(2014) 11 GUJ CK 0059

In the Gujarat High Court

Case No : Tax Appeal No. 284 of 2002

Shri Soneshware Cold Storage APPELLANT

Vs

Asst. C.I.T. RESPONDENT

Date of Decision : 17-11-2014

Acts Referred:
Income Tax Act, 1961 — Section 143(3), 28, 29, 30, 31

Citation : (2015) GLH 2 615

Hon'ble Judges : Kaushal Jayendra Thaker, J;K.S. Jhaveri, J

Bench : Division Bench

Advocate : S.N. Divatia, Advocate for the Appellant; Nitin K. Mehta, Advocate for the Respondent

Judgement

@

K.S. Jhaveri, J.—By way of this appeal, the assessee has felt aggrieved by the order of the Income Tax Appellate Tribunal, Ahmedabad Bench "B", Ahmedabad in ITA No. 4283/AHD/96 for AY 1991-92.

2. While admitting this appeal, this Court has framed the following substantial question of law:

"Whether the Tribunal could have come to the conclusion that the cold storage building is a building like a hotel or a cinema theatre and not a plant without considering the requirements of the cold storage building particularly in view of the decision rendered by the Supreme Court in the case of Commissioner of Income Tax, Karnataka Vs. M/s. Karnataka Power Corporation, ?"

3. The brief facts of the present case are that the appellant is a partnership firm and it is engaged in the business of running cold storage at Deesa (B.K.). The appellant had filed its return of income for AY 1991-92 on 28th August, 1991 declaring total loss of Rs. 1,89,123/- wherein the appellant had claimed inter alia depreciation at a rate of 33.33% in respect of cold storage building treating as a plant within the meaning of section 32 of the Income Tax Act, 1961. During the

assessment proceedings u/s. 143(3), the AO denied the claim of depreciation on the cold storage as a plant, but he treated it as a building and accordingly allowed depreciation at a rate of 15%.

4. That being aggrieved by the assessment order, the appellant preferred an appeal before CIT(Appeals), Ahmedabad, who by order dated 9.8.1996 allowed the said appeal in favour of the appellant.

5. That being aggrieved by the order of CIT(A), the respondent preferred an appeal before the Income Tax Appellate Tribunal being ITA No. 4283/Ahd/96. The Tribunal by order dated 11.3.2002, reversed the order of CIT(A).

6. That being aggrieved by the order of the Tribunal, the present appellant has preferred the present Tax Appeal before this Court.

7. Heard the learned advocates appearing for the parties and considered the submissions made on behalf of the respective parties.

8. The main submission of Mr. Divetia learned advocate appearing on behalf of the appellant is that on factual back ground, it cannot be said that the cold storage building is not a plant. The appellant had claimed depreciation at the rate of 33.33% in respect of cold storage building treating as a plant within the meaning of section 32 of the Income Tax Act, 1961. However, during the assessment proceedings, the same was denied and only 15% depreciation was made admissible by the A.O. Being aggrieved by this order, the assessee carried the matter before the CIT(A), which, on interpretation, came to the conclusion that cold storage was a plant and allowed the depreciation. The Revenue preferred an appeal before the ITAT, which, relying on a decision of the Apex Court in the case of CIT v. Anand Theatres, reported in (2000) 244 UTR 192, reversed the finding of the CIT(A). The Tribunal without going into the facts, decided the matter as if it was squarely covered by the pronouncement of the Apex Court in the case of CIT v. Anand Theatres (supra). The Tribunal has observed as under:

"2. In ITA No. 4283/Ahd/96, the only point raised by the Revenue is against the direction of the CIT(A) to allow depreciation on the cold storage building at the rate application to plant and machinery. The issue is squarely covered against the assessee by the decision of the Hon''ble supreme Court in the case of Commissioner of Income Tax, Trivandrum Vs. M/s. Anand Theatres, wherein it has been held that the word "plant" as defined in section 43(3) does not include buildings. A building is not an adjust to carrying on of the business. The Hon''ble Supreme Court observed that the meaning of the words ''building'' and ''plant'' have to be gathered in the context of the scheme of section 32. In the said decision, the Apex Court, after an exhaustive review of the case law on the subject, has observed that the business of a hotel or for that matter a cinema is carried on in a building or premises and building is not an apparatus for running such business. It is a shelter or a home for conduct of such business. Applying the aforesaid principles, we hold that in the case of the assessee the building in which the business of cold storage is run can not be construed as a plant. Depreciation on building in the case of the assessee would therefore be allowable at 15% which is a applicable to buildings, as held by the AO. We would accordingly reverse the finding of the CIT(A) and allow the appeal of the Revenue."

9. In fact, the decision of the Apex Court, as rightly pointed out by the learned advocate for the appellant relates to theatre, whereas, the decision of the Allahabad High Court in the case of Shyam Enterprises Vs. Commissioner of Income Tax, , wherein, the decision in the case of Delhi Cold Storage Pvt. Ltd. Vs. Commissioner of Income Tax, New Delhi, has been considered, relates to cold storage.

10. The Tribunal has not ventured to go even into the definition of term ''plant''. Learned advocate Mr. Divetia has taken us through the distinguishing features between a plant and a building. Mr. Divetia has tried to urge that cold storage requires different kind of treatment and built-up. The cold storage, according to Mr. Divetia, has special facilities vis-?-vis theatre, and therefore, the decision relied on by the Tribunal of the Apex Court could not have been made the basis for allowing the appeal. Mr. Divetia has also relied on the decision of Shyam Enterprises Vs. Commissioner of Income Tax, and the decision in the case of Commissioner of Income Tax Vs. Shree Gopikishan Industries Pvt. Ltd., .

11. As against this, learned advocate Mr. Mehta has submitted that there is thin distinction between of doing ''business with'' or ''business in''. He has mainly relied on the meaning of sec. 32 of the Act and the decision in the case of Commissioner of Income Tax, Trivandrum Vs. M/s. Anand Theatres, and the decision of the Calcutta High Court in the case of Commissioner of Income Tax Vs. Mangolia Dairy Products, .

12. As far as question of law is concerned, it would not be out of place to reiterate the definition of word ''plant'' as defined in section 43 of the Act. Section 43 reads as under:

"43. In sections 28 to 41 and in this section, unless the context otherwise requires -

(1) "actual cost" means the actual cost of the assets to the assessee, reduced by that portion of the cost thereof, if any, as has been met directly or indirectly by any other person or authority:

[Provided that where the actual cost of an asset, being a motor car which is acquired by the assessee after the 31st day of March, 1967, [but before the 1st day of March, 1975,] and is used otherwise than in a business of running it on hire for tourists, exceeds twenty-five thousand rupees, the excess of the actual cost over such amount shall be ignored, and the actual cost thereof shall be taken to be twenty-five thousand rupees.]

13. The decision of the Calcutta High Court in the case of Commissioner of

Income Tax v. Mangolia Dairy Products (India) (supra), relied by Mr. Mehta would not apply to the facts of this case as in that case, the cold storage was within the building and not a part of the building and in the said decision, the assessee claimed it to be a factory premises. As far as the decision of the Apex Court in the case of Commissioner of Income Tax, Trivandrum Vs. M/s. Anand Theatres, , is concerned, the Apex Court has held as follows:

"A characteristic of plant is that it is an adjunct to the carrying on of a business and not the essential site or core of the business itself. Therefore, a hotel or cinema building cannot be stated to be an adjunct to the carrying on of the business, that is to say, something added to another, or which is in a subordinate, auxiliary or dependent position."

14. In our view, the Tribunal has grossly erred in relying on the conclusive manner of term ''plant'' under sec. 43(3) of the Act, would nowhere include the complete building. The Apex Court in the case of CIT v. Anand Theatres (supra) has observed as under:

"In England also, there are conflicting decisions involving the question whether a structure would be a plant or not and it is stated that each case is required to be decided on the facts of that case. In Commissioners of Inland Revenue v. Scottish and Newcastle Breweries Ltd. [1982] 55 TC 252 (decided by the House of Lords), the Court of Appeal observed that though there is no statutory definition of "plant" for the purpose of section 41 of the Finance Act, 1971, from a series of cases decided, the following principles emerges to be settled law:

i) Something which is properly to be regarded as part of the setting in which a business is carried on and not as part of the apparatus used for carrying on the business is not plant: see J. Lyons and Co. Ltd. v. Attorney General [1944] 1 Ch 281, 287.

ii) Something which forms part of the setting of a trade may nevertheless be plant if it is more a part of the apparatus than part of the setting (Jarrold v. John Good and Sons Ltd. [1963] 1 WLR 214 : [1962 40 TC 681 (CA).

iii) The term "plant" is not apt to cover the permanent structure of a building in which a business is carried on (John Good and Sons Ltd.''s case [1963] 1 WLR 214 : [1962] 40 TC 681 (CA).

iv) Something which is a structure or part of a structure may nevertheless be plant, if it fulfills the function of plaint in the trader''s operations (IRC v. Barclay, Curle and Co. Ltd. [1970] 76 ITR 62 (HL) : [1969] SC (HL) 30 : [1969] 45 TC 221 (HL).

v) Apparatus which has no functional purpose in the commercial process, even if it serves to attract custom, is not plant (Dixon v. Fitch''s Garage Ltd. [1976] 1 WLR 215 : [1975] 50 TC 509 (Ch D), in this case the apparatus in question was a canopy constructed over the pumps of a petrol filling station to provide shelter while the commercial process of delivering fuel was carried on)."

15. In the present case, on the facts, it cannot be disputed that the structure was of a permanent nature, and therefore, a cold storage plant will be governed by the term ''plant'' as defined in the Act. The CIT(Appeals) in its order in para-8 & 9 has observed as under:

"8. I have carefully considered facts of the case and submission made on behalf of the appellant. Allahabad High Court in the case of Kanodia Cold Storage has held that the definition of the word "plant'' is inclusive, the word plant includes within the ambit buildings and equipment. It further held that the building with insulated walls and is used as a freezing chamber. It is part of the air-conditioning plant of cold storage, hence such building has to be treated as plant. Respectfully following the said decision of the Allahabad High Court, the A.O. Is directed to allow depreciation on the cold storage building at the rate applicable to plant.

9. Appellant''s final ground of appeal pertains to computation of the cost of building, plant and machinery. The Assessing Officer has deducted subsidy received by the appellant while determining the cost of these assets. This issue has been decided by the S.C. in favour of the assessee in the case of Commissioner of Income Tax, Hyderabad Vs. M/s. P.J. Chemicals Ltd., . Assessing Officer is directed to allow depreciation on the assets without subsidy from the total cost."

16. The finding of CIT(A) being just and proper and in consonance with the provisions of the Act, we think that the tribunal has committed an error in reversing the said decision. The decision in the case of CIT v. Anand Theatres (supra) would not apply to the facts of the present case. The decision in the case of CIT v. Anand Theatres also has been deliberated by the Calcutta High Court in the case of Commissioner of Income Tax Vs. Shree Gopikishan Industries Pvt. Ltd., . In that view of the matter, the present appeal requires to be allowed in favour of the assessee and against the Revenue. Hence, this appeal is allowed accordingly.