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

\+ **ITA No. 333/2008 & ITA No.338/2008**

Reserved on : 11th August, 2009
Pronounced on: 9th October, 2009

1. ITA No.333/2008

COMMISSIONER OF INCOME TAX ...Petitioner

Through: Ms. Prem Lata Bansal, Mr. Paras Chaudhary,Advocates.

VERSUS

HYBRID RICE INTERNATIONAL PVT. LTD. ....Respondent

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

2. ITA No. 338/2008

COMMISSIONER OF INCOME TAX ...Petitioner

Through: Ms. Prem Lata Bansal, Mr. Paras Chaudhary,Advocates.

VERSUS

HYBRID RICE INTERNATIONAL PVT. LTD. ....Respondent

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

CORAM:
HON'BLE MR. JUSTICE A. K. SIKRI
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

1. Whether the Reporters of local papers 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?

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VALMIKI J. MEHTA, J.

1. This common order will dispose of the two ITAs 333/2008 & 338/2008. At the time of admission, following two questions of law were framed and which we answer by means of this judgment:-

> " 1. Whether ITAT was correct in law in allowing depreciation to the assessee on WDV on germplasm as on 31.03.2001 when the Department had challenged the said WDV computed by ITAT in assessment year 2001-2002?
>
> 2. Whether the cost incurred by the assessee much before becoming an "assessee" can still be treated as actual cost to the assessee in complete disregard to the peculiar circumstances of the case?"

2. The issue therefore pertains to the claim for depreciation on germplasm seeds which is a plant. That the germplasm seeds are a plant is undisputed by the revenue. The facts of the case are that the assessee is in the business of producing superior quality hybrid seeds of rice for supply to farmers. For the purpose of producing hybrid seeds, the assessee is using paddy seeds, also referred to as germplasm seeds. The germplasm is an expression broadly used to denote the hereditary properties of the seed, which are transmitted from one generation to another. The germplasm seed is capable of passing on the character to the next generation and it is used as basic plant material in plant

breeding. The assessee has claimed depreciation on germplasm seeds treating the same asset used in the business. In the earlier years, the assessee had treated the activity of producing hybrid seeds as an agricultural activity, which is exempt from tax and therefore, no depreciation had been claimed. However, after the decision of the tribunal in case of parent company i.e. M/s Pro Agro Seeds Co. Ltd. for assessment year 1996-97, in ITA No. 90/Del/2000 wherein similar activity was held to be non agricultural, the assessee revised the return for the assessment year 2001-02 onwards and declared income from the activity as business income and claimed depreciation on germplasm seeds. Depreciation had been claimed on the actual cost of the germplasm seeds, which had been acquired in the earlier years without making any allowance for depreciation in the earlier years as the income in those years had been shown as agricultural income and no depreciation had been claimed. The A.O. was not satisfied with the claim. He asked the assessee to submit a depreciation chart on the basis of written down value (WDV) after making notional allowance for depreciation in earlier years. The assessee did not file any such chart and rather insisted that the depreciation be allowed on the actual cost. In the absence of details, the A.O. disallowed the entire claim of depreciation for the assessment year 2001-02. For assessment year 2002-03, the depreciation allowed by him was on the basis of WDV as per the assessment order for assessment year 2001-02. The basic issue raised in these appeals is as to what should be the WDV of

the germplasm seeds for the purpose of computation of depreciation. There no dispute about allowability of depreciation.

3. Before we proceed to deal with the issue raised, it may be appropriate to refer to the relevant provisions of the Act relating to the allowance of depreciation. Depreciation on an asset used for the purpose of business is allowable under the provisions of Section 32 at a prescribed rate on the basis of written down value (WDV) of assets of block of assets.

The WDV has been defined under sub-section (6) of section 43 to mean:

(a) In the case of assets acquired in the previous years, the actual cost to the assessee;

(b) In the case of asset acquired before the previous year the actual cost to the assessee less all depreciation actually allowed to him under this Act or under the Income Act 1922 or any Act repeated by that Act or any executive orders issued when the Indian Income tax Act 1886 was in force.

The actual cost has been defined in sub-section(1) of section 43 as per which actual cost means 'the actual cost' of the assets to the assessee reduced by that portion of the cost thereof if any as has been met directly or indirectly by any other person or authority.

4. We find that the issue in question as to whether actual cost should be taken for allowing of depreciation or only market value or notional written down value (WDV) at the commencement of the assessment year is no longer

res integra and covered by three judgments of the Supreme Court reported ***CIT Vs. Straw Products Ltd. (1966) 60 ITR 156, CIT Vs. Dharampur Leather Co. Ltd. (1966) 60 ITR 165, CIT Vs. Nand Lal Bhandari Mills (1966) 60 ITR 173.*** The relevant portions of the Supreme Court judgment in Straw Products Ltd. case reads as under:-

> "The Appellate Assistant Commissioner, disagreeing with the Income-tax Officer, held on appeal that the assessee had not been allowed excess depreciation allowance as per the original assessment and there was no basis for initiating proceedings under section 34. He was of the view that the expression "actually allowed" could not imply depreciation allowed by a mental phenomenon. The Appellate Tribunal upheld the order of the Appellate Assistant Commissioner and directed the computation of the allowance on that basis. On a reference the High Court by its judgment dated August 22, 1961, answered the question as follows:
> "In the circumstances of this case the correct basis for computing written down value of depreciable assets of the company is the one adopted by the Appellate Assistant Commissioner."
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> "Mr. A.V. Viswanatha Sastri, the learned counsel for the Revenue, urges before us that the High Court was wrong in answering the question in favour of the assessee. He urges that the expression " actually allowed under any laws or rules of a merged State." occurring in paragraph 2 of the Taxation Laws (Merged States) (Removal of Difficulties) Order, 1949, meant income of an assessee is exempted from taxation for a certain number of years, the assessee must be deemed to have claimed depreciation and deemed to have been allowed depreciation according to the provisions of the said laws or rules. He further says it does not matter whether the assessee made a claim or not because it is fair that when the Indian Income Tax Act is applied the assessee should be brought at par with the assessees who had suffered taxation under the Act.
> We are unable to give such an artificial meaning to the expression "all depreciation actually allowed under any laws or rules", and we agree with the High Court that the expression "actually allowed" is unambiguous and connotes the idea that the

allowance was actually given effect to. If it was intended to include any allowance which are not actually allowed then the Central Government would have added a deeming provision as the legislature did in the *Explanation* to section 10(5) of the Act."

The judgment in Dharampur Leather Co. Ltd. case having been passed on the same day by the Supreme Court in the Straw Products case affirms the view in the Straw Products case that the words actually allowed does not include notional allowance.

In the ***Nand Lal Bhandari Mills*** case the Supreme Court (per Subha Rao & Sikri JJ), held as under:-

"that in fixing the depreciation allowance for the years in which the respondent was assessed as a non-resident under the Indian Income-tax Act, the Income-tax Officer had "actually allowed" only a portion of the amount towards depreciation allowable in assessing its world income. The mere fact that in the matter of calculation the total amount of depreciation was first deducted from the world income and thereafter a proportion was struck did not amount to an actual allowance of the entire depreciation in ascertaining the taxable income that accrued in British India. Therefore, the depreciation deducted in arriving at the taxable income alone could be taken into account and not the depreciation taken into account for arriving at the world income."

In ***Mahendra Mills*** case the Supreme Court after reviewing various decisions including those of its own overruled the views of various High Courts which held that actually allowed would include notionally allowed and approved the views of other High Courts which held that actually allowed means only actually allowed and not notionally allowed. The head note portion succinctly brings out the ratio of the case and the same reads as under:-

"The language of the provisions of section 32 and 34 of the Income-tax Act, 1961, is specific and admits of no ambiguity. Section 32 allows depreciation as deduction subject to the provision of section 34. Section 34 provides that deduction under section 32 shall be allowed only if the prescribed particulars have been furnished. Rule 5AA of the Income-tax Rules, 1961, since deleted, provided for the particulars required for the purpose of deduction under section32. Even in the absence of rule 5AA, the return of income in the form prescribed itself requires particulars to be furnished if the assessee claims depreciation. These particulars are required to be furnished in great detail. There is a circular of the Board dated August 31, 1965, which provides that depreciation could not be allowed where the required particulars have not been furnished by the assessee and no claim for the depreciation has been made in the return. The Income-tax Officer in such a case is required to compute the income without allowing depreciation allowance. The circular of the Board dated April 11, 1955, imposes merely a duty on the officers of the department to assist the tax payers in every reasonable way, particularly, in the matter of claiming and securing relief. The officer is required to do no more than to advise the assessee. It does not place any mandatory duty on the officer to allow depreciation if the assessee does not want to claim. The provision for claim of depreciation is certainly for the benefit of the assessee. If he does not wish to avail of that benefit for some reason, the benefit cannot be forced upon him. It is for the assessee to see if the claim of depreciation is to his advantage. Income under the head "profits and gains of business or profession" is chargeable to income tax under section 28 and income under section 29 is to be computed in accordance with the provisions contained in section 30 to 43A. The argument that since section 32 provides for depreciation it has to be allowed in computing the income of the assessee cannot in all circumstances be accepted in view of the bar contained in section 34. If section 34 is not satisfied and the particulars are not furnished by the assessee his claim for depreciation under section 32 cannot be allowed. Section 29 is thus to be read with reference to other provisions of the Act. It is not in itself a complete code.

If the revised return is a valid return and the assessee has withdrawn the claim of depreciation it cannot be granted relying on the original return when the assessment is based on the

> revised return. Allowance of depreciation is calculated on the written down value of the assets, which written down value would be the actual cost of acquisition less the aggregate of all deductions "actually allowed". If the assessee has not claimed deduction of depreciation in any past year it cannot be said that it was notionally allowed to him. A thing is "allowed" when it is claiomed. A subtle distinction is there when we examine the language used in section 16 and sections 34 and 37 of the Act. It is rightly said that a privilege cannot be to a disadvantage and an option cannot become an obligation. The Assessing Officer cannot grant depreciation allowance when the same is not claimed by the assessee."

5. The counsel for the revenue has strongly relied upon the judgment of the Supreme Court in ***CIT Vs. Saharanpur Electrical Supply Corporation Ltd. 194 ITR 294***. We fail to understand as to how the said judgment would apply at all to the facts of the present case. In the said judgment, the Supreme Court has only held that if actual cost is wrongly assessed earlier, then, in the subsequent assessment years the actual cost can be recomputed and the mistake can be corrected. However, the facts of the present case clearly are different because in the earlier assessment years there did not arise any question of calculation of the actual cost because no depreciation was claimed for the earlier years. We, therefore, also fail to understand as to how the assessee is taking advantage of his own wrong as contended by the revenue. In fact, what is wrong which the assessee has done of which he is seeking to take advantage is not understood because, once it is held that depreciation is a privilege and can only be on the basis of actually allowed and not notionally allowed, there does not remain any issue of any wrong by the assessee. There is no wrong and as held by the

Supreme Court in the Mahendra Mills case, it is only a privilege which t assessee may choose to exercise or not. No doubt, statutorily a legislature can require the actual cost to be computed in a particular way but when that is not so, why should the assessee be deprived the benefit of depreciation with respect to computation of his income when depreciation has not been claimed by the assessee in the earlier years.

6. We, therefore, answer the question of law framed in that we hold that ITAT was correct in law in allowing depreciation to the assessee on the actual cost of the germplasm seeds and the actual cost incurred by the assessee much before becoming an assessee can still be treated as an actual cost to the assessee when depreciation has to be claimed.

With these observations, the appeals are dismissed.

VALMIKI J.MEHTA, J

A.K. SIKRI, J

October 9, 2009

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