Radio programme production for broadcasting tantamounts to manufacture – therefore, eligible to claim additional depreciation

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In brief

In a recent decision, the Delhi High Court (HC) upheld the Delhi Income-tax Appellate Tribunal's (Tribunal) decision holding that the taxpayer was entitled to claim additional depreciation under section 32(1)(iia) of the Income-tax Act, 1961 (the Act) on the plant and machinery used by it to produce radio programmes for broadcasting through its FM channels. Furthermore, the HC held that the taxpayer was entitled to claim depreciation on the One-time Entry Fees (license fees) paid by the taxpayer to the Government of India in connection with radio stations which had not gone on air during the year, as they were ready to use and were actually being run on trial basis.

In detail

Facts

- The taxpayer[1] was engaged in the business of FM radio broadcasting, and had been granted permission for operating FM Radio Broadcasting channels in seven cities against payment of prescribed license fee.
- Of these seven radio stations, the taxpayer went on air in assessment year (AY) 2008-09 (the year) from three radio stations.
- Of the remaining stations, three were ready to go on air during the year, but the taxpayer decided not to put these stations on air before the end of the year. However, the taxpayer had started taking trial runs by running radio programs within the office premises of these stations.
- In its return of income for the year, the taxpayer claimed additional depreciation under section 32(1)(iia) of the Act on plant and machinery used by it to produce radio programmes for broadcasting through its FM channels during the year.
- The taxpayer also claimed depreciation on the license fee paid for the radio stations.
- In scrutiny assessment, the Tax Officer (TO) rejected the taxpayer's claim for additional depreciation on the ground that production of radio programmes could not be considered as 'manufacture or production of an article or thing'.
- Furthermore, the TO disallowed the taxpayer's claim for depreciation on the license fee on the ground that the asset under consideration, i.e. license fee, was not put to use during the year, and that depreciation could not be allowed unless the asset was actually used for the taxpayer's business.
- The Tribunal overruled the TO and CIT(A)'s decision and ruled in favour of the taxpayer.

Issues before the HC

- Was the taxpayer entitled to claim additional depreciation for machinery

[1] TS-708-HC-2015 (Delhi)

used to produce radio programmes for broadcasting through its FM channels, given the definition of manufacture existing at the time of assessment?

- Was the taxpayer entitled to claim depreciation on license fees paid for the stations that had not gone on air during the year?

Department's contentions

- The taxpayer was not engaged in a business of 'manufacture or production of any article or thing'. 'Broadcasting' was not 'processing'.
- The definition of 'manufacture' under section 2(29BA) of the Act would not apply in the present case, as it was introduced only with effect from 1 April 2009.
- As regards the definitions of the terms, 'thing', 'article' and 'manufacture', Black's Law Dictionary said that "manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labour and manipulation".
- Reliance was placed on the Supreme Court's (SC) decision in Tara Agencies[2], where, for the purposes of the erstwhile section 35B(1A) of the Act, it had been held that the process of blending of tea by the taxpayer "falls short of either manufacturing or production".
- Reliance was also placed on the SC decision in Empire Industries Ltd. & Ors,[3] to urge that there must be a transformation, and that a new and different article must emerge, having a distinctive name, character or use. Reliance was also placed on the SC decisions in J.G. Glass Industries Ltd[4] and in Gramophone Co. of India Ltd[5].
- The SC decision in Oracle Software India Ltd.,[6] which was relied upon by the Tribunal to rule in the taxpayer's favour was distinguished on the ground that the judgement had been passed keeping in mind section 80-IA, whereas for section 32(1)(iia) of the Act, one had to examine whether the equipment was in fact used for the taxpayer's main business.
- As regards depreciation on license fee, reliance was placed on the decision in the case of Yellamma Dasappa Hospital[7], wherein it had been held that the 'kept ready' theory was not available to the taxpayer for claiming depreciation when the legislature had chosen to use the word 'used'.

Taxpayer's key contentions

- The production of radio programmes involved the technical process of recording, editing, copying, and then broadcasting. Therefore, as held by the Tribunal, it amounted to 'production of an article or thing' and hence, the taxpayer was eligible for claiming additional depreciation.
- Reference was made to the Single Judge HC decision in Kesari Singh Gujjar[8] to urge that dissemination of news and news reporting would be covered under goods classified under Clauses 38 and 41 of the Schedule to the Trade Marks Rules.
- The TO had allowed the claim for additional depreciation in succeeding years, i.e. AYs 2009-10 and 2010-11.
- With respect to the claim of depreciation on license fee, reliance was placed on the decisions in Refrigeration & Allied Industries Ltd,[9] Capital Bus Service Pvt. Ltd,[10] and Ashima Syntex Ltd,[11] to contend that depreciation would be allowed so long as the asset was kept ready, and had been used for undertaking trials.

HC Ruling

- On the question of allowance of additional depreciation, on facts, the HC held as under:
  - Production of radio programmes involved the processes of recording, editing and making copies prior to broadcasting.
  - When the radio programmes were made, there comes into existence an intangible 'thing' which could be transmitted, and even sold by making copies. Therefore, it could definitely be stated that radio programmes produced by the taxpayer were a 'thing', if not an 'article'.

[2] CIT *v.* Tara Agencies [2007] 292 ITR 444 (SC)
[3] Empire Industries Limited & Ors. *v.* UOI [1985] 3 SCC 314
[4] UOI *v.* J.G. Glass Industries Limited [1998] 2 SCC 32
[5] Gramophone Co. of India Limited *v.* Collector of Customs, Calcutta [2000] 1 SCC 549
[6] CIT *v.* Oracle Software India Limited [2010] 320 ITR 546 (SC)
[7] DCIT *v.* Yellamma Dasappa Hospital [2007] 290 ITR 353 (Karnataka)
[8] T.V. Today Network Limited *v.* Kesari Singh Gujjar [CS (OS) No. 1085 of 2005]
[9] CIT *v.* Refrigeration & Allied Industries Limited [2001] 247 ITR 12 (Delhi)
[10] Capital Bus Service (P.) Limited *v.* CIT [1980] 123 ITR 404 (Delhi)
[11] ACIT *v.* Ashima Syntex Limited [2001] 251 ITR 133 (Gujarat)

- In view of the Black's Law Dictionary's definition, it was clear that 'thing' could have intangible characteristics. The word, 'manufacture' envisaged subjecting of any material or thing to certain processes to produce something that has a distinct characteristic. In other words, the process must result in the transformation of a thing or article, to result in a new or different article.
- The term 'manufacture', in the context of section 32(1)(iia) of the Act could include a combination of processes. In the context of 'broadcast', it could encompass processes of producing, recording, editing and making copies of the radio programme, followed by its broadcast.
- The definition in section 2(29BA) of the Act, though introduced with effect from 1 April 2009, must be understood as clarificatory in nature, given the common parlance understanding of the term, 'manufacture'.
- The tax department had not challenged the taxpayer's claim for additional depreciation in subsequent years.
- The taxpayer could be said to have used the plant and machinery acquired and installed by it, for 'manufacture or production of an article or thing' and therefore, was entitled to claim additional depreciation during the year.

- On the question of allowance of depreciation on license fee:
  - The taxpayer's claim for depreciation on license fees was disallowed, not because the assets had not been put to use for business, but on the basis that depreciation had been claimed on an intangible asset, and not on other tangible assets.
  - No provision of the Act was brought to the HC's notice that stated that a taxpayer would be denied the claim of depreciation on intangible assets only because there was no claim of depreciation on tangible assets.
  - It was sufficient that the assets be kept ready for use to claim depreciation thereon under section 32 of the Act.
  - Reliance was placed on the HC's own decision in Refrigeration & Allied Ind. Ltd.[9] and Capital Bus Service Pvt. Ltd.[10].
  - Consequently, the HC accepted and allowed the taxpayer's claim.

The takeaways

- This judgement has held that radio programmes produced by the taxpayer are a 'thing'. Accordingly, assets acquired and installed after 31 March 2005 and used for producing radio programmes for broadcasting were eligible for additional depreciation under section 32(1)(iia) of the Act, in view of the facts of this case.
- This judgement has re-emphasised the principle that for claiming depreciation under section 32 of the Act, it is sufficient that the assets are kept ready to use and are not actually used.
- Furthermore, it has been held that the definition of manufacture, introduced with effect from 1 April 2009 under section 2(29BA) of the Act is clarificatory in nature.

Let's talk

For a deeper discussion of how this issue might affect your business, please contact:

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