

(2000) 08 GUJ CK 0059
In the Gujarat High Court
Case No : Tax Appeal No. 186 of 1999

Assistant Commissioner of Income Tax	APPELLANT
Vs	
Ashima Syntex Ltd.	RESPONDENT

Date of Decision : 04-08-2000

Acts Referred:

Income Tax Act, 1961 — Section 10(1), 10(2), 143(1), 143(2), 2(13)
Income Tax Rules, 1962 — Rule 5

Citation : (2001) 251 ITR 133

Hon'ble Judges : K.M. Mehta, J;B.C. Patel, J

Bench : Division Bench

Advocate : Manish R. Bhatt, for the Appellant; S.N. Soparkar, for the Respondent

Judgement

K.M. Mehta, J.—The Assistant Commissioner of Income Tax, Central Circle 2(3), Ahmedabad, has filed this appeal u/s 260A of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), being aggrieved and dissatisfied by an order passed by the Income Tax Appellate Tribunal, Ahmedabad Bench "B" (hereinafter referred to as "the Tribunal"), in I.T.A. No. 133/Ahd. of 1997 for the assessment year 1993-94.

2. Learned counsel for the Revenue submitted before us that two questions of law are arising in this matter for determination of this court, which are as under :

"(1) Whether the Appellate Tribunal is right in law and on facts in allowing the assessee's claim for depreciation on plant and machinery of fabric division amounting to Rs. 1,11,96,701 ?

(2) Whether the Appellate Tribunal is right in law and on facts in not observing that the attendant facts and circumstances would lead one to believe that trial run commenced only after the close of the previous year, and even the training of the employees of the assessee-company by foreign technicians for running the imported plant and machinery was also completed after the close of the previous year ?"

3. Ashima Syntex Ltd., the assessee, and the respondent herein had filed the return of income on December 30, 1993, declaring total income of Rs. 60,71,322 for the assessment year 1993-94 for the year ending on March 31, 1993. Under Sections 143(1) and 143(2) notices were issued. Before the Assistant Commissioner of Income-tax the assessee stated that the assessee had imported air-jet looms from Japan. These looms were technologically very advanced and very sensitive to humidity. The assessee had a humidification plant but the production process took long time to stabilize. The assessee's plant is located in a notified industrial area notified by the Government of Gujarat which is 30 Kms. from Ahmedabad and the availability of skilled man power to operate such machinery and to train them caused delay in commercial production. However, it was stated that the assessee commenced trial production on March 26, 1993, and some cotton fabrics were also produced which have been shown as closing stock. It was further stated that the assessee was entitled for depreciation as the assets of the new division were put to use during the previous year on trial run basis. The Income Tax Officer by his order, dated March 21, 1996, rejected the claim of the assessee on the ground that up to the end of the accounting year only tests and trials were going on and success was achieved only at the end of the accounting year and it could not be said that the assessee set up the business upto the end of the previous year.

4. Being aggrieved and dissatisfied with the aforesaid order of the Income Tax Officer, the assessee preferred an appeal being Appeal No. CIT(A)VT/ CC 2(3)/42/96-97 before the office of the Commissioner of Income Tax (Appeals) on April 23, 1996, and the Commissioner of Income Tax (Appeals) by his order dated October 30, 1996, was pleased to dismiss the appeal of the assessee and confirmed the order of the Income Tax Officer.

5. Being aggrieved and dissatisfied with the aforesaid order of the Commissioner (Appeals), the assessee preferred an appeal before the Income Tax Appellate Tribunal, Ahmedabad Bench "B", being I. T. A. No. 133/A of 1997 and the Appellate Tribunal by its judgment and order dated January 12, 1999, allowed the appeal of the assessee. In para. 7 of its judgment, the Tribunal held that "thus taking into consideration the totality of the facts and circumstances of the case we are of the opinion that the Departmental authorities were not justified in denying the claim of depreciation to the assessee as admittedly the machines were installed and used for trial production in the accounting year relevant to the assessment year under consideration. Accordingly, we reverse the order of the Commissioner of Income Tax (Appeals) in this regard and direct the Assessing Officer to allow depreciation to the assessee-company".

6. Before we consider the contentions raised in this petition some of the relevant provisions of the Act may be quoted :

Section 10(1) and (2) of the Income Tax Act as amended by Act VII of 1939 which reads as under :

"10. (1) The tax shall be payable by an assessee under the head "Profits and gains of business, profession or vocation" in respect of the profits or gains of any business, profession or vocation carried on by him.

(2) Such profits or gains shall be computed after making the following allowances, namely :- . . .

(iv) in respect of insurance against risk of damage or destruction of buildings, machinery, plant, furniture, stocks or stores, used for the purposes of the business, profession or vocation, the amount of any premium paid ;

(v) in respect of current repairs to such buildings, machinery, plant or furniture, the amount paid on account thereof ;

(vi) in respect of depreciation of such buildings, machinery, plant or furniture being the property of the assessee, a sum equivalent to such percentage on the original cost thereof to the assessee as may in any case or class of cases be prescribed ; . . .

(vii) in respect of any machinery or plant which has been sold or discarded, the amount by which the written down value of the machinery or plant exceeds the amount for which the machinery or plant is actually sold or its scrap value :

Provided that such amount is actually written off in the books of the assessee :

Provided further that where the amount for which any such machinery or plant is sold exceeds the written down value, the excess shall be deemed to be profits of the previous year in which the sale took place."

7. Thus it is clear that the very definition of business includes "any manufacture".

8. Sub-section (13) of Section 2 of the Act defines what business is. It reads thus :

" "business" includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture."

9. Section 32(1) of the Act reads as under :

"32. (1) in respect of depreciation of buildings, machinery, plant or furniture owned by the assessee and used for the purposes of the business or profession, the following deductions shall, subject to the provisions of Section 34, be allowed . . ."

10. At the time of hearing of this appeal Mr. B. B. Naik, learned counsel for the Revenue, instructed by Mr. M. R. Bhatt submitted that the activity of trial runs and proving of the wide range of machine tools, was essential and a pre-requisite before the actual manufacture could start, and on these facts the question is whether it could be said by the assessee-company that it carried out business in the year of account. Learned counsel for the Revenue submitted that as in the instant case there were no activities from which it can be said that the profit

could be earned, it cannot be said that the plant and machinery were used for the purpose of business. Learned counsel submitted that there was certain pre-production operation and the Commissioner accepted the contention raised by the Revenue. It is required to be noted that what was done was testing of tools in order to satisfy the company whether they would be proper for the legitimate purpose of textile machinery. Even in the letter it was specifically mentioned that there was no production but there was trial production for proving of the wide range of the machine tools. Thus, there was no question of production, but machinery was being tested, and certain tools were tested.

11. Learned counsel appearing for the Revenue also submitted that the appeal of the Revenue may be allowed also on the ground that the expenses prior to the date of commercial production have been capitalised because of the accounting policy adopted by the company which is as per guidance note issued by the Institute of Chartered Accountants. Learned counsel for the Revenue stated that having capitalised the expenditure in the books of account the company cannot claim depreciation and though this issue was raised before the Tribunal no finding is given on the said issue.

12. Learned counsel for the assessee on the merits of the matter stated that the word "used for the purpose of business" obviously means used for the purpose of the assessee's own business the profits of which are being charged. It was further submitted that the words "used for the purpose of business" denote user for such purpose during the accounting year. It was stated that the word "used" should be understood in a wide sense so as to embrace passive as well as active user it was stated that when machinery is kept ready for use at any moment in a particular factory under an express contract from which taxable profits are earned the machinery can be said to be used for the purpose of business which earns profits if it is not actually worked for commercial production. Learned counsel for the assessee further submitted that it is not necessary that the machinery, plant, etc., should be used throughout the accounting year or during the whole of that year. Even if they are worked for only a part of the year, the assessee should be granted full allowance and not merely an amount proportional to the period of user.

13. As regards additional submission of learned counsel for the Revenue, learned counsel for the assessee further stated that such capitalisation cannot give any additional benefit to the company and that the expenses capitalised cannot be claimed as revenue expenses. The assessee can claim the benefit of depreciation only. Accordingly, expenditure which may allowable in one year shall be claimed over a period of years which does not give any advantage to the assessee.

14. Learned counsel for the assessee stated that at the outset it may be clarified that this issue has not been raised by the Revenue at all before the Tribunal and does not arise out of the order of the Tribunal. The only argument raised by the Revenue before the Tribunal on this issue was that "the fact that the expenses have been capitalised in the books of account leads one to infer/conclude that as

a matter of fact there was no trial production at all". In view of the fact that the Tribunal has given a finding that as a matter of fact the company did have trial production the Tribunal was not called upon to comment on this factual inference sought to be drawn by the Revenue. It is important to note that the Revenue did not argue what is the legal effect of such capitalisation at all.

15. In view of the aforesaid submissions learned counsel appearing for the assessee stated that such issue still needs to be answered, the submissions of learned counsel for the assessee are as under :

In such situations whether to capitalise or to treat an expenditure to be of a revenue nature is at the option of the assessee and either option cannot lead to a conclusion in law that the assessee is not eligible to claim depreciation. He has relied upon the decision reported in Sivakami Mills Ltd. Vs. Commissioner of Income Tax, .

16. In any case, the entries in the books of account are irrelevant to decide the rights of an assessee to claim certain expenditure to be an admissible expenditure.

17. Learned counsel for the Revenue placed strong reliance on the decision in the case of Addl. Commr. of Income Tax Gujarat Vs. Speciality Paper Ltd., (Appex.) which is an appendix to the decision in the case of Hotel Alankar Vs. Commissioner of Income Tax, Gujarat, . In the case of Addl. Commr. of Income Tax Gujarat Vs. Speciality Paper Ltd., , the question referred for opinion of the court was under (page 879) :

"Whether, on the finding of the Tribunal that the assessee had been equipped with all the plant and machinery including wet press found necessary to produce the requisite quality of paper and substantial quantity of raw materials necessary for the manufacture of products by the end of June, 1966, the assessee must be held to have set up its business at that point of time, although only trial production followed thereafter and regular commercial production commenced some time later ?"

18. The court, considering the facts and the material placed on record before it, refrained the question which reads as under (page 884) :

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the assessee had set up its business by about the end of June, 1966 (sic 1956), since it was equipped with all the plant and machinery and the raw materials necessary for manufacturing the products ?"

19. The Division Bench relied upon the judgment of the apex court in the case of Commissioner of Wealth-tax Madras Vs. Ramaraju Surgical Cotton Mills Ltd., in order to find out what is the meaning of "established". After referring to other cases on the point, on page 883, the court observed that :

"The real test indicated by the Supreme Court is, whether a company has put its

plant and machinery and other business activities in such a shape that it was ready to go into the business of production."

and, thereafter, answered the refrained question in the negative, i.e., in favour of the Revenue.

20. In the case of Hotel Alankar Vs. Commissioner of Income Tax, Gujarat, , reliance was placed in the aforesaid case of Addl. Commr. of Income Tax Gujarat Vs. Speciality Paper Ltd., (Appex). The court pointed out that it would be de hors the commercial sense to assert that it was only when one reached the stage of receiving customers that one could be said to have set up a hotel business. In the case of Addl. Commr. of Income Tax Gujarat Vs. Speciality Paper Ltd., (Appex.), as pointed out by the Division Bench in the case of Hotel Alankar Vs. Commissioner of Income Tax, Gujarat, , the decision was on its own facts which were very eloquent.

21. The court observed (page 877) :

"The company there had gone into a trial production and in the test and trial which they had taken for purposes of deciding whether they would be able to achieve the commercial production, and produce the product for which the business was set up, namely, of speciality paper, they found that the entire effort had misfired and unless some additional plant was erected and also the capacity raised, the company was not able to continue the business of production. It was in those facts that since the company could not achieve the quality or the quantity of the product for making it a commercial production that the Division Bench of this court held that in the peculiar facts and circumstances of that case, the company could not have been said to have set up the business. In our opinion, therefore, that decision turns on its own facts and would not be of any assistance to the case of the Revenue here."

22. The Division Bench pointed out that in the experts' opinion it was necessary to instal a wet press. The erection of the wet press was in progress by about June 7, 1966, as recorded in the report of the directors of June 7, 1966. The hope of the directors expressed in the said report was that with the additional equipment the company would be able to produce marketable quality of paper. In fact, the company was required to instal additional plant and machinery to achieve the object. In June the production commenced and it was found that wet press is necessary. The same was erected. However, quality of paper could not be achieved. Therefore, additional plant and machinery was required to be installed. Thus, in view of these peculiar facts and circumstances of that case, applying the test indicated by the Supreme Court whether the company has put up its plant and machinery and other business activities in such a shape that it was ready to go into the business production at that point of time, i.e., by about the end of June, 1966. After considering the judgment of this court in Commissioner of Income Tax, Gujrat I Vs. Saurashtra Cement and Chemical Industries Ltd., wherein the Division Bench made the observations (on pages 175

and 176) which was extracted by the Division Bench and stated as under (see page 873 of 133 ITR) :

"But, as pointed out above, business is nothing more than a continuous course of activities and all the activities which go to make up the business need not be started simultaneously in order that the business may commence. The business would commence when the activity which is first in point of time and which must necessarily precede the other activities is started. Take, for example, a case where an assessee engages in the business of a trader which consists of purchasing and selling goods. The assessee must necessarily purchase goods in order to be able to sell them and purchase of goods must, therefore, necessarily precede their sale. Can it be said, in such a case, that when the assessee purchases goods for the purpose of sale, he does not commence his business ? is it necessary that he must start the activity of selling goods before he can be said to have commenced his business ? We have to consider the question as to when an assessee can be said to have commenced business from a common-sense point of view. We have to ask ourselves the question as to when a businessman would regard a business as being commenced ? Would he not consider a business as having commenced when an essential activity of that business is started ? The argument of the Revenue seeks to confound the commencement of a business with the establishment of the business as a whole and carrying on of all the activities of the business. This confusion is the result of a loose description of the business of the assessee as a business of manufacture and sale of cement."

23. In the case of Hotel Alankar Vs. Commissioner of Income Tax, Gujarat, the Division Bench considered the judgment of the Bombay High Court delivered by Chagla C. J. in Western India Vegetable Products Ltd. Vs. Commissioner of Income Tax, Bombay City, where it expressed the distinction between "commencing a business" and "setting up a business". Relying on the said judgment the court observed as under (page 877) :

". . . when a business is established and is ready to commence business, then it can be said of that business that it is set up. The words "ready to commence" would not necessarily mean that all the integrated activities are fully carried out and/or wholly completed so that the business can be commenced. In our opinion, the said requirement is also complied with in a given case where an assessee has undertaken the first of the kind of integrated activities of which the business is overall comprised of."

24. The court has held (at page 878) that the assessee had set up the business when the building was placed at the disposal of the firm. . Learned counsel appearing for the respondent-company supported the reasoning arrived at by the Tribunal in this behalf and stated that there should be no interference with the judgment of the Tribunal and the appeal of the Revenue should be dismissed. The Tribunal has arrived at the finding after appreciation of facts and after applying the principles of law and therefore the appeal could not raise any

substantial question of law and therefore also this court should dismissed the appeal.

25. However, learned counsel for the assessee has cited the following decisions in support of the case that the reasoning adopted and the finding reached by the Tribunal are correct and as per provisions of law.

26. In the case of COMMISSIONER OF INCOME TAX, BOMBAY Vs. VISWANATH BHASKAR SATHE., , the Bombay High Court, speaking through Beaumont C. J. (at page 625), held that :

"But I think that the word "used" in this section may be given a wider meaning and embraces passive as well as active user. Machinery which is kept idle may well depreciate, particularly during the monsoon season. It seems to me that the ultimate test is, whether, without the particular user of the machinery relied upon the profits sought to be taxed could have been made ; and as I read the agreement in the case, the profits of the assessee during the year under assessment could not have been earned except by his maintaining his factory in good working order, and that involves the user of the factory and the machinery."

27. Before the apex court in the case of The Liquidators of Pursa Limited Vs. Commissioner of Income Tax, Bihar, . From the facts it appeared that the case filed by the respondent (Commissioner of income tax) in the appeal that in the middle of 1943 the directors of the company commenced negotiations for the sale of the factory and other assets of the company with the ultimate object of winding up the company. From the correspondence, affidavit and other material placed before the Tribunal an inventory was prepared and a firm offer was received from Dalmia Jain and Co. Ltd. for the purchase of the factory and the stores as on that date. This offer was on August 16, 1943, communicated by cable to the directors in England. On August 20, 1943, the directors asked the local managers in India to proceed with the matter in anticipation of the sanction of the shareholders which the directors expected to obtain at an extraordinary general meeting to be held very shortly. That meeting, however, was held on October 8, 1943, i.e., eight days after the accounting year started. At that meeting the firm offer of Dalmia Jain and Co. Ltd. was accepted and a concluded agreement for sale came into existence. It was, however not disputed that between August 9, 1943, when the firm offer was obtained and December 10, 1943, when possession of the factory was made over to Dalmia Jain and Co. Ltd., the company never used the machinery and plant for the purpose of manufacturing sugar or for any other purpose except that of keeping them in trim and running order. Indeed, throughout the accounting period the machinery and plant were not used by the company. The apex court after explaining the meaning of the term "business" and purposes of business on page 272 observed as under :

"It is, however, clear that in order to attract the operation of Clauses (v), (vi) and (vii) the machinery and plant must be such as were used, in whatever sense that

word is taken, at least for a part of the accounting year. If the machinery and plant have not at all been used at any time during the accounting year no allowance can be claimed under Clause (vii) in respect of them and the second proviso also does not come into operation."

28. The apex court at page 273 further observed as under :

"Although the High Court will not disturb or go behind the finding of fact of the Tribunal, it is now well settled that where it is competent for a Tribunal to make findings in fact which are excluded from review, the appeal court has always jurisdiction to intervene if it appears either that the Tribunal has misunderstood the statutory language--because the proper construction of the statutory language is a matter of law--or that the Tribunal has made a finding for which there is no evidence or which is inconsistent with the evidence and contradictory of it."

29. In the instant case, the Revenue could not point out that there is no evidence before the Tribunal to arrive at the conclusion it reached or that the conclusion arrived at is inconsistent with the evidence and contrary to it. On the contrary, we are of the view that the Tribunal has properly appreciated and understood the facts and the law and has passed an order in accordance with law.

30. The Division Bench (Coram : Fazl AH C. J. as his Lordship then was and Manohar Lall J.) of the Patna High Court in the case of COMMISSIONER OF Income Tax, BIHAR AND ORISSA Vs. DALMIA CEMENT LTD., after relying upon the observations in the case of COMMISSIONER OF INCOME TAX, BOMBAY Vs. VISWANATH BHASKAR SATHE., on page 419, observed as under :

"In my opinion, however, this Sub-section cannot be invoked in the present case. The words "not wholly used for the purposes of the business, profession", etc., do not mean not used throughout the year or during the whole of the year in question. They mean that the building, machinery etc., have not been used exclusively for the purpose of the profession or vocation, that is to say, they have been used for other purposes also. There is no such provision in the Act as would justify the view that if the machinery is not used throughout the year, then the period for which it has worked should be calculated and depreciation should be allowed in proportion to such period."

31. In the case of Jaipur Finance and Dairy Product P. Ltd. Vs. Commissioner of Income Tax, after considering several judgments, the Delhi High Court observed (at page 412) that :

"The words "used for the purposes of the business" are capable of a larger and a narrower interpretation. If the expression "used" is construed strictly, it can be taken as connoting or requiring the active employment or the actual working of a machinery, plant or building in the business. On the other hand, the wider meaning will include not only cases where the machinery, etc., is actively employed but also cases where there is, what may be described as, a passive

user of the same in the business.

The above survey of the decisions on the subject clearly shows that the consensus of judicial opinion is in favour of adopting the liberal interpretation. We are also of opinion that in the context in which the expression occurs and also having regard to the various types of cases that could arise, the wider interpretation has to be placed on this expression. The decided cases, which have been earlier referred to, have arisen in different contexts which clearly indicate that the wider and more liberal interpretation of the provisions would in the context of Section 10(2)(vi) and (vii) may be appropriate."

32. In the said case the court further pointed out that the allowance for normal depreciation does not depend upon the actual working of the machinery and it is sufficient if the machinery in question is remployed by the assessee for the purpose of business and for no other business and it is kept by him ready for actual use.

33. In the case of Whittle Anderson Ltd. Vs. Commissioner of Income Tax, Bombay City I, , the Bombay High Court pointed out what constitutes "used". The court pointed out that (headnote) :

"(i) "such building, machinery or plant" in Clause (vii) means building, machinery or plant "used for the purposes of the business, profession or vocation" and, even for the applicability of the second proviso to Clause (vii) of Section 10(2), the machinery in the instant case it must be shown to have been used by the assessee in the business which it was carrying on in the previous year ;

(ii) the word "used" in that Section should be understood in a wide sense so as to embrace passive as well as active user ; when machinery is kept ready for use at any moment in a particular factory under an express agreement from which taxable profits are earned, the machinery can be said to be "used" for the purposes of the business which earned the profits, although it was not actually worked ;

(iii) as the agreement clearly provided that, although two out of the four presses which were directly in the pooling arrangement were to remain idle while the two presses worked, the owners of those presses which were idle had to keep them ready for use at any time and the contingency for their use could also, upon the terms of the agreement, arise at any time and having regard to the above meaning of the word "used", it is clear that even these presses which remained under forced idleness were in use during the entire period of the year."

34. The apex court, in the case of M/s. South India Viscose Ltd. Vs. Commissioner of Income Tax, , considering Section 32 of the Act and the Rules, held as under (page 294) :

"It is no doubt true that u/s 32(1) of the Act depreciation is allowable on buildings, machinery, plant or furniture owned by the assessee and used for the purpose of the business or profession and in rule 5 it was laid down that the

depreciation shall be calculated on the written down value of the assets as are used for the purposes of business or profession of the assessee at any time during the previous year. That only means that depreciation allowance shall be allowable on the machinery or plant that is used for the purposes of business or profession of the assessee at any time during the relevant previous year. The said provisions in Section 32(1) and rule 5 do not require that for the purpose of calculating the normal depreciation allowance it is necessary to determine the exact period during which a particular item of machinery or plant had been actually used during the previous year. So also, for the purpose of calculating the extra shift depreciation allowance, which does not differ in nature from the normal depreciation allowance, it cannot be said that it is necessary to determine the exact period during which a particular item of machinery or plant had been actually used in the double/triple shift during the relevant previous year. The High Court, in our opinion, was in error in construing rule 5 and Part I of Appendix I to the Rules to hold that the Income Tax Officer is required to apply his mind to examine which machinery, owned by the assessee, had been used in the extra shift."

35. From what is stated hereinabove, it is very clear that in the instant case, as the Tribunal found that the plant and machinery were used and cloth was produced, that itself was sufficient to grant depreciation under the Act.

36. In the case of Commissioner of Income Tax, Gujarat Vs. Suhrid Geigy Ltd., , this court pointed out that depreciation is inseparable from actual user for business and depreciation allowance is permissible only on that account ; that it is not an allowance for natural wear and tear by reasons of aging process, that every building starts aging from the day it is constructed, but depreciation is claimable only on account of its user for business which can result in profits or gains ; that this can happen only when production commences. The court posed three questions as under (page 886) :

"Can depreciation allowance be claimed for the building for a period :

- (1) before the completion of the installation of machinery in the said building ;
- (2) before it starts functioning effectively ;
- (3) before the production (even trial run) is commenced and the business of the company of manufacturing an article with the aid of the said machinery has commenced ?"

The court also observed (at page 886) that : "in other words, the question is whether it can be said that the building has been used in the business even before the articles, for production of which the plant is set up, have not been produced and the machinery itself has become functional later on."

37. The court observed (at page 888) that :

"In order to succeed, the assessee must establish--

- (1) that the building in question was used for the purpose of his business, and
- (2) that it was used for the purpose of his business during the relevant period."

38. The court further pointed out that depreciation is claimable only on account of its user for business which can result in profits or gains, and this can happen only when production commenced. The court further held (at page 889) that :

"In our opinion, therefore, the commencement of the business by way of the production of the articles for the manufacture of which the plant was being set up is an essential precondition for holding that the business of the company had started. If the business had not started till then, there was no question of claiming depreciation for using a particular building or machinery "in the business"."

39. In the case of *Arvind Polycot Ltd. v. Asst. CIT* [1996] 222 ITR 280, a Division Bench of this court, wherein one of us was a party, has considered the difference between setting up a new business and expansion of the existing unit, and held as under (page 283) :

"The assessee is engaged in the manufacturing of cloth. It appears that new air-jet looms were purchased with a view to manufacture fabrics having width of 56 inches. The old machines were capable of producing fabrics having width of 36 inches to 44 inches only. As it was not possible to manufacture fabrics having width of 56 inches with old looms, new air-jet looms were purchased. It appears that this has led the Assessing Officer to believe that the assessee has purchased the machinery for the purpose of new business. It thus appears that modernisation has been considered by the Assessing Officer as a new business. It is not disputed that the assessee-company, having its manufacturing activity at Ahmedabad, is engaged in weaving and spinning, and manufacturing varieties of textile cloth. It is clear that the business is the same, the administration is the same, the funds are common, the staff is the same, persons in the management are the same and the output would be textile fabrics. Thus, it is clear that it would not be a new business."

40. In the case of *V. Ramakrishna and Sons Limited Vs. Commissioner of Income Tax, Tamil Nadu-I, Madras*, , a Division Bench of the Madras High Court while considering the question of development rebate, was required to consider whether the plant run on experimental basis could be said to be the use of plant and machinery for the purpose of business (on page 551). According to the Tribunal, in that case, the factory itself was not geared into commercial production. There was evidence to show that the factory was run on experimental basis and some quantity of pipes has actually turned out from the machine. The fact that the pipes so produced were not marketed or that the assessee did not commence regular production on a commercial scale cannot erase the fact that the plant and machinery were new, that they were installed, that they were put to use. The court further pointed out user of the machinery in test production or experimental manufacture was still user for the purposes of

the assessee's business.

41. Thus, it is clear that the settled position in law is that it is not necessary that the machinery must be used for a particular number of days so as to entitle it to depreciation, but it requires that it should be used for the purpose of business or profession or vocation. The trial run of the machinery is obviously for the purpose of business and not for any other purposes. What is required to be seen that the machinery must be "used" for the purpose of the business and keeping in mind the wider meaning ascribed by various decisions of various courts to the term "use", even trial production of a machinery would fall within the ambit of "used for the purpose of business". Further, as the statute does not prescribe a minimum time limit for "use" of the machinery, the assessee cannot be denied the benefit of depreciation on the ground that the machinery was used for a very short duration for trial run.

42. In the instant case, the Tribunal, on appreciation of evidence, arrived at a conclusion that plant and machinery was used from March 26, 1993, till the end of the accounting year, i.e., March 31, 1993. The Tribunal also found that grey cotton was manufactured and with the permission of the authorities of Kandla Port Trust, the material was disposed of. Thus, use of machinery is not in doubt.

43. We are, therefore, of the opinion that when there is commencement of the business by way of production of the articles, it can be said that the assessee is entitled to depreciation.

44. It is required to be noted that when an entrepreneur undertakes to invest a huge amount for the manufacture of the product, he has to plan it properly. Installation of machinery or plant and machinery in the building itself is not sufficient to attract the provisions contained in Section 32 of the Act. There must be use of plant and machinery for the purpose of business as contemplated in Section 32 of the Act. There is thus a thin line between the trial run and actual production, or many a time, the word used is "commercial production". If the machines are installed properly and it gives good result, then one need not wait for any rectification in the system. There may be some cases wherein after commencement of the production, the machine may not give proper results-- may be on account of failure of certain parts, may be on account of requirement of certain additional machinery, etc. In such a case, the production obtained at the initial stage would be considered as trial production. In the instant case, there is nothing to indicate that the assessee was required to instal any additional part or machinery with a view to run the entire unit. It is not a case similar to that case where before the Bombay High Court there was no production and only tools were tested. The present case is not similar to that of Addl. Commr. of Income Tax Gujarat Vs. Speciality Paper Ltd., (Appex.) where wet press was required to be installed and even thereafter additional machinery was required to be installed. In the instant case, plant and machinery were installed and it worked smoothly. There may be certain machines, which in view of the latest technology, require no trial run. If separate parts are fitted and the

machine is brought into existence, it may require a trial run, but if machinery is imported and it is merely fixed here, it does not mean that the machine would not work. Ultimately, on evidence, the Tribunal has found that 2,68,412 mtrs. of grey cloth was manufactured.

45. The law does not require that there must be optimum production for granting the benefit. Law only requires that there must be use of plant and machinery for the purpose of business. Use of such words that plant and machinery was run more extensively or was required to be used for larger production is not to be found in the Act or Rules. Whether the plant and machinery were up to the extent of its efficiency is irrelevant for the purpose of deciding depreciation. The test is that building, plant and machinery are used for the purpose of business. It is not even necessary that in a year it must have been used for a particular number of days. If the intention of the Legislature was that if the plant and machinery is used for a particular number of days, only then one is entitled to get the benefit of depreciation, the Legislature would have made that provision. Earlier, rules were to the aforesaid extent. Even recently, with regard to depreciation of vehicles, law is made clear. Therefore, it is for the Legislature to make a provision in that regard. Unless and until that provision is made, plant, machinery and building used for the purpose of business in a particular year irrespective of the number of days for which it worked, and if worked for the purpose of business, would attract the provisions of Section 32 of the Act.

46. It is required to be noted that in the instant case also, it cannot be said that the question is of setting up a new unit, but the question is of expansion of the unit. It should, therefore, be granted depreciation.

47. It is required to be noted that before the court in the case of Addl. Commr. of Income Tax Gujarat Vs. Speciality Paper Ltd., (Appex), the question was with regard to setting up of the business, and not about depreciation.

48. In the instant case, the Revenue has contended that the assessee having capitalised the expenditure in the books of account of the company, the company cannot claim depreciation. Surprisingly, this was not the issue raised before the Tribunal and there is no finding recorded by the Tribunal in this behalf. As it is not arising out of the order rendered by the Tribunal, it would not be open for the Revenue to contend the said submission. The Tribunal was called upon whether there was production or not, and on the basis of evidence placed before the Tribunal, the Tribunal has drawn an inference from the material and fact that the plant and machinery were used for the purpose of business. Even if the expenditure has been capitalised what is the legal effect of such capitalisation has not been argued before the Tribunal. It is further required to be noted that whether to capitalise, or treat a particular expenditure as revenue is for the assessee, and it does not raise any question of law. From this, an inference cannot be drawn that the assessee is not entitled to get depreciation. In our view, in the absence of raising such question before the Tribunal, and having a finding of the Tribunal on such question, it would not be open for the parties to

raise the question before this court as a substantial question of law.

49. In our view, the Tribunal has based its finding on the material placed on record and no substantial question of law arises in this matter. Hence, the appeal is required to be dismissed, and is hereby dismissed, with no order as to costs.