

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO. 127 OF 2018

Pr. Commissioner Of Income Tax-5 ...Appellant
Versus
Dharmanandan Diamonds Pvt.ltd. ...Respondent

Mr. Suresh Kumar for Appellant.
Mr. M.M. Subramaniam i/b Mr. Vishnu Hadade for Respondent.

**CORAM: K.R.SHRIRAM &
M.M.SATHAYE JJ.**

DATE : 14th JUNE 2023

PC. :-

1. The Appellant has proposed the following substantial questions of law.

SUBSTANTIAL QUESTION OF LAW

I. Whether on the facts and in the circumstances of the case and in law, the ITAT erred in holding that assessee is eligible for claiming depreciation of Rs.35,21,38,615/- on revalued assets instead of WDV?

II. Whether on the facts and in the circumstances of the case and in law, the Tribunal erred in not appreciating the fact that the conversation of firm to a company was an internal arrangement for evasion of Tax ?

III. Whether on the facts and in the circumstances of the case and in law, the Tribunal erred in holding that the assessee was eligible to claim depreciation as per the revaluation carried out and the report of the Government Approved Valuer?

IV. Whether on the facts and in the circumstances of the case and in law, the Tribunal was right in not appreciating the fact that depreciation claimed by the assessee was in respect of revalued assets where the depreciation claim is @ 80%?

V. Whether on the facts and in the circumstances of the case

and in law, the Tribunal erred in not appreciating the fact that there was a contravention of provisions of Sec. 47(xiii) of the Income Tax Act, 1961 at the time of conversion of firm to a company ?

2. Respondent, i.e., assessee is engaged in the business of manufacturing of diamonds and power energy. Return of Income Tax was filed on 30/09/2009 declaring total loss of Rs. 16,28,78,976/- which was processed under Section 143(1) of the Income Tax Act, 1961 (the Act) and MAT was determined under Section 115JB of the Act at 10% of the book profit at Rs. 13,56,39,861/-.

3. Assessee was incorporated on 31/08/2007 and hence assessment year 2008-09 was the first year of the Company. Assessee was created and constituted to take over all the assets and liabilities of erstwhile partnership firm-Dharmanandan Diamonds, to carry out business in a more efficient manner. The total turn over of the assessee during the year was Rs.869.70 crores and as the assessee took over assets and liabilities of the firm as on 01/09/2007, depreciation was claimed by the erstwhile partnership firm on the written down value as per its records upto 31/08/2007 and assessee claimed depreciation from 01/09/2007 till 31/03/2008

at revalued price. The revaluation was done by Government approved valuer.

4. In the subsequent year, i.e., AY 2009-10, which is the year in question, the assessee-Company claimed depreciation on the written down value as on 31/03/2008 by reducing the depreciation claim for the period from 01/09/2007 to 31/03/2008 on revalued figure. According to the assessing Officer, Petitioner had claimed excess depreciation and disallowed the depreciation as claimed on the revalued cost. The assessee's claim of depreciation was recalculated at Rs.12,92,66,889/- in place of Rs.35,21,38,615/-. The total income was determined under normal provisions at Rs.5,64,14,373/- and book profit under Section 115JB was worked out at Rs.13,56,43,461/-.

5. The assessee impugned this order before the Commissioner of Income-tax (Appeals), who by an order dated 04/03/2014, dismissed the Appeal. This order was impugned by assessee before the Income Tax Appellate Tribunal (ITAT), and ITAT allowed the Appeal by an order dated 21/06/2017. It is this order of

ITAT which is impugned in this Appeal.

6. In our view, ITAT has come to the correct conclusion.

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

“Depreciation

32.(1) In respect of depreciation of --

(i) buildings, machinery, plant or furniture, being tangible assets;”.....

owned, wholly or partly by the assessee and used for the purpose of the business or profession, the following deductions shall be allowed-].....

.....Provided also that the aggregate deduction, in respect of depreciation of buildings, machinery, plant or furniture, being tangible assets or know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets allowable to the predecessor and the successor in the case of succession referred to in clause (xiii), clause (xiiib) and clause (xiv) of section 47 or section 170 or to the amalgamating company and the amalgamated company in the case of amalgamation, or to the demerged company and the resulting company in the case of demerger, as the case may be, shall not exceed in any previous year the deduction calculated at the prescribed rates as if the succession or the amalgamation or the demerger, as the case may be, had not taken place, and such deduction shall be apportioned between the predecessor and the successor, or the amalgamating company and the amalgamated company, or the demerged company and the resulting company, as the case may be, in the ratio of the number of days for which the assets were used by them.”

Section 43(1) defines actual cost which reads as under:-

“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:”

Rule 5 of Income Tax Rules, 1962 which deals with

depreciation also states “..... provided that the aggregate

depreciation allowed in respect of any asset for different assessment

years shall not exceed the actual cost of the said asset”.

7. Therefore, as per proviso to Section 32, aggregate deduction in respect of depreciation on tangible assets or intangible assets allowable to the predecessor and the successor in the case of succession, i.e., to the partnership firm and to the assessee, respectively, shall not exceed in any previous year, the deduction calculated at the prescribed rates as if the succession or the amalgamation or the demerger, as the case may be, had not taken place, and such deduction shall be apportioned between the predecessor and the successor. This was applicable only to the assessment year 2008-09 when the succession took place as for later years, it would not be the case as the assets would no longer belong to the predecessor but only the successor, i.e., the assessee, who can claim depreciation.

8. In this case, for assessment year 2008-09, predecessor, i.e., the partnership firm has claimed depreciation for five months from 01/04/2007 to 31/08/2007 and successor, i.e., assessee has claimed depreciation for assessment year 2008-09 for the period from 01/09/2007 to 31/03/2008. By way of illustration, if

succession had not taken place during assessment year 2008-09 and the predecessor, i.e., the partnership firm would have claimed Rs. 1 crore as depreciation, both predecessor and successor for that year could claim together only Rs. 1 crore as depreciation and nothing more. Admittedly, this is what happened in the case at hand also. Appeal pertains to AY 2009-10 in which year the asset is clearly owned by successor, i.e., assessee. The assessee as per Section 32 r/w Rule 5 of the Act quoted above, will be entitled to claim depreciation in respect of any assets on the actual cost of the said assets. The actual cost of the said assets will be the actual cost which the assessee paid to the predecessor after revaluing the assets and certainly in our view assessee will be entitled to claim depreciation for the subsequent years on the basis of the actual cost paid.

9. Mr. Suresh Kumar submitted that for the actual cost no money was paid but shares were issued in lieu of cash. Certainly that will be the cost which assessee has paid to procure the assets. This is the reason given by ITAT in the impugned order and we are in agreement with the view expressed by ITAT.

10. In the circumstances, in our view no substantial question of law arise.

11. Appeal dismissed.

[M.M.SATHAYE,J.]

[K.R.SHRIRAM, J.]