
(2008) 07 P&H CK 0046
In the Punjab And Haryana At Chandigarh

Punjab Bone Mills

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 10-07-2008

Acts Referred:

Income Tax Act, 1961 — Section 260A

Citation : (2008) 07 P&H CK 0046

Hon'ble Judges : Satish Kumar Mittal, J;Rakesh Kumar Garg, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Satish Kumar Mittal, J.—The assessee has filed this appeal u/s 260A of the Income Tax Act 1961 {hereinafter referred to as the Act}, against the order dt. 20-4-2007, passed by the Income Tax Appellate Tribunal, Amritsar Bench, Amritsar (hereinafter referred to as the Tribunal), in FTA No. 343/Asr/2004 for the assessment year 2000-01, whereby the appeal of the revenue has been partly allowed.

2. The facts of the case are that the assessee is engaged in the business of manufacturing glue flakes from bone sinews and fluff. Vide order dated 31st March, 2003, the assessing officer completed the assessment for the assessment year 2000-01 at an amount of Rs. 99,19,480, by making various additions. The issue before us pertains to disallowance of depreciation amounting to Rs. 1,76,254, out of the depreciation of Rs. 2,59,198, as claimed by the assessee on account of use of boiler. The assessing officer disallowed the depreciation, while recording a finding that the said boiler was also used by M/s Protinkem and M/s P.B.M. Gelatine (P) Ltd., Jalandhar, the sister-concerns of the assessee. The assessing officer, while working out the percentage of the work of production of Glue/TG, done by the sister-concerns of the assessee, at 68 per cent, also observed that on account of use of boiler, the assessee had shared expenses with its sister-concerns, for use of fuel, power and generator set..

3. On appeal, filed by the assessee, the Commissioner (Appeals) ((hereinafter referred to as the Commissioner (Appeals) deleted the said addition, while observing that the boiler was actually owned by the assessee and was used by him for business purposes. It was further observed that if the surplus steam was sold to another concern, that could not be taken as a ground for holding that the assessee had not used the boiler for business purposes. Rather, it was added in the income of the assessee without any extra expenditure incurred by it.

4. Aggrieved against the aforesaid order passed by the Commissioner (Appeals), the revenue filed appeal before the Tribunal. On the said issue, the appeal was allowed and order of the Commissioner (Appeals) was set aside, observing as under:

In this regard, it is seen that the issue of supply Of surplus steam was not before the assessing officer. The assessing officer has made the disallowance in accordance with the provisions of Section 38(2) of the Act. As per this section, wherein any building, machinery, plant or furniture is not exclusively used for the purposes of the business or profession, the deductions inter alio, u/s 32(I)(ii) shall be restricted to a fair proportionate part thereof, which the assessing officer may determine having regard to the user of such building, machinery, plant or furniture for the purposes of the business or profession. The learned Commissioner (Appeals), is seen, is rather gone at a tangent from the findings arrived at by the assessing officer. The issue of disallowance u/s 38(2) of the Act has not at all been able to repel the findings arrived at by the assessing officer. The case is directly covered by the provisions of" Section 38(2). Therefore, we hereby uphold the findings of the assessing officer.

5. Against the aforesaid order of the Tribunal, the assessee has filed the instant appeal, raising the following two substantial questions of law for consideration of this Court:

(1) Whether on the true and correct interpretation of provisions of Section 32, the depreciation is to be allowed to the assessee on the user of the asset ?

(2) While granting of the depreciation under, Section 32 on fulfilling the foundational condition of user the interpretation per Section 38 is to be proportioned related to production ?

6. We have heard counsel for the parties.

7. Learned Counsel for the assessee submits that the Tribunal was not justified in having reversed the finding of the Commissioner (Appeals) by overlooking the factum of use of the boiler by the assessee for its business purposes. If surplus steam is sold by the assessee to its sister-concerns, then it cannot be taken as a ground for not using the asset for business purposes. Therefore, the Commissioner (Appeals) was right while holding that the assessee was entitled for depreciation u/s 32 of the Act. In support of his contention, learned Counsel for the assessee has relied upon a decision of the Delhi High Court in Punjab

National Bank Ltd. Vs. Commissioner of Income Tax, Delhi I, and another decision of the Madras High Court in Commissioner of Income Tax Vs. Indian Express (Madurai) Pvt. Ltd., .

8. On the other hand, learned Counsel for the revenue, while referring to the finding recorded by the assessing officer, submits that in the instant case, the assessee has shared expenses with its sister-concerns for use of the boiler i.e., expenses with regard to use of fuel, power and generator set, but no disallowance has been made in respect of depreciation of boiler, diesel, generator set and electric installation. Learned Counsel further submits that admittedly, there was no evidence before the CFT{A) that the assessee has sold the surplus steam and earned the income, therefore, he was not justified in adding the same in the income of the assessee. Hence, the issue of selling the surplus steam was not before the assessing officer and he made the disallowance in accordance with provisions of Section 38(2) of the Act and the Tribunal was fully justified in setting aside the order of the Commissioner (Appeals).

9. Section 32 of the Act provides for certain depreciations in respect of building, machinery, plant or furniture, being tangible assets, which are wholly or partly used by the assessee for the purpose of his business or profession. If, however, the assets are not exclusively used for business purposes, but are also used for other purposes, the assessee would be entitled only for a proportionate part thereof. Section 38(2) of the Act reads as under:

38. Building, etc., partly used for business, etc., or not exclusively so used.?(2) Where any building, machinery, plant or furniture is not exclusively used for the purposes of the business or profession, the deductions under Sub-clause (ii) of Clause (a) and Clause (c) of Section 30, clauses (i) and (ii) of Section 31 and Clause (ii) of Sub-section (1) of Section 32 shall be restricted to a fair proportionate part thereof which the assessing officer may determine, having regard to the user of such building, machinery, plant or furniture for the purposes of the business or profession.

10. In the instant case, as per the finding recorded by the assessing officer, the assessee was not using the boiler exclusively. The boiler, in respect; of which the depreciation has been claimed, was also, used by the sister-concerns of the assessee. Not only that, on account of the said use, the assessee had shared expenses with its sister-concerns for use of fuel, power and generator set. In view of this finding of fact, in our opinion, the Tribunal has rightly come to the conclusion that the deduction claimed by the assessee u/s 32(I)(ii) of the Act has to be restricted to a fair proportionate part thereof, which the assessing officer may determine having regard to the user of such building, machinery, plant or furniture for the purposes of the business. In the instant case, the assessing officer has held that the boiler has been used by the sister-concerns of the assessee to the extent of 68 per cent Thus, the expenses amounting to Rs. 1,76,257 were not allowed to the assessee.

11. The judgments cited by learned Counsel for the assessee are not applicable to the facts and circumstances of this case. In *Punjab National bank v. CIT* (supra), the assessee owned a building of 6 floors, 5 of which were occupied by the assessee for the purpose of his business and the 6th floor was let out by the assessee to a party. The whole building was fitted with air-conditioning plant and there were also lifts operating. In those circumstances, it was held that depreciation had to be allowed in full on the building and the lifts and air-conditioning plant, since the same were being used by the assessee for the purpose of its business. The fact that they might also be utilised by the tenant of one of the floors or customers or visitors did not make any difference. The facts are different in the instant case. Here, the assessee permitted its sister-concerns to partly use the boiler and on account of use thereof, the assessee had shared expenses with its sister-concerns, for use of fuel, power and generator set. Similarly, in *CIT v. Indian Express (Madurai) (P) Ltd.* (supra), a tape, obtained by the use of the machine of the assessee, for which depreciation was claimed, was subsequently made available to its sister-concern. In those facts, it was held that use of the machine was an exclusive use for the purpose of the business of the assessee and making available of the tape to its sister-concern was a subsequent event which might amount to a gratuitous act on the part of the assessee but would not render the user non-exclusive so far as the assessee was concerned for the purpose of its business. In the instant case, the boiler was directly permitted by the assessee to be partly used by its sister-concerns. Further, in the case of *CIT v. Indian Express (Madurai) (P) Ltd.* (supra), the assessee incurring the expenditure in terms of commercial expediency was an expenditure which was required to be incurred for its business. Such expenditure must be regarded as having been incurred exclusively for the purpose of assessee's business even though incidentally a third party may also happen to be benefited by reason of such expenditure. However in the instant case expenditure was even shared by one sister-concern with the assessee. Therefore, it cannot be said that the assessee has used the boiler exclusively for the purpose of its business.

12. In view of the above, we are of the opinion that in this appeal, no substantial question of law is arising from the order of the Tribunal.

Dismissed.