

**Court No.32**

**Income Tax Appeal No.209 of 2008**

M/s Shyam Enterprises Vs. Commissioner of Income Tax,  
Allahabad

**Hon. Sunil Ambwani, J.**

**Hon. Pankaj Mithal, J.**

We have heard Shri R.P. Agrawal, learned counsel for the appellant-assessee. Shri Bharat Ji Agrawal, Sr. Advocate assisted by Shri A.N. Manajan appears for the department.

This appeal under Section 260A of the Income Tax Act, has been preferred on substantial question of law as follows:-

*"I. Whether on the facts and in the circumstances, the Ld. ITAT is justified in restricting the depreciation on cold storage chambers to 10% treating them as special type of buildings and not eligible to depreciation @ 25% as plant, in view of amendment to section 43 (3) with effect from 1.4.2004?"*

*II. Whether the amended provisions of section 43 (3) brought into force with effect from the assessment year 2004-05 exclude the cold storage chambers from the ambit of 'plant'?"*

The assessee is running a cold storage. It claimed depreciation on cold storage at the rate of 25% including cooling plant and the special chambers, lined with thermocol and which according to the assessee do not have any separate existence from the cooling plant. The authorities allowed depreciation at the rate of 10%. They made the addition of Rs.5,28,878/-. The Income Tax Appellate Tribunal opined that after the amendment in S. 43 (3) w.e.f. 1.4.2004 the building has been specifically excluded from the definition of plant; S. 32 provides for different rates of depreciation for building, machinery, plant or furniture, ships, buildings used for hotels, aeroplanes and other items mentioned therein. The word 'plant' is given an inclusive meaning under S. 43 (3) which does not include buildings. The rules prescribing the rates of depreciation in Appendix-1 with reference to Rule 5

gives rates in a table on which depreciation is admissible. These specifically provide for grant of depreciation dealing with furniture and fittings, separately than the machinery and plant. The chambers, which required thermocole lining, have separate existence. The cold storage building is a specific type of building, which requires chambers fitted with thermocole, nevertheless it should remain as a specific building and needs a separate cooling plant. The Tribunal found that for cooling plant the assessee already enjoys depreciation at the rate of 25% and that thermocol fitted chambers are entitled to depreciation at the normal rate of 10%, as given by the lower authorities.

Shri R.P. Agrawal, learned counsel for the appellant submits that the amendment in S. 43 (3) w.e.f. 1.4.2004 does not make any change in the definition of the word 'plant', which remains an inclusive definition. It includes buildings or furniture and fittings, which are other than, and are not integrally connected with the plant. The building, which does not have separate existence, and is integral part of the plant, used for the purposes of business or profession, is not to be treated separately for depreciation. He submits that the ratio of the judgment of Calcutta High Court in Commissioner of Income Tax Vs. Shree Gopikishan Industries Pvt. Ltd., (2003) 262 ITR 568, is entirely applicable to the facts of this case. The Calcutta High Court considered the distinction between plant and building in the case of cold storage. It was held relying upon the nature of the building of cold storage, which requires insulation, refrigeration and sanitary or other arrangement strictly in accordance with West Bengal Cold Storage (Licensing and Regulation) Act, 1966, the storage of chamber itself is an apparatus and tool of the trade through which the business is carried on. The Calcutta High Court held as follows:-

*"Infact, it is the whole building, which houses the chambers to be constructed in a particular manner according to the specification. Without a thermocole, a chamber cannot function. AT the same time, without the building the thermocole cannot have a separate existence. Both these parts are integral parts of each other. Once cannot survive without the other. Therefore, a cold storage is definitely plant."*

Shri Bharat Ji Agrawal, learned counsel for the department submits that S. 43 (3) has to be read along with S. 43 (1). He submits that the definition of plant under S. 43 (3) has to be read with S. 32, providing for depreciation. He submits that S. 32 provides for depreciation of (i) buildings, machinery, plant or furniture, being tangible assets; and (ii) know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998. According to Shri Agrawal the cold storage building has separate existence from the cooling plant. The table of rates at which depreciation is admissible under Appendix-I with reference to Rule 5 of the Income Tax Rules, 1962 provide for depreciation at different rates for tangible assets and which separately provides for depreciation on buildings. In case of buildings, which are used only for residential purposes, except hotel and boarding houses, depreciation is provided at 5% and for buildings other than those used mainly for residential purposes and not covered by sub-items (1) above and (3) below, the depreciation is provided at 10%. Item-3 provides buildings acquired on or after the 1st day of September, 2002 for installing machinery and plant forming part of water supply project or water treatment system, and which is put to use for the purpose of business of providing infrastructure facilities under clause (i) of Sub-S. (4) of Section 80-1A for which depreciation is

provided at 100%. For plant and machinery in sub-category (iii) the depreciation is provided at 35%. The machinery and plant other than those, which are covered by sub-item 2, 3 and 8 of the heading machinery and plant are provided depreciation at 25%. Sub-category 2 to 8 includes vehicles including commercial vehicles etc.

We do not find substance in the contention of Shri Bharat Ji Agrawal that building has separate existence from the cooling plant and for which the depreciation are admissible at different rates. This question has come up earlier in this Court. It was held by this Court in Commissioner of Income-Tax, Lucknow Vs. Kanodia Cold Storage, 1975 (100) ITR 155 that in common parlance the word 'plant' includes within its ambit buildings and equipment used for manufacturing purposes. The definition of 'plant' in S. 43 (3) is inclusive and does not exclude things normally included in it. Where a building with insulated walls is used as a freezing chamber though it is not machinery or part thereof, it is a part of the air conditioning plant of the cold storage of the assessee, and will be entitled to special depreciation at 15% on its written down value, (as provided at that time). The Court had an occasion to consider the structure of the building of the cold storage and held that the service line was a part of the entire set up for the functioning of the cold storage. The replacement of the existing line with a new line did not result in the creation of any new asset of enduring nature.

The amendment in S. 43 (3) w.e.f. 1.4.2004 is only clarificatory in nature, and which excluded the live stock or buildings or furniture and fittings from the plant. What was excluded in the context was building or furniture and fittings and not building of special nature, which does not have existence independent from the plant. In case of cold

storage as it was found by Calcutta High Court, the building is required to be constructed for cooling chambers in a specific process and manner and without such specific process and manner a chamber cannot be commissioned, for which a licence is also required to be obtained. The whole building, which houses the chambers has to be constructed according to specifications in a particular manner. Without a thermocole a chamber cannot function independently and at the same time without the building the thermocole cannot have a separate existence. Both these parts are integral parts of each other.

The cold storage has special facilities for refrigeration. Just as a refrigerator cannot be divided into two parts namely the cooling system behind or under the refrigerator, and the cabinet in front, or on top thereof, the plant of cold storage also cannot be separated in a manner that the special chambers may have separate existence and be treated as building, sans cooling plant for providing a different rate of depreciation.

In Delhi Cold Storage P. Ltd. Vs. Commissioner of Income Tax, 1991 (19) ITR 656, the Supreme Court was concerned with the word 'processing' to be understood as an action which brings some change or alteration of the goods or material subjected to the act of processing. The court was concerned with the definition of 'industrial company' as defined under S. 2 (7) (c) of the Finance Act, 1973 for the purposes of 1st Schedule of the Act. This judgment in our opinion, does not apply to the present case as there is no material or any plea that any manufacturing or processing of goods is carried out in the cold storage.

The income tax appeal is **allowed**. Both the questions are decided in favour of the assessee and against the department. The order of the Income Tax Appellate Tribunal dated 27th May, 2008 in I.T.A. No.353 (Alld.)/2007 for the

assessment year 2004-05, M/s Shyam Enterprises, Allahabad Vs. The Dy. CIT-I, Cir.I, Allahabad is set aside. The assessee will be entitled to compute and to take benefit of depreciation on the cooling chambers of the cold storage in the relevant assessment year, at the notified rate of 25%.

**Dt.04.08.2011**

SP/