**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**TAX APPEAL NO. 93 of 2000**

**FOR APPROVAL AND SIGNATURE:**

**HONOURABLE MR.JUSTICE KS JHAVERI**

**and**

**HONOURABLE MR.JUSTICE K.J.THAKER**

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

DY. C.I.T. (ASST.)....Appellant(s)

Versus

SUN PHARMACEUTICALS IND. LTD....Opponent(s)

==========

Appearance:

MR KM PARIKH, ADVOCATE for the Appellant(s) No. 1

MR SN SOPARKAR, ADVOCATE for the Opponent(s) No. 1

==========

CORAM: **HONOURABLE MR.JUSTICE KS JHAVERI**
and
**HONOURABLE MR.JUSTICE K.J.THAKER**

**Date : 17/12/2014**

**ORAL JUDGMENT**

**(PER : HONOURABLE MR.JUSTICE K.J.THAKER)**

1. By way of this appeal, the Revenue has challenged the judgment and order dated 6.3.2000 passed by the Income Tax Appellate Tribunal, Ahmedabad Bench "C" in ITA No. 1261/Ahd/1999 for AY 1996-97.

2. At the out-set, it is to be noted that when the present appeal was preferred by the Revenue, the Revenue felt that the challenge should be only to the effect as to whether the Tribunal is right in law and on facts in allowing the deduction u/s. 80HHC and 80IA on gross total income inclusive of income from other sources as per the provisions of sec. 80AB. According to the Revenue, other sources could not be included in the income eligible for deduction under sec. 80HHC and 80IA. It is an admitted position by and between the parties that the assessee received income from lease rent and interest which has been taxed, according to the AO as income from other sources.

3. The CIT(Appeals), on appeal preferred by the assessee, the present respondent herein, held that the claim for deduction under sec. 80HHC and 80IA was allowable. This aspect has aggrieved the Revenue and following question was posed for

 

consideration of this Court:

> "Whether the Appellate Tribunal is right in law and on facts in allowing the deduction u/s. 80HHC and 80IA on gross total income inclusive of income from other sources ?"

4. This Court in the case of **Jt. Commissioner of Income Tax v. United Phosphorous Ltd. in Tax Appeal No. 2 of 2002,** has held as follows:

> "7. Similarly, in Tax Appeal No.175/2001 disposed of by the coordinate Bench, the following observations are relevant for our purpose;
>
> > "We have heard the learned advocates at length and have also perused the order of the Tribunal and judgment delivered in the case of CIT v. Mahendra Mills, 243 ITR 56. In our opinion, no substantial question of law arises in this appeal as the Tribunal has rightly decided the appeal in view of the ratio laid down by the Hon'ble Supreme Court in the case of Mahendra Mills (supra). It is also pertinent to note that the Tribunal had taken similar view in the case of Sun Pharmaceutical Industries v. Deputy Commissioner of Income tax (Assessment) in I.T.A. Nos. 2355/A/98, 1261 and 1190/A/89 for the Assessment Years 199596 and 199697 and against the said view taken by the Tribunal in the case of Sun Pharmaceutical Industries (supra), the revenue had not filed

> an appeal though an appeal has been filed by the revenue in the said case on other points. It has been submitted by learned advocate Shri Qureshi that the revenue proposes to amend the appeal memo filed in the case of Sun Pharmaceutical Industries, but as on today, the fact remains that the issue regarding claim of depreciation in the case of Sun Pharmaceutical Industries decided by the Tribunal has not been challenged by the revenue.
>
> Looking to the view expressed by the Supreme Court in the case of Mahendra Mills (supra), in our opinion, the Tribunal was justified in taking the view with regard to the depreciation in the instant case and, therefore, we do not find any substantial question of law involved in this appeal and, therefore, the appeal is dismissed.
>
> 8. In view of the above, the question of law raised in this appeal is answered in favour of the assessee and against the Revenue."

5. Even Tax Appeal No. 175/2001 has been disposed off by the co-ordinate Bench of this Court relying on the decision of the Apex Court in the case of **CIT V. Mahendra Mills, reported in 243 ITR 56.**

6. The learned counsel for the appellant felt that as the aforesaid question was not raised in this appeal should be raised in this appeal

afresh after many years that the issue involved in the present case, requires re-consideration, and therefore, Civil Application being OJ CA No. 546 of 2010 was filed after Tax Appeal No. 2/2002 was decided, and pursuant to the order passed in OJCA No. 546 of 2010, vide order dated 26.11.2014, the following substantial question of law has been framed by this Court, which reads as under:

> "Whether, the Appellate Tribunal is right in law and on facts in holding that depreciation not claimed for by the assessee, cannot be allowed as a deduction despite the introduction of the concept of block assets ?"

6. We have heard the learned counsels appearing for the parties and considered the submissions. Mr. Soparkar learned counsel at the out set submitted that the question no. 2 cannot be re-agitated as it is covered by the decision of this Court in **Tax Appeal No. 175 of 2001** as well as **Tax Appeal No. 2/2002** decided on 17.11.2014. However, Mr. Parikh learned counsel for Revenue submitted that the question of law as raised in this case was never decided in those matters, and therefore, he requested that the question of law be decided afresh. As both the questions of law are inter connected are decided together.

7. We have heard the learned counsel appearing for the parties at length. According to the learned counsel Mr. Parikh, the decision of the Full Bench of the Bombay High Court in the case of **Plastiblends India Limited v. Additional Commissioner of Income-tax & Ors., reported in [2009] 318 ITR (Bom)[FB]** will have to be applied to the facts of this case. Ld. Counsel has relied on the grounds of challenge raised in this appeal as it original was and amended.

8. In contra, learned counsel Mr. Soparkar for revenue has drawn our attention to the decision of the Hon'ble Supreme Court in the case of **Commissioner of Income Tax v. Mahendra Mills, reported in [2000] 243 ITR 56** and the decision of this Court in **Tax Appeal 2/2002** and **Tax Appeal No. 175/2001.** It is submitted that the questions of law are concluded, but no elaborate reasons are to be given in view of the finding of fact and the question also having been answered in the case of Manehdra Mills (supra), and therefore, the decision of the Hon'ble Supreme Court will enure for the benefit of the present assessee as the amendment is after 2000 and not prior thereto.

9. The decision cited by the learned counsel for the Revenue of the Bombay High Court (supra) cannot be applied in the facts of this case and

as far as this question of law is concerned.

10. This takes us to the original first question wherein also the learned counsel for the appellant has placed reliance on the decision of the Full Bench of Bombay High Court **Plastiblends India Limited v. Additional Commissioner of Income-tax & Ors., reported in [2009] 318 ITR (Bom)[FB]** and submitted that this appeal should be allowed.

11. As far as this aspect is concerned, the finding of fact recorded by the CIT(Appeals) which reads as under:

> "3. The contentions of the appellant and the reasons given by the Assessing Officer in allowing full depreciation are considered. The decision of CIT v. Mother India Refrigeration (P) Ltd. (supra) relied on by the assessing Officer is not applicable in the instant case as the issue as to whether depreciation is optional or not was never before the Supreme Court. The second decision of Madras High Court in the case of Dasa Prakash Bottling Co. v. CIT (supra) will also not be applicable as the Gujarat High Court,which is jurisdictional High Court in the case of CIT v. Arun Textiles 192 ITR 700 did not

agree with this decision. In the case of Arun Textiles (supra), the Gujarat High Court held that there is nothing in the provisions of section 32(1) read with section 29 of the Income-tax Act, 1961, to indicate that even when no claim is made for allowing deduction in respect of the depreciation under section 32(1), the Income-tax Officer is bound to allow a deduction. Under the scheme of the Act, income is to be charged regardless of depreciation on the value of the assets and it is only by way on an exception that section 32(1) grants an allowance in respect of depreciation on the value of the capital assets enumerated therein. There is intrinsic evidence under section 43(6)(b) of the Act in the expression "less all depreciation actually allowed" to show that it is not as if all allowable deductions are to be granted by the Income-tax Officer even when the assessee does not want the same. Sub-section (2)(a) of Section 143(3) of the Act provides that an assessee can object to such deduction made under section 143(1). Therefore, the assessee can come forward in such a case and make clear its intention that it does not want to compute depreciation on the

assets and wants no benefit of claiming any depreciation in respect thereof. The Circular of CBDT 29 D (XIX-4) of 1965 (F. No. 45/239/65-ITJ), dated 31.8.1996) directed that, "where the required particulars have not been furnished by the assessee and no claim for depreciation has been made in the return, the Income-Tax Officer should estimate the income without allowing depreciation allowance." Respectfully following the decision of the Gujarat High Court, I hold that the depreciation is optional to the assessee and once he chooses not to claim it, the Assessing Officer cannot allow it while computing the income. Further, once the depreciation is option, applying the same ratio of Gujarat High Court and other Courts, it will be optional for block of assets also. It is not necessary that the depreciation is allowable not allowable as a whole. The assessee can claim it partly also in respect of certain block of assets and not claim in respect of other block of assets. I, therefore, direct the Assessing Officer to withdraw depreciation allowance of Rs. 85,24,227/- not claimed by the appellant."

12. The Tribunal has upheld the well reasoned finding of CIT(Appeals) in computing and analyzing the gross business profit. The provisions of section. 80IA read with section 80HHC reads as follows:

> **[Deductions in respect of profits and gains from industrial undertakings or enterprises engaged in infrastructure development, etc.**
>
> **Sec: 80IA**:[(1) Where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (4) (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction of an amount equal to hundred per cent of the profits and gains derived from such business for ten consecutive assessment years.]
>
> (2) The deduction specified in sub-section (1) may, at the option of the assessee, be claimed by him for any ten consecutive assessment years out of fifteen years beginning from the year in which the undertaking or the enterprise develops and begins to operate any infrastructure facility or starts providing telecommunication service or develops an industrial park [ or develops a special economic zone referred to in clause (iii) of sub-section (4)] or generates power or

> commences transmission or distribution of power [or undertakes substantial renovation and modernisation of the existing transmission or distribution lines.
>
> **Sec: 80HHC:**[(1) Where an assessee, being an Indian company or a person (other than a company) resident in India, is engaged in the business of export out of India of any goods or merchandise to which this section applies, allowed, in computing the total income of the assessee, [ a deduction to the extent of profits, referred to in sub-section(1B),] derived by the assessee from the export of such goods or merchandise."

13. The submission of learned counsel for respondent as is based on the decision of the Hon'ble Supreme Court in the case of **JOINT COMMISSIONER OF INCOME TAX v. MANDIDEEP ENG. AND PKG.IND. P. LTD. reported in [2007] 292 ITR 1 (SC),** wherein, the Hon'ble Supreme Court has held as follows:

> "The point involved in the present case is whether sections 80HH and 80-I of the Income-Tax Act, 1961, are independent of each other and therefore a new industrial unit can claim deductions under both the sections on the gross total income independently or that deduction under section 80-I can be taken on the reduced balance after

taking into account the benefit taken under section 80HH."

12. The fact that the Tribunal and the CIT(A) have concurred, we are not persuaded to take a different view then that taken by both the authorities below as the orders are neither perverse nor against settled legal proposition of law on the contrary they are based on correct interpretation of law and decisions of Apex Court and this Court.

13. We hold that (1) that the Appellate Tribunal is right in law and on facts in allowing the deduction u/s. 80HHC and 80IA on gross total income inclusive of income from other sources. As far as newly added question is concerned, there also we hold that the the Appellate Tribunal is right in law and on facts in holding that depreciation not claimed for by the assessee, cannot be allowed as a deduction despite the introduction of the concept of block assets. The questions are answered in favour of assessee and against the Revenue. The Tax Appeal stands dismissed.

**(K.S.JHAVERI, J.)** **(K.J.THAKER, J)**

mandora