7 SCOB [2016] HCD 98

HIGH COURT DIVISION
(Statutory Original Jurisdiction)

Income Tax Reference Application No. 334 of 2006.
with
Income Tax Reference Application No. 335 of 2006.
with
Income Tax Reference Application No. 12 of 2008.
with
Income Tax Reference Application No. 422 of 2009.

Youngone Synthetic Fiber Product Industries Ltd. and another
.... Applicant

Versus

The Commissioner of Taxes
.....Respondent

Mr. M.A. Noor with
Mr. Muhammad Nawshad Zamir with
Mr. Reajul Hasan, Advocates
..... for the applicant.

Mr. Pratikar Chakma, A.A.G
..... for the respondent.

Heard on 20.01.2016, 27.01.2016, 28.01.2016 and 03.02.2016
Judgment on: 04.02.2016.

Present:
Mr. Justice Sheikh Hassan Arif
And
Mr. Justice Abu Taher Md. Saifur Rahman

Income Tax Ordinance, 1984
Section 28, 29:
Therefore, it appears from the above description of the word "depreciation" that in calculating the total income in a concerned assessment year, the wears and tears of assets, which have been used for the purpose of the business and to earn revenue, have to be taken into consideration. From the context of the said concept, the relevant provisions have been incorporated in our statute book, namely Income Tax Ordinance, 1984. Thus, while Section 28 of the said Ordinance classifies the income from business and profession, Section 29 provides for the allowances to be deducted from the said income while calculating the same for the purpose of assessment. Clause(VIII) of sub-section (1) of Section 29 provides that the depreciation of building, machinery, plan or furniture etc. of the concerned assessee, which have been used for the purposes of business or profession, shall be allowed as admissible under the Third Schedule to the said Ordinance. Again, Paragraph-2 of the said Third Schedule, in particular sub-paragraph (1) of the same, provides that in computing the profits and gains from the business or profession, an allowance for depreciation shall be made in the manner provided hereinafter. This Paragraph 2 is followed by a Table under Paragraph 3

prescribing fixed rates of depreciations to be allowed on the 'written down value' of any particular assets used in the business. ... (Para 16)

As against above backdrop, we are of the view that, if the interpretation as suggested by the learned advocate for the assessees is accepted by this Court, that will give an absurd result in that though the assessees became liable to face some sort of consequences because of non-filing of the returns during the said ten years period, thereby preventing the concerned tax authorities from doing any assessment thereon, the same assessees would be given a double benefit now by allowing the original costs of the said properties ten years ago to be treated as 'written down value' in the concerned assessment year without deducting the actual depreciation which would have been allowed or could have been allowed had there been any actual assessments upon returns filed by the assessees. Under no circumstances, a Court of law can accept such proposition. This being so, we are of the view that, though no assessment has in fact been done during the said exemption period, the application of law should be made in such a way that no undue benefit is given to such assessees. In view of above, we hold that the words "depreciation allowed under this Ordinance" can under no circumstance be regarded as depreciation actually allowed through assessment orders. ... (Para 19)

Judgment

SHEIKH HASSAN ARIF, J:

1. Since the questions of law and facts involved in the aforesaid four reference applications are almost same, they have been taken up together for hearing, and are now being disposed of by this common judgment.

2. The background facts in the aforesaid reference applications are as follows:-

I.T.R. Application No. 334 of 2006

This Reference Application, at the instance of the Assessee- Youngone Synthetic Fiber Product Industries Ltd., has arisen out of order dated 31.05.2006 passed by the Taxes Appellate Tribunal, Division Bench-1, Dhaka in I.T.A. No. 3864 of 2005-2006 (Assessment year 2005-2006).

3. Background facts are that the assessee-applicant, pursuant to notices under Section 83(1) and 79 of the Income Tax Ordinance, 1984, submitted return for the assessment year 2005-2006 showing Tk. 82,19,179/- as income. In the said return, the assessee, amongst others, claimed depreciation on its assets for an amount of Tk. 1,35,47,142/-, having been worked out upon taking the original costs of the assets as the 'Written Down Value'. However, the said depreciation and Written Down value were not accepted by the concerned Deputy Commissioner of Taxes (DCT), who calculated Written Down Value of the properties as Tk. 3,03,97,499/-, as against the Written Down Value of Tk. 8,70,58,476/- as claimed by the Assessee. The said Written Down Value, as determined by the DCT, was done by reducing the original costs of the properties by notionally allowing depreciation on the said properties for each of the preceeding 10(ten) years, namely from the assessment year 1995-1996, during which period the assessee-company was enjoying tax exemption. Being aggrieved by such assessment order, the assessee preferred appeal before the Commissioner of Taxes (Appeal), Taxes Appeal Zone-2, Dhaka, whereupon, the Commissioner (Appeal) affirmed the said decision of the DCT holding that the DCT lawfully allowed such depreciation at the prescribed rate as provided by the Third Schedule to the Income Tax

Ordinance, 1984 ("the said Ordinance"). Being dissatisfied again, the assessee filed Second Appeal before the Taxes Appellate Tribunal, Division Bench-1, Dhaka, being ITA No. 3864 of 2005-2006, whereupon, the Tribunal, vide order dated 31.05.2006, affirmed the said decisions of the lower authorities by referring to the concerned law and a circular of the National Board of Revenue, being Circular No. 3/2005 dated 06.04.2005.

4. **I.T.R. Application No. 335 of 2006**

This Reference Application, at the instance of the assessee, has arisen out of order dated 31.05.2006 passed by the Taxes Appellate Tribunal, Division Bench-1, Dhaka in I.T.A. No. 3865 of 2005-2006 (Assessment year 2005-2006).

5. Background facts are that the assessee submitted return pursuant to notices issued on it under Sections 83(1) and 79 of the said Ordinance for the assessment year 2005-2006. In the said return, the assessee had shown income of Tk. 3,01,48,288/- and claimed depreciation for Tk. 5,70,38,381/-, having been worked out upon taking the original cost of the Written Down Value of the property after tax exemption enjoyed by the assessee for 10(ten) years. However, the said depreciation was not accepted by the DCT who, accordingly, calculated depreciation by working out written down value for the said assessment year at Tk. 24,65,07,938/-, as against the written down Value of Tk. 74,49,30,277/- as claimed by the assessee. The DCT did the said calculation of written down value by reducing the original cost of the concerned properties by notionally allowing depreciation at the prescribed rate for each of the preceding 10(ten) years, starting from the assessment year 1994-1995, during which period the assessee was enjoying tax exemption. Being aggrieved by such calculation of written down value and depreciation, the assessee preferred appeal before the Commissioner of Taxes (Appeal), Taxes Appeal Zone-2, Dhaka, whereupon, the Commissioner (Appeal), vide order dated 07.12.2015, though partly allowed the appeal, upheld the calculation done by the DCT in so far as the same is concerned with regard to the calculation of depreciation and written down value. Being aggrieved again, the assessee filed Second Appeal before the Taxes Appellate Tribunal, Division Bench-1, Dhaka, being ITA No. 3865 of 2005-2006 (Assessment year 2005-2006), whereupon, the Tribunal, vide order dated 31.05.2006, affirmed the said decision of the lower appellate authorities by referring to the concerned law and also to a circular of the National Board of Revenue, being Circular No. 3/2005 dated 06.04.2005.

6. The above two reference applications are directed against the aforesaid orders of the Tribunal by referring the following questions of law for the answer of this Court:-

> *Whether on the facts and in the circumstances of the case, depreciation ought to have been allowed taking the original cost of the fixed assets to the applicant as the written down value within the meaning of paragraph 11(5) of the Third Schedule to the Income Tax Ordinance, 1984?*

7. **In I.T.R.A No. 12 of 2008**

This Reference Application has arisen out of order dated 29.08.2007 passed by the Taxes Appellate Tribunal, Division Bench-2, Dhaka in I.T.A. No. 479 of 2007-2008 (Assessment year 2004-2005) at the instance of the Assessee-Youngone Hi-Tech Sportswear Industries Ltd.

8. Background facts are that the assessee filed return under Section 82 of the said Ordinance for the assessment year 2004-2005 showing Tk. 1,61,84,112/- as net loss. Thereupon, the assessment was completed. Subsequently, the assessment of the assessee was

re-opened under Section 93 of the said Ordinance, wherein the assessee claimed depreciation for an amount of Tk. 3,18,50,287/- as per books of accounts and claimed depreciation for the entire year, though the assessee was enjoying tax exemption for the initial nine months out of twelve months in the concerned income year. The DCT then calculated written down value for an amount of Tk. 4,41,93,450/- as per the rate prescribed by the 3rd Schedule to the said Ordinance, but allowed the said depreciation for the entire year as claimed by the assessee. Being aggrieved by some other allowances and disallowances, the assessee preferred appeal before the Commissioner of Taxes (Appeal), Taxes Appeal Zone-2, Dhaka, whereupon, the Commissioner (Appeal), vide order dated 23.05.2007, amongst others, reduced the said allowance of depreciation to a period of 03(three) months holding that since the assessee was enjoying tax exemption for the preceeding nine months in the income year, depreciation could not be allowed for the entire year. Being aggrieved by such reduction of depreciation and other issues, the assessee preferred Appeal before the Taxes Appellate Tribunal, Division Bench-2, Dhaka, being ITA No. 497 of 2007-2008 (Assessment year 2004-2005), whereupon, the Tribunal affirmed the said decision of the Commissioner of Tax (Appeal) in so far as the issue of depreciation was concerned. This reference application is directed against the said order of the Tribunal with the following question of law for the answer of this Court:-

> *Whether in the facts and in the circumstances of the case, depreciation could be allowed proportionately for three months when the assets were in use for the entire period during the income year?*

9. **In I.T.R.A No. 422 of 2009**

This Reference Application, at the instance of the Assessee-applicant Youngone Hi-Tech Sportswear Industries Ltd., has arisen out of order dated 29.08.2009 passed by the Taxes Appellate Tribunal, Division Bench-1, Dhaka in I.T.A. No. 2292 of 2008-2009 (Assessment year 2006-2007).

10. Background facts are that the assessee, after enjoying ten years of tax exemption, filed return for the assessment year 2006-2007 showing a net loss of Tk. 11,93,06,787/-. Accordingly, assessment was completed pursuant to notices under Section 83(1) and 79 of the said Ordinance. In the said return, the assessee showed income of Tk. 2,35,34,324/- and claimed depreciation for an amount of Tk. 5,24,75,782/- in respect of its assets and properties. As against the same, the DCT allowed depreciation for an amount of Tk. 3,55,10,760/- on the basis of Written Down Value and fresh acquisition during the year as per a separate sheet as attached to the order, but allowed such depreciation only for 06(six) months being Tk. 1,77,55,380/- and thus refused to allow the depreciation for the entire year, namely 100% as claimed by the assessee. Being aggrieved by such calculation of depreciation and other orders, the assessee preferred appeal before the Commissioner of Taxes (Appeal), Taxes Appeal Zone-2, Dhaka, whereupon, the Commissioner (Appeal), vide order dated 30.09.2008, partly modified the said order of the DCT as regard depreciation and, accordingly, directed the DCT to allow depreciation at the rate of 47.44%. Being aggrieved again, the assessee-applicant preferred Second Appeal before the Taxes Appellate Tribunal, Division Bench-2, Dhaka being ITA No. 2272 of 2008-2009 (Assessment year 2006-2007), whereupon, the Tribunal affirmed the said order of the Commissioner (Appeal) in so far as the calculation of depreciation was concerned. This reference application is directed against the said order of the Tribunal with the following question of law:

> *Whether on the facts and circumstances of the case, depreciation worked out by the DCT on the basis of written down value of the assets ought to have been allowed for the entire year?*

11. The aforesaid reference applications are contested by the concerned Commissioner of Tax who filed affidavits-in-reply (affidavit-in-opposition) in I.T.R. Application Nos. 334-335 of 2006 and 422 of 2009.

12. Mr. M.A. Noor, learned advocate appearing for all the applicants, at the very outset, has taken this Court to the relevant provisions of law, in particular Sections 28, 29(1)(viii) and Paragraphs-2 and 11(5) of the Third Schedule to the said Ordinance and other relevant provisions of law. Particularly referring to the provisions under sub-paragraph (5) of Paragraph 11 in the said Third Schedule, learned advocate submits that though admittedly no depreciation was previously allowed to the petitioner, the concerned tax officials, in ITR No. 334-335 of 2006, calculated the depreciation upon notionally reducing the value of the original price of the properties, purchased or installed by the petitioner about ten years ago, at a rate prescribed in the Third Schedule to the said Ordinance and, accordingly, upon calculating depreciation at such rate for each and every year, the written down value of the said properties in the concerned assessment year has been worked out for calculation of the depreciation. Mr. Noor further submits that since Clause (b) of sub-paragraph (5) of Paragraph 11 in the Third Schedule specifically provides the words "depreciation allowed under this Ordinance" and since admittedly no such depreciation was ever allowed to the assessee before the concerned assessment year, the tax authorities committed illegality in not applying the letters of the statute as they are. This being so, according to him, the answer to the question referred to in ITR Nos. 334-335 of 2006 should be in the affirmative i.e. in favour of the assessee and against the revenue.

13. By putting emphasis on the words "allowed" as occurring in the said sub-paragraph (5) of Paragraph-11, Mr. Noor argues that since the statute has specifically mentioned the words in the said provision, in view of the long standing practice of this Court in applying fiscal law literally, the concerned authorities ought to have taken the original cost of the assets and properties of the assessees as the 'written down value' in the concerned assessment year for deduction of depreciation at a rate prescribed by law. The same having not been done, according to him, this Court should answer the question in the affirmative. The above being the general and common submissions of Mr. Noor in respect of all the reference applications, he submits, the questions posed in other two reference applications, namely in ITR Application No. 12 of 2008 and 422 of 2009, should also follow same result upon taking into consideration the submissions made by him on this point. Thus, according to him, the Tribunal ought to have allowed depreciation for the entire year in ITR No. 12 of 2008 and ITR No.422 of 2009.

14. As against this, Mr. Rashed Jahangir, learned Deputy Attorney General, submits that since the admitted position is that the properties in question in Reference Application Nos. 334-335 of 2006 were acquired, purchased or installed about ten years ago, under no circumstances, the original price of the said properties can be taken as the 'written down value' in the concerned assessment year. Referring to the same words, namely, "depreciation allowed under this Ordinance" as occurring in Clause-(b) of sub-paragraph (5) of Paragraph 11 in the Third Schedule, leaned DAG argues that the word "allowed" cannot be interpreted as 'actually allowed through assessment done by the concerned DCTs in the said period of 10 years'. Rather, he submits, it should be interpreted in a way that the allowance allowable or would have been allowed during the said ten years' period should be calculated for

determination of the written down value in the concerned assessment year. According to him, "allowed under this Ordinance" does not necessarily mean that the said allowance of depreciation for each of the ten years has to be practically done through actual assessments by the DCT. He submits that, even though no assessment had been done during the said ten years period, though the assessee was required to file return for each year, the effect depreciation taken into consideration for the purpose of calculating the 'written down value' after 10 years had the returns been filed and assessment been done. In this regard, he draws this Court's attention to the concerned SRO No. 289-Ain/89 dated 17.08.1989 by which the said exemption on payment of tax for ten years was given in favour of the petitioner. According to him, the same principle should also be applied in answering the questions referred to in ITR no. 12 of 2008 and ITR No. 422 of 2009.

15. For addressing the issues raised in the aforesaid reference applications, let us, at the beginning, try to understand the meaning of the word "depreciation" as used in some relevant sections of the said Ordinance, though no such definition has been provided by the said Ordinance itself. It appears from the reputed text books in this field, namely "The Law and Practice of Income Tax, Kanga & Palkhivala, Tenth Edition (2014)" that the said author has described the word 'depreciation' in the following terms:-

> *"Depreciation, as a general principle, represents the diminution in value of a capital asset when applied to the purpose of making profit or gain. The term "depreciation" means wear and tear of the assets used for the purposes of earning revenue on user of the assets. In other words, one cannot deduce the correct income without taking into account the wear and tear which an asset undergoes while being used for the purpose of generating receipts, which on finalization of accounts, result in taxable profits. The concept of depreciation is that any asset, on account of normal wear and tear, is required to be replaced at a point of time in future. Therefore, to enable a business to meet the cost of such replacement, the wear and tear is permitted to be calculated at a notional rate of percentage of the cost/written down value of the assets.(see para-1 at page-728).*

16. Therefore, it appears from the above description of the word "depreciation" that in calculating the total income in a concerned assessment year, the wears and tears of assets, which have been used for the purpose of the business and to earn revenue, have to be taken into consideration. From the context of the said concept, the relevant provisions have been incorporated in our statute book, namely Income Tax Ordinance, 1984. Thus, while Section 28 of the said Ordinance classifies the income from business and profession, Section 29 provides for the allowances to be deducted from the said income while calculating the same for the purpose of assessment. Clause (VIII) of sub-section (1) of Section 29 provides that the depreciation of building, machinery, plan or furniture etc. of the concerned assessee, which have been used for the purposes of business or profession, shall be allowed as admissible under the Third Schedule to the said Ordinance. Again, Paragraph-2 of the said Third Schedule, in particular sub-paragraph (1) of the same, provides that in computing the profits

and gains from the business or profession, an allowance for depreciation shall be made in the manner provided hereinafter. This Paragraph 2 is followed by a Table under Paragraph 3 prescribing fixed rates of depreciations to be allowed on the 'written down value' of any particular assets used in the business. The term "written down value" has also been defined in the said Third Schedule under paragraph-11(5) in the following manner:

"written down value" means-

(a) Where the assets were acquired in the income year, the actual cost thereof to the assessee;

(b) Where the assets were acquired before the income year, the actual cost thereof to the assessee as reduced by the aggregate of the allowances for depreciation allowed under this Ordinance, or the Income-tax Act, 1922 (XI of 1922), in respect of the assessments for earlier year or years;"

(Underlines supplied)

17. For the purpose of giving answers in the instant reference applications, Clause (b) of the aforesaid definition of "written down value" is relevant. According to the said Clause (b) of sub-paragraph (5) of paragraph-11 of the Third Schedule, if a particular property is purchased before the concerned income year, the actual cost of the property has to be reduced by aggregate of allowance for depreciation allowed under this Ordinance. These words "depreciation allowed under this Ordinance" have become the crux of dispute between the parties. According to the applicants, depreciation actually allowed through assessments done in previous years can only be taken for consideration in determining the "written down value" of any assets in the concerned assessment year. On the other hand, according to the department, depreciation allowed means depreciation, in usual course, would have been allowed, either by assessment, or without assessment has to be the criterion for consideration before determination of such 'written down value'.

18. The admitted position in these reference applications is that the assessee in I.T.R. No. 334-335 of 2006 enjoyed ten years exemption from payment of tax and the assessee in ITR No. 12 of 2008 and 422 of 2009 enjoyed exemption for nine months and six months respectively in their respective concerned income years. Therefore, the question is whether the 'depreciation allowed under this Ordinance' should be meant depreciation actually allowed through assessment orders or not. It is evident from the concerned SRO, by which the petitioner admittedly enjoyed a tax exemptions, that by such exemption the petitioner was not exempted for filing returns, or the DCT concerned were not prevented from doing any assessment on such returns, during the said exemption period. However, it is also admitted that the assessee, during the said exemption period of ten years, did not file any return. Thus, the DCT also did not have any opportunity to do assessment on such returns filed by the assessee. This means some penal consequences for the assessees for such non-filing of returns, but that is not relevant for the disposal of the questions in these reference applications. The only question is given that the assessees did not file returns during the said exemption periods, whether the words "depreciation allowed under this Ordinance" should give any benefit to the assessee as no such depreciation was in fact allowed through

assessment orders or no such opportunity was there on the part of the concerned DCT to allow such depreciation in the absence of any return being filed by the assessee.

19. As against above backdrop, we are of the view that, if the interpretation as suggested by the learned advocate for the assessees is accepted by this Court, that will give an absurd result in that though the assessees became liable to face some sort of consequences because of non-filing of the returns during the said ten years period, thereby preventing the concerned tax authorities from doing any assessment thereon, the same assessees would be given a double benefit now by allowing the original costs of the said properties ten years ago to be treated as 'written down value' in the concerned assessment year without deducting the actual depreciation which would have been allowed or could have been allowed had there been any actual assessments upon returns filed by the assessees. Under no circumstances, a Court of law can accept such proposition. This being so, we are of the view that, though no assessment has in fact been done during the said exemption period, the application of law should be made in such a way that no undue benefit is given to such assessees. In view of above, we hold that the words "depreciation allowed under this Ordinance" can under no circumstance be regarded as depreciation actually allowed through assessment orders.

20. Our above view will also apply as regards the questions referred to in the remaining two other reference applications, namely ITR No. 12 of 2008 and ITR No. 422 of 2009, in that though the assesssees in those cases enjoyed tax exemption in the concerned income year for nine months and six months respectively, the depreciation has to be calculation for the entire year.

21. Therefore, our answers to the questions referred to in ITRA Nos. 334-335 2006 are negative, i.e. against the assesses and in favour of the revenue, to the question referred to in ITRA No. 12 of 2008 is in the negative, i.e. in favour of the assessee and against the revenue and to the question referred to in ITRA No. 422 of 2009 is in the affirmative, i.e. in favour of the assessee and against the revenue.

22. The Registrar, Supreme of Bangladesh is directed to take steps in view of the provisions under Section 161(2) of the Income Tax Ordinance, 1984.