

ito Vs. Royal Diam

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Court : Mumbai

Decided On : Sep-06-2002

Reported in : (2004)88TTJ(Mumbai)268

Appeal No. : ITA No. 4172/Mum/2000 A.Y. 1998-99 6 September 2002

Appellant : ito

Respondent : Royal Diam

Judgement :

ORDER

M.K. Chaturvedi V.P.

This appeal by the revenue is directed against the order of Commissioner (Appeals)-XIX, Mumbai and relates to the assessment year 1998-99.

2. The following three grounds taken in this appeal are reproduced here as under :

'1. On the facts and in the circumstances of the case and in law, the learned Commissioner (Appeals) erred in holding that a sum of Rs. 2,76,900 being interest received from bank should be treated as income from profit and gains of business, and not income from 'other sources' as held by the assessing officer.

2. On the facts and in the circumstances of the case and in law, the learned Commissioner (Appeals) erred in holding that it is the net interest which is to be

deducted to arrive at the 'profits of the business' though the Explanation clause (baa) to section 80HHC provides reduction of 90 per cent of receipt,

3. On the facts and in the circumstances of the case and in law, the learned Commissioner (Appeals) erred in directing the assessing officer to compute business incomes without allowing the depreciation which has not been actually claimed by the assessee, disregarding the provisions of section 32 of the Act.'

3. I have heard the rival submissions. Both the parties agreed that ground No. 1 is covered against the assessee by the decisions of the jurisdictional High Court rendered in the case of CIT v. Kantilal Chhotalal : [2000]246ITR439(Bom) and CIT v. Rao Ratna Exports (P) Ltd. : [2000]246ITR443(Bom) Respectfully following the precedents, I decide this issue in favour of the revenue and against the assessee.

4. In regard to Ground No. 2, both the parties agreed that the issue stands settled in favour of the assessee by the decision of the Tribunal rendered in the case of Pink Star v. Dy. CIT (2000) 72 ITD 137 (Bom) I, therefore, respectfully following the precedent, direct the assessing officer that credits and debits of same nature should be netted out against each other in order to avoid any distortion in the profits. Accordingly I decide this issue in favour of the assessee and against the revenue.

5. The last ground relates to the question whether depreciation can be trusted on the assessee in respect of office premises and factory building, even though the same was not claimed in the return.

6. I have heard the rival submissions in the light of material placed before me and precedents relied upon. The Apex Court in the case of CIT v. Mahendra Mills (2000) 243 ITR 56 at P. 79, has held that it does not place mandatory duty on the officer to allow depreciation if the assessee does not want to claim that. The provision for claim of depreciation is certainly for the benefit of the assessee. If it does not wish to avail that benefit for some reason, benefit cannot be forced upon him. It is for the assessee to see if the claim of depreciation is to his advantage. Rather the Income Tax Officer should advise him not to claim depreciation if that course is beneficial to the assessee. Further, at p. 80, Hon'ble Supreme Court has

observed : 'It is rightly said that a privilege cannot be to a disadvantage and an option cannot become an obligation'.

7. Finance Act, 2001, with effect from 1-4-2002 inserted Expln. 5 to section 32, this reads as under :

'Explanation 5 : For the removal of doubts, it is hereby declared that the provisions of this sub-section shall apply whether or not the assessee has claimed the deduction in respect of depreciation in computing his total income; '

8. No doubt this is a piece of declaratory legislation. The presumption against retrospective operation is not applicable to declaratory legislation. As per Crais Statute Law, 1st Edition, p. 58, 'for modern purposes a declaratory Act may be defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective. The usual reason for passing a declaratory Act is to set aside what Parliament deems to have been a judicial error, whether in the statement of common law or in the interpretation of statutes. Usually, if not invariably, such an Act contains a preamble, and also the word 'declared' as well as the word 'enacted'.

9. The use of the words 'it is declared' is not conclusive that the Act is declaratory. At times, these words are used to introduce new rules of law and the Act. Therefore, necessarily this will not imply retrospective operation. In determining the nature of the legislation, regard must be had to the substance rather than to the form. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. In the absence of clear words indicating that the amending Act is declaratory, it would not be so construed when the pre-amended provision was clear and unambiguous.

10. To find out the intent of the legislature, it would be beneficial to make recourse to the Memorandum Explaining Provisions in the Finance Bill, 2001. (2001) 248 ITR 193 This reads as under

'Modification of provisions relating to allowance of depreciation :

Under the existing provisions of sub-section (2) of section 32 of the Income Tax Act, carry forward and set off of unabsorbed depreciation is allowed for assessment years.

With a view to enable the assesseees to conserve sufficient funds to replace capital assets specially in an era where obsolescence takes place so often, the Bill proposes to dispense with the restriction of 8 years for carry forward and set off of unabsorbed depreciation.

It is further proposed to clarify that in computing the profits and gains of business or profession for any previous year, deduction of depreciation under section 32 shall be mandatory.

The proposed amendments will take effect from the 1-4-2002, and will, accordingly, apply in relation to assessment year 2002-2003 and subsequent years.'

11. Clause 21 of the Notes on Clauses to Finance Bill, 2001 (2001) 248 ITR 1211 reads as under

'Clause 21 seeks to amend section 32 of the Income Tax Act relating to depreciation.

Sub-clause (a) seeks to insert a new Expln. 5 in clause (ii) of sub-section (1) of the said section so as to clarify that the provisions of sub-section (1) of sections 32 shall apply whether or not the assessee has claimed the deduction for depreciation in computing his total income.

Sub-clause (b) seeks to substitute sub-section (2) so as to provide that where full effect cannot be given to the depreciation allowance in any previous year owing to there being no profits or gains chargeable for that previous year or owing to the profits or gains chargeable being less than the allowance, the depreciation allowance or part thereof to which effect has not been given shall be added to the amount of allowance for depreciation for the following previous year, or for the

succeeding previous year till such time the full effect has been given to the depreciation allowance claimed by the assessee.

These amendments will take effect from 1-4-2002, and will, accordingly, apply in relation to the assessment year 2002-2003 and subsequent years.'

12. In the case of *Ram Nath Jindal v. Dy. CIT* at p. 593, Punjab & Haryana High Court held as under:

'Thus, it is clear that the assessing officer cannot grant the benefit of depreciation when it has not been claimed by the assessee. This position is further obvious from the fact that in the Finance Act, 2001, Expln. 5 has been inserted in section 32(1)(ii) with effect from 1-4-2002. It has been, inter alia, provided that the provision shall apply 'whether or not the assessee has claimed the deduction in respect of depreciation in computing his total income'. It is no doubt true that the Explanation appears to have been added 'for the removal of doubts'. However, the fact remains that prior to the insertion of the Explanation, there was no express provision by which depreciation could be fictionally deemed to have been claimed and granted.'

13. Taking into consideration the entire conspectus of the case and the precedents available on the point, Expln. 5 in section 32(1)(ii) cannot be held to be retrospective. As such, it is not relevant for deciding the present issue.

14. The Apex Court in the case of *CIT v. Mahendra Mills* (supra) has clearly laid down that a privilege cannot be to a disadvantage and an option cannot become an obligation. If the assessee does not wish to avail the benefit of depreciation for some reason, the benefit cannot be forced upon him. I, therefore, respectfully following the precedent, decide this issue in favour of the assessee and against the revenue.

15. In the result, appeal of the revenue stands partly allowed.