
(2005) 02 CAL CK 0012
In the Calcutta High Court
Case No : Income Tax A. No. 41 of 2001

Multican Builders Ltd.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 15-02-2005

Acts Referred:

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

Citation : (2005) 199 CTR 124 : (2005) 278 ITR 142 : (2005) 147 TAXMAN 103

Hon'ble Judges : Soumitra Pal, J;D.K. Seth, J

Bench : Division Bench

Advocate : J.P. Khaitan, S. Bhowmick and C.S. Das, for the Appellant;M.P. Agarwal, for the Respondent

Final Decision : Allowed

Judgement

D.K. Seth, J.

The question :

1. A simple question has been raised by Mr. Khaitan, appearing on behalf of the assessee, challenging the order of the learned Tribunal in respect of the assessment year 1986-87 on the strength of an agreement executed on September 1, 1986, when the accounting year expired on September 30, viz : whether the subject vehicles so leased under the said agreement were used for the purpose of business in the previous year 1986-87 in order to enable the assessee to obtain the benefit of depreciation u/s 32 of the Income Tax Act, 1961.

Submission on behalf of the appellant:

2. Mr. Khaitan had supported his submission on the basis of the materials on record relying on certain decisions to which we shall be referring at the appropriate stage. According to him, the assessee having been carrying on the business of leasing out, as soon as the vehicles were leased out, the vehicles are used for the purpose of the assessee's business. He referred to various terms of

the agreement and pointed out that the vehicle, which was purchased on August 4, 1986, was intended to be taken delivery of by the lessee at his own risk from the supplier and the registration was also his responsibility. Notwithstanding anything contrary thereto, the lease was supposed to commence from September 1, 1986, without any allowance in the rent in the case of default or infraction in the process of receipt of delivery and registration.

3. He went a step ahead and contended that even if the vehicle was not leased out, the moment the assessee purchased the vehicle for the purpose of leasing out, it would amount to use of the vehicle for the purpose of his business. He contended that even a stand-by generator was held to be a use for the purpose of the business. He also contends that a trial run of a plant would also amount to use of the plant for the purpose of the business even though actual business may not commence. He also contends that even though the plant does not operate during the period of the previous year when the factory was under lock-out has also been held to be a use for the purpose of the business.

4. To support his contention, he relied upon the decisions in Commissioner of Income Tax Vs. Oriental Coal Co. Ltd., ; Commissioner of Income Tax Vs. Geo Tech Construction Corporation, ; Commissioner of Income Tax Vs. Kanoria General Dealers (P.) Ltd., ; Hindusthan Gas and Industries Ltd. v. CIT [1995] 79 Taxman 151 (Cal) and Commissioner of Income Tax Vs. Union Carbide (I) Ltd., .

Submission on behalf of the respondent/Department:

5. Mr. Agarwal, learned Counsel for the Department, on the other hand, pointed out that the agreement seems to be antedated as it appears from the decision of the learned Tribunal. Even then, according to him, the date of registration being September 6, 1986, there was no possibility of entering into an agreement of lease on September 1, 1986. He further contended that it is the point of time when the vehicle was put to use that is relevant. Relying on Commissioner of Income Tax Vs. Oriental Coal Co. Ltd., , he points out that the decision refers to actual use. Therefore, until the vehicle is put to actual use, the depreciation cannot be asked for. He also relied on Dineshkumar Gulabchand Agrawal Vs. Commissioner of Income Tax and Another, , Nagpur Bench, where the word "use" employed in Section 32 was held to denote actual use not merely ready for use. He points out that this was challenged in the Supreme Court where the SLP was rejected.

32 : Depreciation : Used for the purpose of business : Claiming of:

6. After having heard learned Counsel for the parties, it appears that the question is to be decided on the basis of the manner in which the expression has been used in Section 32. Section 32 prescribes that in respect of depreciation of building, machinery, plant, and furniture being tangible assets owned wholly or partly by the assessee and used for the purpose of the business or profession, the deductions shall be allowed. The expression that has been used with which we are now concerned is expressed as "used for the purpose of business or

profession". It does not qualify the word "used" by "actual" nor does it qualify the same by the phrase "put to" as has been used in other provisions of the 1961 Act. Therefore, the expression that has been used is to be interpreted in the ordinary grammatical sense. It has to be used in common parlance, not in the legal or technical sense.

7. The word "use" in Longman Dictionary of Contemporary English, 1982 reprint has been defined as "the act of using or state of being used; the ability or right to use something; the purpose or reason for using something; usefulness or advantage given by something; take advantage of; to employ; to put to use". In the Shorter Oxford English Dictionary, 3rd edition, 1987 reprint, the word "use" has been given the meaning as "act of using or fact of being used; act of using a thing for any (esp. a profitable) purpose; the fact, state, or condition of being so used; utilization or employment for or with some aim or purpose; application or conversion to some (esp. good or useful) end; the act or fact of using, holding, or possessing land or other property so as to derive revenue, profit, or other benefit from it; a trust or confidence reposed in a person for the holding of the property, etc., of which another receives or is entitled to the profits or benefits; to follow (a trade, etc.); to employ (an article etc.), esp. for a profitable end; to treat or deal with (a person or thing)."

8. The above dictionary meaning clearly indicates that the word "use" means the employment or using a particular article or thing for profitable purpose in relation to business or trade. In relation to a trade or business the expression used for the purpose of business is to be construed in consonance with the kind or character of the business or trade followed by the assessee. It cannot be interpreted without the context of the purpose of the business. While interpreting the word "use" for the purpose of Section 32 in order to allow depreciation, the object and purpose of acquisition of the article or thing and its employment for profitable purpose or its use for taking advantage of would be material and relevant.

9. The leasing of the article or thing would amount to employment of the article or thing for profitable use, since the advantage of the possession or acquisition of the article or thing is being obtained by reason of such leasing. Whether the rent is payable at a later date or the profit that will accrue at a later point of time would not be relevant for the purpose of determining the use of the article or thing. In a business of leasing the moment the article or thing is leased out, the article or thing is put to use for the purpose of leasing or is used for leasing, the business. The rent or profit, which will accrue, will accrue on account of grant of lease from the date when the lease is granted, even though the profit or the rent may accrue at a later point of time.

10. The two conditions to be fulfilled in order to avail of the allowance of depreciation are : first, that the plant and machinery must be owned by the assessee, and second, it must be used for the purpose of business of the assessee. The property for which the purchase order was placed by the assessee

and the ownership supported by its subsequent registration after the purchase and the lease of such property, after purchase but before registration would remain the property of the assessee. The ownership is acquired with the purchase followed by delivery of the asset to the purchaser. The purchaser may authorize anyone to take delivery of the property. Taking of delivery by anyone else would be on behalf of the purchaser/owner. The ownership accrues the moment the property is purchased, which is confirmed by delivery with which the title in the property passes on to the owner. The subsequent registration is only a mode of recording of evidence of ownership. The event of registration does not confer title. The title is acquired by purchase. The registration is only a system of recording the ownership. Unlike immovable property, the acquisition of title is not dependent on the registration of movable property, if after such acquisition of ownership, the property is leased out, even though registered at a subsequent date, which is only a piece of evidence of the event of acquisition of the property by the person, that would not prevent the property being leased out. In a business of leasing the moment the property is leased out, whether the lessee is capable of taking advantage of the article or thing or putting the same to his use is immaterial for the purpose of construing the effect of use by the owner leasing out the same. The event of use of the property by the owner commences on the leasing out of the property. Whether the lessee is able to put the same to his use or not is not a relevant factor for construing the word "use" of the article or thing in relation to the lessor.

11. The question was dealt with in relation to Section 32 in various cases since cited by Mr. Khaitan. The view, we have taken, finds support from the ratio decided in those decisions, which we propose to discuss in order to examine as to what extent it helps us in arriving at the above conclusion as hereafter.

12. In Commissioner of Income Tax Vs. Kanoria General Dealers (P.) Ltd., , the Calcutta High Court had held that the expenditure incurred for setting up a unit of a business ready to commence production could not be disallowed on the ground that the same had not been incurred prior to the commencement of the actual business of commercial production. Similarly, for the assessment year 1969-70, the claim of depreciation cannot be disallowed for the year 1966-67. It was held that even though the unit did not commence production, though was ready to commence and there was a trial, the assessee was entitled to depreciation for the year 1966-67.

13. In Commissioner of Income Tax Vs. Oriental Coal Co. Ltd., , our High Court had held that two conditions are to be satisfied by an assessee before claiming depreciation; firstly that the plant and machinery must be owned by the assessee and, secondly, the plant and machinery must be used for the purpose of business of the assessee. Once these two conditions are satisfied, the assessee would be entitled to depreciation. The fact that the plant and machinery would not be actually used because of lock-out prevailing during the two previous years relevant to the assessment years 1983-84 and 1984-85. It could not be

said that the plant and machinery had actually been used for the purpose of business as contemplated u/s 32(1). It was further held in certain cases like a pooling arrangement or where plant or machinery has come as stand by to provide against break-down, even a passive use may entitle the assessee to claim depreciation u/s 32 because in both these cases the machinery is kept ready for use in the factory. The allowance of depreciation may not depend on the actual working of the machinery. But no depreciation is allowable if the assets are not used at all for the purpose of the business of the assessee in the relevant previous years.

14. In *Hindusthan Gas and Industries Ltd.* [1995] 79 Taxman 151 (Cal), it was held that in several cases passive use of an asset was held to be sufficient for obtaining depreciation allowance. It had found that the assessee had leased out a generating set in the course of his business. It could not get back the same even after the expiry of the period of lease because of the lock-out in the lessee's factories. This was a happening, which was incidental to the assessee's business of leasing out generating sets. The assessee itself was not actually running the generating sets. The assessee's business was leasing out of the generators. The generating set was used by the assessee and was being used by the assessee in its business of leasing out generating sets.

15. In *Commissioner of Income Tax Vs. Geo Tech Construction Corporation*, , it was held that there was no requirement that the asset should be used for the whole of the assessment year in question. The two ingredients for depreciation allowance are that the asset is owned by the assessee and that it is used for the purpose of the assessee's business or profession. The word "used" for the purpose of business may have a larger or narrower interpretation. If the expression "used" was construed strictly, it could be taken as connoting or requiring the active employment or actual working of the machinery, plant and building in the business. On the other hand, the wider meaning would include not only cases where the plant and machinery were actively employed but also cases where the assessee makes what may be described as passive use of the same in the business and an asset could be said to be used when it is kept ready for use. Since the Tribunal had recorded the finding that there was positive material to show the existence of the asset at the work site, and about the passive user it could not be termed to be one without any basis or illegal. Accordingly, the claim for the depreciation was held to be allowable.

16. In *Commissioner of Income Tax Vs. Union Carbide (I) Ltd.*, , our High Court had held that it is one thing for the machinery to wait positively during the year in question ready to come into use of commercial thing at any time although it might actually not even be used because running of the units ran perfectly. But this is not the same thing as plant and machinery, which is being brought up to the status actually active for commercial use during the year. It is wholly plain in trial production that is in the making of production fully ready for generating productive of commercial profit. It might be that the assessee's use is to keep it

as a stand by. But it might be again that the assessee had used it for a trial production or in some other purpose for the assessee's business, which is not immediately productive of commercial profit. But this was not gone against the assessee. Once the assessee can establish bona fide use of the machinery for the purpose of the assessee's business, then and in that event, the assessee establishes the assessee's right to claim depreciation. Unless there are words in the section indicating that not every kind of use for the purpose of the business will satisfy for attracting allowance it is not open for the Revenue to read into the section any words of limitation so as to affect the interest of the assessee. It is with a view to the business of the assessee that the assessee used the machinery for the purposes of its business in causing those to go into trial production. If that is not using the machinery for the purposes of the business, then the court would be at a loss as to how else the court could describe the above activity of the assessee in that regard. The claiming of depreciation is inextricably connected with the assessee commencing its business at the first place. It might be that no use made by it of plant or machinery can be said to be used by it for the purpose of its business.

Whether the vehicle was used for the purpose of business :

17. Therefore, it is to be ascertained when the vehicle was used for the purpose of the business. Whether entering into the agreement for lease by an assessee carrying on business of leasing amounts to use of the vehicle for the purpose of his leasing business which is required to be examined. From the agreement, it appears that it was executed on September 1, 1986. Admittedly, the vehicle was purchased on August 4, 1986. Therefore, ownership of the vehicle remained with the assessee and, as such, when the agreement was entered into, it could be said that the assessee was the owner of the vehicle, which is a tangible asset used for the purpose of leasing of business carried on by the assessee. The date of registration of the vehicle in the name of the assessee was effected on September 6, 1986. But the terms of the agreement contained that the vehicle would be taken delivery of by the lessee from the supplier at his risk and the lessor would not bear any responsibility for any damage prior to or during delivery. The lessee was also responsible for arranging transportation of the vehicle from the place of the manufacture/delivery to the place indicated by the lessee. It is also pointed out from Article 2.1 of the agreement that the lease shall commence from the date upon which the lessor issues its purchase order for the vehicle notwithstanding that payment of rent shall commence as provided therein and the property would remain the exclusive property of the lessor. The status of the lessee in relation thereto would be that of a bailee. In Clause 16.4, it is pointed out that having inspected the vehicle the lessee had signed the agreement relying entirely on his own judgment. Thus, it appears that the vehicle was in existence though not registered under the ownership of the lessor when the lessee had inspected. The term was 48 months. In one of the agreements it was mentioned to be from first due date as it appears from page 52 of the paper book, whereas in the other agreement at page 82, it was simply

48 months. However, this expression 48 months from due date would not be relevant in consonance with the agreement entered into between the parties. Since it is the first in a deed is the principle of interpretation of a deed in the case of inconsistency in different parts. When, as agreed in the covenant part of the deed containing the terms preceding the schedule, the lease is supposed to commence from September 1, 1986, the mentioning of first due date at the schedule would not eclipse the terms of the lease as agreed.

18. From the above discussion, it appears that there was nothing to hold about the non-genuineness of the agreement nor can it be said that the deed was a sham one. At the same time, that was not the finding of the learned Tribunal. On the other hand, the learned Tribunal proceeded on a logic that the rent would become due on October 20, 1986 which is falling in the next previous year and, as such, the vehicle could not be said to have been put to use in the previous year 1986-87. This logic seems to be unacceptable. The rent accrues on the commencement of the lease the rent whereof is calculated in the unit of the month comprising the use of the asset for the whole period of the month. Therefore, the profit starts accruing and the taking of advantage starts continuing with the commencement of the lease irrespective of the rent being receivable in the unit of month, which may become due either at the end of the month or in the same month or in advance as may be agreed. It cannot be said if the rent is payable in advance that it would be a use on a particular date but when receivable after the use would commence on the date the rent is due. It is a mode of receipt and payment of the rent or profit between the parties on account of the use of the asset commenced from the date when the lease is agreed to commence. Receipt of the rent at a later date would not affect the event of commencement of the lease being the event of using the asset for which profit starts accruing and the advantage thereof commences to continue.

Conclusion :

19. From the above discussion, it is clear that the claim of depreciation is not dependent on the actual use or the asset being put to use. It is dependent on the question of being used for the purpose of the business. When the leasing is the business, giving of a vehicle in lease even if it may not be used by the lessee on the date of the agreement but from the date of registration of the vehicle or thereafter even then it would be an use for the purpose of the leasing business of the assessee. It is the use of the vehicle by the lessor for the purpose of his business, which is material. It is the use of the vehicle for the purpose of leasing which is material.

20. In this case, as we have found that the vehicle was leased out before September 30, 1986, falling in the relevant assessment year, which was used for the purpose of leasing by the assessee in the course of the business carried on by it. Therefore, this case is well within the provisions of Section 32(1) for claiming depreciation for the assessment year 1986-87. The decision in Dineshkumar Gulabchand Agrawal Vs. Commissioner of Income Tax and Another,

does not help us in the absence of any detailed reasons given therein in order to persuade us to agree with the same. In any event, the decisions of our High Court having been otherwise, with which we see no reason to disagree.

Order:

21. In the result, the question is answered in favour of the assessee. The appeal is allowed. The order of the learned Tribunal is hereby set aside.

22. There will, however, be no order as to costs.

23. Xerox certified copy of this judgment be made available to the parties, if applied for, on usual terms.

Soumitra Pal, J.

24. I agree.