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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

R-93

\+ **ITA 346/2002**

STITCHWELL QUALITEX (RF) ..... Appellant
Through: Mr. S. Krishnan, Advocate.

versus

INCOME TAX OFFICER & ANR ..... Respondents
Through: None.

CORAM:
HON'BLE DR. JUSTICE S.MURALIDHAR
HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R

% 16.09.2015

1. This appeal by the Assessee, Stitchwell Qualitex (RF), under Section 260-A of the Income Tax Act, 1961 ('Act') is directed against the impugned order dated 26th April 2002 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 6209/Del/96 for the Assessment Year ('AY') 1990-91.

2. The following question of law has been framed by the Court by its order dated 3rd April 2003:

> "Whether the Tribunal was correct in law in holding that the Assessee-firm was not entitled to depreciation claimed by it in respect of Unit-II?"

3. The facts to this appeal are that the Assessee is a registered firm carrying on business of manufacturing bag stitching machines in a factory situated at Noida since 1981. In the year 1987 the Assessee applied for and was allotted plot No. A-11, Sector-57, Noida. It constructed a factory building thereon in the accounting year ending 31st March 1989 (AY 1989-90) and the cost of the factory building was Rs. 9,77,775.58. Machinery worth Rs. 1,10,825 was installed in the said factory (styled Unit II) in the previous year 1989-90. The Assessing Officer while framing assessment under Section 143 (3) of the Act noted that the Assessee had claimed depreciation of Rs. 1,97,458 in the AY 1990-91 as per the following details:

Building :	Rs. 1,51,432.00
Plant & Machinery:	Rs. 36,572.00
Furniture & fixtures:	Rs. 2,920.00
Office equipment in respect of Unit-II:	Rs. 6,534.00
	Rs. 1,97,458.00

4. The AO disallowed the above claim of depreciation on the ground that (i) no sales have been made from Unit-II; (ii) purchases made for Unit-II are only Rs. 361.70; (iii) no expenses under any head have been claimed; (iv) all the wages payments and official documents showed that no manufacturing

activity took place; (v) no separate staff was engaged and (vi) no power bill has been received. The AO held that the Assessee failed to prove that it had undertaken any manufacturing activity during the AY in question.

5. The Commissioner of Income Tax (Appeals) ['CIT (A)'] however accepted the plea of the Assessee that the plant and machinery was installed in the previous year 1989-90 (AY 1989-90). However, the CIT (A) also observed that there was no employment of staff, payment of wages, purchase of raw material or sale from Unit-II. The CIT further observed that "in other words, the plant was not actually used for any manufacturing activity." The CIT (A) allowed the depreciation and came to the conclusion that the assets were kept ready for actual use and were profit making apparatus.

6. Aggrieved with the above order of the CIT (A), the Revenue went in appeal before the ITAT. The ITAT referred to the decision of the Supreme Court in ***Federation of Andhra Pradesh Chambers of Commerce and Industry v. State of Andhra Pradesh [2001] 247 ITR 36 (SC)*** and concluded that "in order to claim depreciation, it is important, *inter alia*, that the asset must be actually used for the purpose of business." Accordingly, it

was held that “the CIT (A) was not justified in granting depreciation.”

7. This Court has heard the submissions of Mr. S. Krishnan, learned counsel for the Appellant. None appears for the Revenue.

8. As noted by this Court in a recent decision in ***National Thermal Power Corporation Limited v. Commissioner of Income Tax (2013) 357 ITR 253 (Del)***, two conditions are necessary to be fulfilled before an allowance by way of depreciation under Section 32 of the Act can be granted to the Assessee. The first is ownership of the asset and the second, the user of the assets for the purposes of the business. The Court on the facts of the said case rejected the stand of the Revenue that the machinery and equipment had to be put to actual use and that it would not be enough if they were "kept ready for use". The Court referred to a large number of decisions of the High Courts which held that the expression "used for the purpose of business" in Section 32 of the Act was interpreted to include a case where the asset is kept ready for use but is not actually put to use. These included ***Whittle Anderson Ltd. v. CIT (1971) 79 ITR 613 (Bom); CIT v. Yamaha Motor India Pvt. Ltd. (2010) 328 ITR 297 (Del); CIT v. Vayithri Plantations Ltd. (1981)128 ITR 675 (Mad)*** and ***CIT v. Refrigeration and Allied Industries***

Ltd. (2001) 247 ITR 12 (Del).

9. The Supreme Court in ***Federation of Andhra Pradesh Chambers of Commerce v. State of Andhra Pradesh*** (*supra*), was interpreting the word "used" occurring in Section 3 of the Andhra Pradesh Non-Agricultural Lands Assessment Act, 1963. The question in that case was whether the agricultural lands of the Assessee had been used for industrial purposes so as to subject it to levy of 'assessment' . It was held in that context that that "it is only land which is actually in use for an agricultural purpose as defined in the said Act that can be assessed to non-agricultural assessment at the rate specified for land used for industrial purpose." In other words, given the background in which the question arose, the interpretation placed on the word 'used' was in favour of the Assessee.

10. In the present case the context is the claim for depreciation under Section 32 of the Act. On facts, it is not in dispute that the building was constructed in the previous year 1988-89. Further, the plant and machinery was installed in the factory in the previous year ending 31st March 1990. The Court in of the view that the installation of the plant and machinery in the building would amount to use of the building so as to justify the claim for

depreciation on the building. Further, the plant and machinery installed in the building during AY 1989-90 was ready for use for the purpose of business of the Assessee. The electricity connection was given on 6th February 1990. Another important fact was that the Assessee was already conducting its business and this was Unit II which was by way of expansion of an existing business. It is not the Revenue's case that the building and plant and machinery were not for the purpose of business of the Assessee. Therefore, it is concluded that the building and machinery in Unit II were used for the purpose of the business of the Assessee during the AY in question.

11. The question of law is accordingly answered in the negative, i.e. in favour of the Assessee and against the Revenue. The impugned order of the ITAT on the issue is set aside and the appeal is allowed with no order as to costs.

S.MURALIDHAR, J

VIBHU BAKHRU, J

SEPTEMBER 16, 2015
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