets up an undertaking or enterpri for manufacture or production of any article or thing, on or after the 1st day of April, 2015 in any backward area notified by the Central Government in this behalf, in the State of Andhra Pradesh or in the State of Bihar or in the State of Telangana or in the State of West Bengal, and acquires and installs any new machinery or plant (other than ships and aircraft) for the purposes of the said undertaking or enterprise during the period beginning on the 1st day of April 2015 and ending before the 1st day of April 2020 in the said backward area, then, the provisions of clause (iia) shall have effect, as if for the words "twenty per cent.", the words "thirty-five per cent." had been substituted.

Provided further that no deduction shall be allowed in respect of–

(A) any machinery or plant which, before its installation by the assessee, was used either within or outside India by any other person; or

(B) any machinery or plant installed in any office premises or any residential accommodation, including accommodation in the nature of a guest-house; or

(C) any office appliances or road transport vehicles; or

(D) any machinery or plant, the whole of the actual cost of which is allowed as a deduction (whether by way of depreciation or otherwise) in computing the income chargeable under the head "Profits and gains of business or profession" of any one previous year.

22. For the purpose of the above provision, the following conditions will have to be satisfied:

(i) new plant and machinery has to be acquired and installed by the Assessee after 31st March 2005; and

(ii) the Assessee should be engaged in the business of 'manufacture or production' of any article or thing.

23. If the above conditions are satisfied, then the additional depreciation 20% of the actual cost of such machinery would be allowed as deduction.

24. At the outset it must be noted that it is not the case of the Revenue that the activity of 'broadcasting' undertaken by the Assessee does not tantamount to 'business of manufacture or production'. The Revenue's case is that the Assessee was not using the new machinery acquired and installed by it for producing an 'article or thing'.

25. As part of its 'broadcasting' activity, the Assessee might be engaged in several incidental and distinct activities. Therefore, in a given case it may be possible that some part of the plant and machinery acquired and installed by the Assessee after 31st March 2005 might be used for production of programmes and some others for broadcasting. It is not necessary, therefore, that all of the machinery is used for production of radio programmes. Another aspect might be that an Assessee might be only 'broadcasting' the programmes produced by others in which case it would be arguable whether in the first place it could be said that the Assessee is "engaged in the business of manufacture or production of any article or thing". However, as far as the present appeal is concerned these questions do not arise. In any event, no factual details on the above alternative scenarios are available in the present case. As already noted, the case projected by the Revenue is in a much narrower compass, viz., that the Assessee has not used the machinery acquired and installed by it after 31st March 2005 used for production of an 'article' or 'thing'. It is this case of the Revenue that is required to be addressed by the Court

26. A careful perusal of the orders of the CIT and the ITAT reveal that the case of the Assessee was that it was using the new plant and machinery for producing radio programmes for broadcasting through its FM channels. This

was informed to the AO by the Assessee in response to the queries posed to during the assessment proceedings.

27. The production of radio programmes, as explained by the Assessee, involved the processes of recording, editing and making copies prior to broadcasting. When the radio programmes is made there comes into existence a 'thing' which is intangible, and which can be transmitted and even sold by making copies. Therefore, it can definitely be stated that the radio programmes produced by the Assessee is 'thing', if not an 'article.' This satisfies the understood definition of 'thing' in terms of the Black's Law Dictionary as under:

> (A) "thing":- "the subject matter of a right, whether it is a material object or not; , any subject matter if ownership within the sphere of proprietary or valuable rights. Things are divided into three categories (1) things real or immovable, such as land, tenements, and hereditaments, (2) things personal or movable, such as goods and chattels, and (3) things having both real and personal characteristics, such as title deed and a tenancy for a term. The civil law divided things' into corporeal or incorporeal.

28. 'Thing' could, therefore, have intangible characteristic. The word 'manufacture' envisages subjecting any material or thing to certain processes in order to produce something which has a distinct characteristic. In other words, the process must result in the transformation of a thing or article to result in a new or different article.

29. The definition of 'manufacture' inserted with effect from 1st April 2009 in the form of Section 2 (29BA) of the Act reads as under:

> "**2(29BA)** "manufacture", with its grammatical variations, means a change in a non-living physical object or article or thing-
>
> (a) resulting in transformation of the object or article or thing into a new and distinct object or article or thing having a different name, character and use.

(b) bringing into existence of a new and distinct object or article thing with a different chemical composition or integral structure.

30. Although this definition was introduced with effect from 1st April 2009 it must be understood as being clarificatory in nature given the common parlance understanding of the term 'manufacture'. The definition is in consonance with the law explained in the decisions cited by Mr. Sahni.

31. In ***Gramophone Co. India Ltd v. Collector of Customs*** (*supra*) was observed that "manufacture implies a change, but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation; a new and different article must emerge having a distinctive name, character and use." In ***Collector of Central Excise, Jaipur v. Rajasthan State Chemical Works*** (*supra*) it was emphasized that it is the cumulative effect of the various processes to which the raw material is subjected to, that a manufactured product emerges. Therefore, "each step towards such production would be a process in relation to the manufacture."

32. Mr. Sahni sought to draw a distinction between 'manufacture' as contemplated in Section 32 (1) (iia) in the context of claim for additional depreciation. However, 'manufacture' could include a combination of processes. In the context of 'broadcast' it could encompass the processes of producing, recording, editing and making copies of the radio programme followed by its broadcasting. The activity of broadcasting, in the above context, would necessarily envisage all the above incidental activities which are nevertheless integral to the business of broadcasting.

33. In that view of the matter, the Court concurs with the view of the ITAT and holds that in the facts and circumstances of the present case, the Assessee can be said to have used the plant and machinery acquired and

installed by it after 31st March 2005 for manufacture/production of 'article or thing.' Since the Assessee has satisfied the requirements of Section 32 (1) (iia) of the Act, it is entitled to the additional depreciation as claimed by it for the AY in question. The Revenue has also no answer to the submission of the Assessee for AYs 2009-10 and 2010-11 its claim for additional depreciation has been allowed by the AO.

34. Question No. 1 is accordingly answered in favour of the Assessee and against the Revenue.

***Question 2: Depreciation on Licence Fee***

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 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., ***CIT v. Refrigeration & Allied Ind. Ltd.*** (*supra*) and ***Capital Bus Service Pvt. Ltd. v. CIT (Del)*** (*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.*** (*supra*) it was held that while interpreting the expression 'used' "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."

38. For all the aforementioned reasons, the question No. 2 is also answered in favour of the Assessee and against the Revenue.

39. The appeal is accordingly dismissed but in the circumstances with no orders as to costs.

**S. MURALIDHAR, J**

**VIBHU BAKHRU, J**

**DECEMBER 9, 2015**
*Rk*