

(1999) 07 KL CK 0041

In the High Court Of Kerala

Case No : Income Tax R. No. 115 of 1995

Commissioner of Income Tax

APPELLANT

Vs

Asian Techs Ltd.

RESPONDENT

Date of Decision : 29-07-1999

Acts Referred:

Income Tax Act, 1961 — Section 32, 32(1)

Citation : (1999) 3 ILR (Ker) 464 : (1999) 240 ITR 396

Hon'ble Judges : R. Rajendra Babu, J;K.K. Usha, J

Bench : Division Bench

Advocate : P.K.R. Menon and N.R.K. Nair, for the Appellant; Joseph Markos and Joseph Kodianthara, for the Respondent

Judgement

Mrs. K.K. Usha, J.—This reference at the instance of the Revenue arises out of the order passed by the Income tax Appellate Tribunal, Cochin Bench, in I.T.A. No. 172/Coch of 1989. The relevant assessment year is 1984-85. The following questions are referred for the opinion of this court:

"1. Whether, on the facts and in the circumstances of the case and on an interpretation of Section 32(1)(iv) of the Income Tax Act as it stood at the relevant time the Tribunal is right in holding and in directing the Assessing Officer to take the written down value as at the beginning of the year without further reducing it by the amount of initial depreciation ?

2. Whether, on the facts and in the circumstances of the case, the Circular No. 372 dated December 8, 1983 Kaka Ba and Kala Budh Public Charitable Trust Vs. Commissioner of Income Tax, Gujarat-I and Others, , item XIV-paragraph 22.5) has correctly interpreted the provision of law ?"

2. The relevant facts are as follows : The assessee was granted depreciation u/s 32(1)(iv) of the Income Tax Act, 1961. The assessment proceedings were originally completed by accepting the written down value, as stated by the assessee, for the purpose of depreciation. Subsequently, proceedings were

initiated u/s 154 by the Assessing Officer who deducted the amount of depreciation granted u/s 32(1)(iv) from the written down value of the assets and on that basis depreciation was granted for the assessment year 1984-85, in the light of the amendment to Section 32(1)(iv) by the Finance Act, 1983. Reliance was placed by the Assessing Officer on the Central Board of Direct Taxes Circular No. 372 (see Kaka Ba and Kala Budh Public Charitable Trust Vs. Commissioner of Income Tax, Gujarat-I and Others,), dated December 8, 1983. The first appellate authority affirmed the view taken by the Income Tax Officer. But, on further appeal, the Tribunal held that the deletion of a portion of Clause (iv) of Section 32(1) of the Finance Act, 1983, would only cover cases where initial depreciation was granted in respect of the specified assets with effect from April 1, 1984, and it will not cover the case of an asset on which initial depreciation was originally granted in the preceding assessment years. According to the Tribunal, the amendment can be given effect only prospectively. Section 32 of the Income Tax Act, 1961, deals with depreciation. The relevant portion of the Section 32 reads as follows :

"32. Depreciation.--(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

(ii) in the case of buildings, machinery, plant or furniture, other than ships covered by Clause (i), such percentage on the written down value thereof as may in any case or class of cases be prescribed. . . .

(iv) in the case of any building which has been newly erected after the 31st day of March, 1961, where the building is used solely for the purpose of residence of persons employed in the business and the income of each such person chargeable under the head "Salaries" is ten thousand rupees or less, or where the building is used solely or mainly for the welfare of such persons as a hospital, creche, school, canteen, library, recreational centre, shelter, rest-room or lunch room, a sum equal to forty per cent, of the actual cost of the building to the assessee in respect of the previous year of erection of the building ; (but any such sum shall not be deductible in determining the written down value for the purposes of Clause (ii) of Sub-section (1)). (emphasis supplied)

By the Finance Act, 1983, which came into force from April 1, 1984, the underlined portion in Clause (iv) was deleted.

The term "written down value" is defined u/s 43(6). The relevant portion reads as follows :

"(6) "written down value" means--

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

(b) in the case of assets acquired before the previous year, the actual cost to the

assessee less all depreciation actually allowed to him under this Act, or under the Indian Income Tax Act, 1922 (11 of 1922), or any Act repealed by that Act, or under any executive orders issued when the Indian Income Tax Act, 1886 (2 of 1886), was in force :

Provided that in determining the written down value in respect of buildings, machinery or plant for the purposes of Clause (ii) of Sub-section (1) of Section 32, "depreciation actually allowed" shall not include depreciation allowed under sub-clauses (a), (b) and (c) of Clause (vi) of Sub-section (2) of Section 10 of the Indian Income Tax Act, 1922 (11 of 1922), where such depreciation was not deductible in determining the written down value for the purposes of the said Clause (vi)."

3. A reading of Section 32 would show that Clause (ii) of Sub-section (1) contains a general provision regarding grant of depreciation, which has to be fixed on the written down value of the buildings, machinery, plant or furniture, in accordance with the percentage provided under the Income Tax Rules. Clause (iv) deals with a special category of building as detailed therein. In respect of such buildings, a sum equal to 40 per cent, of the actual cost of the building to the assessee in respect of the previous year of erection of the building will be granted as depreciation. A reading of Clause (iv) would clearly show that the special provision for depreciation provided therein is a one-time benefit in respect of newly erected buildings. The benefit is not being granted for the succeeding years. It is also to be noted that the percentage of depreciation is fixed in the Act itself unlike under Clause (ii) where the percentage is fixed as per rules. After granting a special depreciation in respect of newly erected building under Clause (iv) the statute further provided that any such sum shall not be deductible in determining the written down value for the purpose of Clause (ii) of Sub-section (1).

4. Written down value in the case of assets acquired before the previous year is the actual cost to the assessee less all depreciation actually allowed to him under the Income Tax Act, 1961, or under the Indian Income Tax Act, 1922, or any Act repealed by that Act, or under any executive orders issued when the Indian Income Tax Act, 1886, was in force. The depreciation allowed under Clause (ii) will have to be thus deducted to find out the written down value of the building. In view of the specific exclusion of 40 per cent, allowed under Clause (iv) as per the underlined portion, while determining the written down value, the one-time grant of depreciation under Clause (iv) cannot be taken into consideration. To this extent there is no dispute between the parties. But Finance Act, 1983, deleted the underlined portion of Clause (iv) with effect from April 1, 1984. The Revenue would contend that by such deletion the assessing authority is enabled to deduct the one-time special deduction of 40 per cent, granted under clause (iv) for the purpose of arriving" at the written down value as per Clause (ii) for the assessment year 1984-85 onwards. The Tribunal did not accept this contention taking the view that the determination of the written down value

cannot be reworked, unless the amendment is retrospective in nature. Learned counsel for the Revenue contended that the provision contained in the circular has very strong persuasive value since it was issued by the authority who has to work out the provisions of the statute. In support of the above contention, he placed reliance on *K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another*, .

5. The relevant portion of the Central Board of Direct Taxes Circular, as reported in *Kaka Ba and Kala Budh Public Charitable Trust Vs. Commissioner of Income Tax, Gujarat-I and Others*, , is as follows :

"22.3 u/s 32(1)(iv), initial depreciation equal to 40 per cent. of the actual cost of buildings used solely for the purpose of residence of low paid employees or for welfare activities for such employees is allowed in computing the taxable profits and gains of the accounting year in which such buildings are erected. The initial depreciation so allowed is, however, not deducted from the actual cost of the building in determining the written down value of the building for the purposes of computing the admissible depreciation allowance in respect of such building in subsequent years. The Finance Act has amended this clause to provide that the initial depreciation allowed in respect of any such building will be taken into account in determining its written down value

22.5 These amendments take effect from 1st April, 1984, and will, accordingly, apply in relation to the assessment year 1984-85 and subsequent years. It may be noted that the aforesaid amendments will apply in computing the written down value of such buildings for the assessment year 1984-85 even though the initial depreciation under the aforesaid provisions may have been allowed in the assessment year 1983-84 or any earlier assessment year."

6. Reference was also made by learned standing counsel for the Revenue to the Notes on Clause 10 of the Finance Bill [1983] 140 ITR 121. Clause 10 deals with amendment to Section 32. The relevant portion of the notes is as follows :

"The aforesaid amendments will take effect from the 1st day of April, 1984, and will accordingly apply in relation to the assessment year 1984-85 and subsequent years."

7. Reliance was also placed on a decision of the Supreme Court in *Maharana Mills (Private) Ltd. Vs. Income Tax Officer, Porbandar*, .

8. Learned counsel for the assessee contended that when the statutory provision is very clear there is no need to take recourse to circulars issued u/s 119 of the Income Tax Act. According to the assessee, a combined reading of Clauses (ii) and (iv) with the definition of the term "written down value" there cannot be any doubt that 40 per cent, special depreciation granted under Clause (iv) in respect of a newly erected building years back cannot be deducted in arriving at the written down value for the assessment year 1984-85 and subsequent years.

9. It is true that going by the circular the amendment brought under the Finance Act, 1983, would apply in computing the written down value of such buildings for

the assessment year 1984-85, even though initial depreciation under Clause (iv) had been allowed in the assessment year 1983-84 or any earlier assessment year. But we find it difficult to give such an interpretation to the statutory provision. The 40 per cent, depreciation granted under Clause (iv) is a one-time benefit granted in respect of a class of buildings, namely, buildings erected by the assessee in the previous year. Admittedly, the building in this case was not erected in the previous year for the assessment year 1984-85. It was erected a few years back and the 40 per cent, depreciation under Clause (iv) was also granted much earlier. Therefore, while considering the assessment year 1984-85 the assessee is not having a building erected during the previous year. If that be so, Clause (iv) has no application at all while finalising the assessment of the assessee for 1984-85. The effect of deletion of the underlined portion in Clause (iv) will be felt only in cases where Clause (iv) is to be made applicable. Clause (iv) can be made applicable for the assessment year 1984-85 only in the case of an assessee who has erected building in the previous year. The Notes on Clause 10 are of no help to the Revenue. It only states that the amendment will take effect from April 1, 1984, and will apply in relation to the assessment year 1984-85 and subsequent years. The decision of the Supreme Court relied on by the Revenue has no application in the facts of the case. The question that arose in that case was u/s 35 of the Indian Income Tax Act, 1922. It was held that the Income Tax Officer was entitled in law to go behind the original cost accepted by his predecessor. The limit to which the Income Tax Officer can go back does not stop at the written down value of the previous year but extends up to the figure of the original cost, and the method enjoined by Section 10(5)(b) of the Income Tax Act is not that the Income Tax Officer should merely scale down the written down value of the previous year, but that he should take into consideration the actual cost, determining it for himself, if necessary, take also into consideration the allowances granted in the past, and then make his own computation, as to the written down value for the assessment year with which he is concerned. The principle laid down was that merely because u/s 35 some written down value and the depreciation amount had been determined, it cannot be said that they are a final determination binding for all times to come. Therefore, if a mistake had been committed during the earlier years in arriving at the written down value, the assessing authority is not bound by the mistake in arriving at the written down value for the assessment year concerned. In the case at hand there is no contention that the written down value was wrongly calculated in the previous years. 40 per cent, granted under Clause (iv) was not deduction up to 1984-85 for arriving at the written down value in accordance with the provisions of law available during those assessment years. Therefore, the principle laid down in *Maharana Mills (Private) Ltd. Vs. Income Tax Officer, Porbandar*, is of no help to the Revenue in this case.

10. We are of the view that the effect of deletion of the underlined portion of Clause (iv) of Section 32(1) by the Finance Act, 1983, will have effect only in cases where initial depreciation under Clause (iv) is granted in respect of

specified assets with effect from April 1, 1984.

11. In the light of the above, we answer question No. 1 in the affirmative, in favour of the assessee and against the Revenue and question No. 2 in the negative against the Revenue in favour of the assessee.

12. A copy of this judgment under the seal of this court and the signature of the Registrar will be sent to the Income Tax Appellate Tribunal, Cochin Bench.