



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

+ **ITA NO.530/2011**

% **Reserved on : 28th November, 2011.**
Date of Decision : 16th December, 2011.

Commissioner of Income Tax Appellant
 Through : Mr. Kamal Sawhney, sr. standing counsel
 with Mr. Amit Shrivastava, Advocate.

VERSUS

Integrated Technologies Ltd.Respondent
 Through

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE R.V. EASWAR

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not ? Yes
3. Whether the judgment should be reported in the Digest? Yes

R.V. EASWAR, J.:

This is an appeal filed by the revenue under Section 260A of the Income Tax Act, 1961 (“Act”, for short) against the order dated 30th April, 2010 passed by the Income Tax Appellate Tribunal (“Tribunal”, for short), Delhi Bench “C” in ITA No.1559/Del./2008 in respect of the assessment year 2004-05.



2. The assessee is a company. It filed a return of income on 18.10.2004 declaring a loss of Rs.4,85,08,380/-. The return was processed under Section 143(1) of the Act but was subsequently picked up for scrutiny and notice under Section 143(2) was issued. In the course of the assessment proceedings, the Assessing Officer noticed that though the assessee has debited expenses amounting to Rs.4,82,93,278/- to the profit and loss account, no business was done in the relevant previous year and there were no purchases or sales or manufacturing activities carried on by the assessee. He further noted that the expenses debited above included depreciation, bad debts, raw material stock written off and administrative expenses. According to the Assessing Officer the expenses were not allowable in computing the business income of the assessee because no business activities were carried on in the relevant previous year. He therefore, proposed to disallow the expenditure claimed by the assessee. In response thereto, the assessee submitted that the administrative expenses were statutory in nature and not related to any business carried on by the assessee and such expenses as were incurred for complying with the legal and statutory requirements under various laws were allowable as deduction.

3. The Assessing Officer was not convinced by the submission of the assessee. According to him the expenses claimed by the assessee in the profit and loss account were not allowable in the absence of any business carried on by the assessee in the relevant previous year. With particular



reference to the assessee's claim of depreciation, he observed that since the plant and machinery was not actually used for the purpose of the assessee's business during the relevant previous year, no depreciation was allowable. In support of his decision he relied on the judgments of the Supreme Court in *L. M. Chhabda & Sons v. CIT* (1967) 65 ITR 638 and *CIT vs. Gemini Cashew Sales Corpn.* (1967) 65 ITR 643. In the aforesaid view of the matter, the Assessing Officer disallowed the entire loss claimed by the assessee and determined the income at Rs.Nil.

4. The assessee carried the matter in appeal before the CIT(Appeals) and filed written submissions, which showed that the expenses debited to the profit and loss account were as under :

Personnel expenses	Rs. 3,95,884.78
Administrative expenses	Rs. 6,43,104.60
Financial charges	Rs. 844.35
Depreciation	Rs. 2,16,41,897.00
Bad debts written off	Rs. 95,15,161.40
Raw material stock write off	Rs. 1,36,26,779.01
Decrease in stock	Rs. <u>23,69,606.74</u>
Total	Rs. <u>4,82,93,277.88</u>

It was contended by the assessee that even though there was no sale or purchase or any manufacturing activity carried on in the relevant previous year, the business was still a going concern and in order to keep it alive and fulfill several legal and statutory formalities, some expenditure has to be incurred. It was also submitted by the assessee that it had approached



the BIFR under Section 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985, that the application was being processed and soon the manufacturing and sale activities will start and therefore in these circumstances it cannot be said that the business of the assessee had ceased to exist. It was pointed out that there was only a temporary lull and the business would revive shortly. With particular reference to the claim of depreciation of Rs.2,16,41,897/-, it was contended that the plant and machinery were kept ready for use once the business revived and such passive use also amounted to use of the asset within the meaning of Section 32 of the Act. It was therefore contended that the claim of depreciation ought to be allowed. In support of the claim for allowance of depreciation, several authorities were relied upon by the assessee, including the judgment of this Court in *Capital Bus Service Pvt. Ltd. Vs. CIT* (1980) 123 ITR 404.

5. The CIT(Appeals) examined the contentions in detail and recorded the following findings :

- a) The assessee was engaged in the manufacture of printed circuit boards and for the assessment years 2000-01, 2001-02, 2002-03 and 2003-04 it had turnover amounting to Rs.0.3 crores, Rs.0.55 crores, Rs.1.87 crores and Rs.0.68 crores respectively. In these years there were net losses as per the accounts and the accumulated losses as on 31.3.2003 came to Rs.13.44 crores.



- b) Since the accumulated loss exceeded the paid-up capital and free reserves of Rs.10.76 crores, the BIFR had registered the assessee's case as case No.165/2004. In this application to the BIFR the assessee had pointed out that though the annual capacity for manufacture of printed circuit boards was 54,000 sq.mts, the assessee could manufacture only 568 sq.mts and 5409 sq.mts in the earlier years.
- c) The reason for the assessee becoming sick was the cancellation of orders from international customers subsequent to the terror attacks in USA, and the assessee's inability to accept orders for domestic markets because it was a hundred per cent export oriented unit and also insufficient working capital.
- d) Although there was no production up to 31.3.2007, in the application for admission of its case before the BIFR the assessee had stated that since the second quarter of 2002, the world business scenario has improved and the company has started receiving substantial orders.

From these facts the CIT(Appeals) concluded that though the assessee had an intention to restart the manufacturing operations, no such operations were actually undertaken and in that view of the matter it cannot be said that the plant and machinery or other assets were used for the purpose of the assessee's business. In support of his view the CIT(Appeals) referred



to several judgments of the Calcutta, Madhya Pradesh, Rajasthan and Bombay High Courts. Thus, the disallowance of depreciation was upheld.

6. In respect of the other expenses disallowed by the Assessing Officer, the CIT(Appeals) dealt with them in some detail and ultimately directed the Assessing Officer to allow the administrative expenses, personnel expenses and financial expenses as deductions. Surprisingly, while dealing with these expenses, he took the view that there is no material on record to show that the assessee had completely abandoned its business and that on the basis of the facts given in the assessee's application dated 29.11.2002 to the BIFR and the minutes of the joint meeting with BIFR held on 2.2.2007 it cannot be said that the assessee had completely abandoned or closed its business forever. It was in this view of the matter that the administrative expenses, personnel expenses and the financial expenses were directed to be allowed. Revenue accepted the said findings and no appeal/cross objections were preferred.

7. The assessee filed a further appeal before the Tribunal and questioned the decision of the CIT(Appeals) regarding allowance of depreciation. The Tribunal, relying upon three judgments of this Court held that the assessee was entitled to the allowance of depreciation on plant and machinery on the footing that they were kept ready for use in the business once it got revived and that amounted to passive use of the assets, which would meet the requirements of Section 32. These judgments are :



- (1) *Capital Bus Service* (supra)
- (2) *CIT Vs. Refrigeration and Allied Industries Ltd.* (2001) 247 ITR 12.
- (3) *CIT Vs. Panacea Biotech Ltd.* (2009) 183 Taxman 212

The Tribunal also found that the claim of passive use of the assets was supported by the efforts made by the assessee to restart the business. According to the Tribunal, the assessee had purchased new plant and machinery in the relevant previous year, had incurred expenses of Rs.1.23 lakhs on account of repairs and maintenance and also purchased consumable stores for Rs.27,131/-. In addition to these expenses, it was noted by the Tribunal that the assessee had incurred expenses of Rs.14.04 lakhs on account of salary, allowances and staff welfare expenses as against Rs.5.14 lakhs incurred in the preceding year. It was observed by the Tribunal that the CIT (Appeals) has allowed deduction of these expenses namely salary, allowance and staff welfare expenses as also the repairs and maintenance and expenses on consumable stores. This, according to the Tribunal, also supported the assessee's plea that it was making all efforts to revive the business and was keeping the plant and machinery and other assets ready for use. Moreover, the revenue had not filed any appeal to the Tribunal questioning the decision of the CIT (Appeals) allowing deduction on account of various expenses such as salary and allowance, staff welfare, repairs and maintenance etc. The



Tribunal has also dealt with the argument of the department that since the assessee was claiming write off of the stock of raw material, work-in-progress and finished goods it could not be said that the assessee was keeping its plant and machinery and other assets ready for use. According to the Tribunal the write off of these stocks was claimed for the simple reason that after lapse of considerable time, these stocks became useless and unfit for any manufacturing activity and write off of such stocks did not mean that the assessee had no intention to revive the business.

8. In the aforesaid view of the matter, the Tribunal held that the plant and machinery and other assets on which depreciation was claimed was kept ready for use and accordingly the depreciation was allowable under Section 32. The revenue challenges the order of the Tribunal and seeks to raise the following questions as substantial questions of law :

- A) Whether the Income Tax Appellate Tribunal was correct in holding that the assessee could get benefit of depreciation under Section 32 of the Act on the basis of “passive use” of the assets?
- B) Whether the Income Tax Appellate Tribunal ought to have appreciated that in the facts and circumstances of the present case there was no question of “passive use” of the assets?
- C) Whether the Income Tax Appellate Tribunal erred in ignoring the clear language of Section 32?

In our opinion, no substantial question of law arises from the decision of the Tribunal. It has been found as a fact by the Tribunal that the assessee



had not closed its business and had every intention to revive the same. The basis for this finding is the fact that the assessee had kept its establishment alive by paying salary and other allowances to the staff and had also acquired plant and machinery in the relevant previous year and had further incurred repair expenditure on its existing plant and machinery. These findings have not been challenged by the revenue as perverse. In fact, the allowance of the salary payments, staff welfare and repairs and maintenance expenditure by the CIT (Appeals) was not challenged by the revenue by filing any appeal on those points before the Tribunal and this aspect has been referred to by the Tribunal in para 9 of its order. Thus, the revenue had impliedly accepted the fact that the business was kept alive in the hope of revival and there was only a temporary lull in the business activities. If the assessee had purchased new plant and machinery and had also incurred repair expenditure of Rs.1.23 lakhs in respect of the existing machinery, it is a fair and reasonable inference to draw that the assessee wants to keep the business alive and revive the same at the earliest opportunity. The assessee has also stated before the BIFR that after the change in the business scenario globally, the company is expecting to receive substantial orders for its products. Thus, the finding of the Tribunal that the business of the assessee was not closed is fully supported by facts on record which have not been challenged by the revenue. The other question as to whether the plant and machinery should have been actually put to use in order to be entitled to depreciation under Section 32 and that mere passive use, in the



sense that they were kept ready for use as and when the business was revived, would be sufficient compliance with Section 32 should not detain us since it has already been decided in the affirmative by at least three judgments of this Court.

9. The Tribunal has referred to the judgments in *Capital Bus Service* (supra), *CIT Vs. Refrigeration and Allied Industries Ltd.* (supra) & *CIT Vs. Panacea Biotech Ltd.* (supra) and has applied the ratio laid down therein to the facts of the present case. The ratio in brief is that it is not necessary that the plant and machinery owned by the assessee should be actually put to use in the relevant accounting year to justify the claim of depreciation and that even if the plant and machinery or other asset is kept ready for use in the assessee's business, the assessee would be entitled to depreciation. The only condition is that the business should not have been closed down once for all and that the assessee should demonstrate that the hopes of the business being revived are alive and real. It is however not a matter that can turn entirely on the assessee's hopes alone. There should be evidence or material to show that the assessee took efforts to keep the business alive in the hope of reviving the same. Maintaining the office and establishment, complying with the statutory formalities, not disposing of the plant and machinery, incurring expenses on the repair of plant and machinery etc., are some of the indications of nurturing the hopes of reviving the business. The above are only illustrative instances and are by no means exhaustive and the question as to whether the assets were kept



ready for use in the business is largely to be decided on the facts and circumstances of each case. In our opinion, the Tribunal has not committed any error in applying the ratio laid down in the judgments of this Court to the facts of the present case in order to uphold the assessee's claim for depreciation.

10. In the light of the foregoing discussion we are of the view that no substantial question of law arises from the order of the Tribunal for decision. Accordingly, the appeal filed by the Revenue is dismissed with no order as to costs.

(R.V. EASWAR)
JUDGE

(SANJIV KHANNA)
JUDGE

DECEMBER 16, 2011
vld/Bisht