IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

ITR No. 6 of 1996

Reserved on : 30.4.2008.

Date of decision: 24th June, 2008

Commissioner of Income-tax **Petitioner.**

Versus

M/s Shivalik Hatcheries Pvt. Ltd. **Respondent.**

Coram

The Hon'ble Mr.Justice Deepak Gupta, J.

The Hon'ble Mr. Justice Kuldip Singh, J.

Whether approved for reporting? yes.[1]

For the petitioner: **Mr. Vinay Kuthiala, Advocate.**

For the respondent: **Mr. P.J.Pardiwala, Advocate &**
Mr. Lovneesh Kanwar, Advocate.

Per Deepak Gupta, J.

The following questions of law have been referred for the opinion of this Court under Sections 256(1) of the Income-tax Act, 1961 (here-in-after referred to as the Act):-

1. Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding the poultry sheds and water lines for sheds as 'plant' for the purposes of depreciation allowance and investment allowance under the Income-tax Act?

2. Whether, on the facts and in the circumstances of the case, the Tribunal

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[1] ***Whether the reporters of the local papers may be allowed to see the Judgment? Yes.***

was right in law in allowing extra shift allowance on poultry sheds, fencing, water tanks and well?

Briefly stated, the facts of the case are that the assessee is a private limited company engaged in the hatchery business. The assessee claimed depreciation and investment allowance on poultry sheds by treating the same as 'plant'. The Assessing Officer only allowed depreciation treating the poultry shed as 'building' and not as 'plant'. Investment allowance was not allowed. The claim of the assessee for treating the water-lines of the poultry sheds as 'plant' was also rejected. The appeal filed by the assessee was rejected. Thereafter, the assessee approached the Income Tax Appellate Tribunal (ITAT). The ITAT came to the conclusion that the poultry sheds were in the nature of 'plant' because the sheds constituted an apparatus or tool for the assessee. According to the ITAT the poultry sheds were unlike others buildings and the nature and type of construction was quite different. In the poultry sheds special provision had to be made for proper light, air, scientific feeding arrangements, proper water system, proper arrangement for collection of manure and droppings, arrangement for medication and vaccination, etc. On these basis it was held that the poultry shed was specifically designed from a technical point of view so as

to facilitate the various hatchery operation on scientific lines. ITAT agreed with the assessee and held that the entire poultry sheds alongwith water-lines, etc. were 'plant'. However, water-lines used for residential quarters were not given the status of 'plant'.

The second question arises out of the claim of the assessee that it should be allowed extra shift allowance (ESA) on poultry sheds, fencing, well and water tank. The ITAT held that once the fencing, poultry sheds, water tank and well are treated to be 'plant' then the assessee was entitled to ESA. The relevant assessment years with which we are concerned are 1982-83 to 1985-86.

We now take up the first question for consideration. The relevant section to be taken into consideration is Section 43 of the Act, which provides for depreciation. 'Plant' has been defined in Section 43(3). The definition of plant at the relevant time reads as follows:

> "Plant includes ships, vehicles, books, scientific apparatus and surgical equipment used for the purposes of the business of profession but does not include tea bushes or livestock."

Later on vide Finance Act of 2003 w.e.f. 1.4.2004 the following words were added at the end of the definition:-

"Or building or furniture and fittings."

In **Commissioner of Income-tax, Andhra Pradesh** vs. **Taj Mahal Hotel**, *1971 (Vol.82) ITR, page 44*, the Apex Court considered the question whether sanitary and pipeline fittings installed in a hotel fall within the definition of a plant. The apex Court held as follows:-

> "It cannot be denied that the business of a hotelier is carried on by adapting a building or premises in a suitable way to be used as a residential hotel where visitors come and stay and where there is arrangement for meals and other amenities are provided for their comfort and convenience. To have sanitary fittings, etc., in a bath room is one of the essential amenities or conveniences which are normally provided in any good hotel, in the present times. If the partitions in Jarrold's case could be treated as having been used for the purpose of the business of the trader, it is incomprehensible how sanitary fittings can be said to have no connection with the business of the hotelier. He can reasonably expect to get more custom and earn larger profit by charging higher rates for the use of rooms if the bath rooms have sanitary fittings and similar amenities. We are unable to see how the sanitary fittings in the bath rooms in a hotel will not be "plant" within Section 10(2) (vib) read with Section 10(2)(5) when it is quite clear that the intention of the legislature was to give it a wide meaning and that is why articles like books and surgical instruments were expressly included in the definition of "plant". In decided cases, the High Courts have rightly understood the meaning of the term "plant" in a wide sense. (See Commissioner of Income-tax v. Indian Turpentine and Rosin Co. Ltd.)

In **Commissioner of Income-tax, Gujarat-III vs. McGAW Ravindra Laboratories (India) Ltd. 1981 (Vol 132) ITR, page 401**, the question raised before the Gujarat High Court was whether the expenditure incurred

for cost of preparing and providing additional specifications for analysis and testing of raw materials and for providing production methods was a 'plant' and also whether roads were a 'plant'. Following the test laid down by the apex Court, the Gujarat High Court held that whereas the expenditure incurred on preparing and providing additional specification for analysis would be 'plant', the amount spent on construction of the road would not be a plant because it was not shown by the assessee that the road was of particular type so as to become part of the 'plant'.

Reliance has been placed by the revenue on a judgement of a Division Bench in **R.C. Chemical Industries vs. Commissioner of Income-tax, New Delhi, 1982 (Vol. 134) ITR, page 330,** of the Delhi High Court, wherein the Delhi High Court laid down certain principles to decide whether a building is a plant or not. These principles are as follows:-

> "1. The definition of "plant in S. 43(3) should be given a wide meaning as it is an inclusive definition.
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> 2. All buildings are not "plant" despite the dictionary meaning which includes building; but a building or structure is not per se to be excluded from the ambit of the expression "plant".
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> 3. If the concrete construction or building is used as the premises or setting in which the business is carried on in contradistinction to

> the fulfilling of the function of a plant, the building or construction or part thereof is not considered a plant. The true test is whether it is the means of "carrying on the business" or the location for so doing.
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> 4. In order, for a building or concrete structure, to qualify for inclusion in the term "plant", it must be established that it is impossible for the equipment to function without the particular type of structure.
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> 5. The particular apparatus or item must be used for carrying on the assessee's business and must not be his stock-in-trade. The matter has to be considered in the context of the particular business of the assessee, e.g., books are a lawyer's plant but a bookseller's stock-n-trade."

It is contended on behalf of the revenue that applying the aforesaid tests the building of poultry sheds cannot be considered to be a plant since the building with some modifications can easily be used as a shed for any other commercial purposes. One of the examples given is that it can be used as a shed to store grain.

A Division Bench of the Karnataka High Court considered the meaning of the word 'Plant' in **Pathange Poultry Farm vs. Commissioner of Income-tax, 1994 (Vol. 210) ITR, page 668**. The Division Bench of the Karnataka High Court was considering the question as to whether each of the small cages erected in a poultry shed should be treated as separate plant or part of a larger unit. The Court held that each of the cages was a plant but came to the conclusion that once each of the smaller

cages is combined to form the larger unit it looses its individuality and becomes a part of the bigger plant. The Court further held that after each small cage merges in the larger unit it cease to perform and becomes incapable of performing any function independent of the entire unit as a plant or machine. Each of the smaller cages was, therefore, treated to be no better than the individual components of an engine.

The apex Court again considered the question as to what meaning should be given to the word 'plant' in **Scientific Engineering House Pvt. Ltd. Vs. Commissioner of Income-tax, Andhra Pradesh, 1986 (Vol. 157) ITR, page 86**. It was held that even drawings, designs, charts, plans, processing data and other literature comprised in the documentation service constituted a book and therefore, fell within the definition of a plant. The Court held that purpose of rendering such documentation service by supply of the documents to the assessee was to enable it to undertake its trading activity. It was held that these documents had a vital function to perform in the manufacture of the instruments and, therefore, even though the documents did not perform any mechanical operations or process they still fall within the definition of 'plant'.

In **Commissioner of Income-tax vs. Dr. B.Venkata Rao, 2000 (Vol. 243) ITR, page 81**, the apex Court considered the question whether a building specifically designed and equipped to function as a nursing home should be treated as a plant. The apex Court held that in view of the fact that the assessee's nursing home is equipped to enable the sterilization of surgical instruments and that the building also housed an operation theatre, the same should be treated as a 'Plant'.

In **CIT, Trivandrum vs. Anand Theatres, (2000) 5 SCC page 393**, the question under consideration before the apex Court was whether a building housing a hotel or a theatre is a plant or not. The apex Court decided the question in favour of the revenue by holding as follows:-

> "In the result, it is held that the building used for running of a hotel or carrying on cinema business cannot be held to be a plant because :
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> (1) The scheme of Section 32 as discussed above, clearly envisages separate depreciation for a building, machinery and plant, furniture and fittings etc. The word 'plant' is given inclusive meaning under Section 43(3) which nowhere includes buildings. The Rules prescribing the rates of depreciation specifically provide grant of depreciation on buildings furniture and fittings machinery and plant and ships. Machinery and plant includes cinematograph films and other items and the building is further given meaning to include roads, bridges, culverts, wells and tube wells.

(2) In the case of Taj Mahal Hotel, (AIR 1972 SC 168 : 1972 Tax LR 54) (supra) this Court has observed that business of a hotelier is carried on by adapting building or premises in suitable way. Meaning thereby building for a hotel is not apparatus or adjunct for running of a hotel. The Court did not proceed to hold that a building in which the hotel was run was itself a plant, otherwise the Court would not have gone into the question whether the sanitary fittings used in bath room was plant.

(3) For a building used for a hotel, specific provision is made granting additional depreciation under Section 32(1)(v) of the Act.

(4) Barclay, Curle and Co.'s case, (1969 (1) WLR 675) decided by the House of Lords pertains to a dry dock yard which itself was functioning as a plant that is to say, structure for the plant was constructed to that dry dock can operate. It operated as an essential part in the operations which took place in getting a ship into the dock, holding it securely and then returning it to the river. The dock as a complete unit contained a large amount of equipment without which the dry dock could not perform its function.

(5) Even in England, Courts have repeatedly held that the meaning to the word 'plant' given in various decisions is artificial and imprecise in application, that is to use the words of Lord Buckley, "it is now beyond doubt that the word 'plant' is used in the relevant section in an artificial and largely Judge-made sense." Lord Wilberforce commented by stating that "no ordinary man, literate or semi-literate, would think that a horse, a swimming pool, moveable partitions, or even a dry-dock was plant."

(6) For the hotel building and hospital in the case of Carr v. Sayer, (65 Tax Cas 15) (supra) it has been observed that a hotel building remains a building even when constructed to a luxury specification and similarly, a hospital building for infectious diseases which might

> require a special layout and other features also remains a premises and is not plant.
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> It is to be added that all these decisions are based upon the interpretation of the phrase 'machinery or plant' under Section 41 of the Finance Act, 1971 which was applicable and there appears no such distinction for grant of allowance on different heads as provided under Section 32 of the Income-tax Act.
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> (7) To differentiate a building for grant of additional depreciation by holding it to be a "plant" in one case where the building is specially designed and constructed with some special features to attract the customers and a building not so constructed but used for the same purpose. Namely, as a hotel or theatre would be unreasonable. “

It would be pertinent to mention that this decision was rendered by a Bench of two judges, which distinguished the earlier judgement given in **Dr. B.Venkata Rao** case, supra, which was also rendered by a Bench of two judges.

However, a three Judge Bench of the apex Court in **Commissioner of Income-tax vs. Karnataka Power Corporation, 2001 (Vol. 247) ITR, page 268**, again considered the question whether a building can be treated as a plant or not. The Court held as follows:-

> “It is difficult to read the judgement in the case of Anand Theatres (2000) 244 ITR 192 (SC) so broadly. The question before the court was whether a building that was used as a hotel or a cinema theatre could be given depreciation on the basis that it was a “plant” and it was in relation to that question that the

> court considered a host of authorities of this country and England and came to the conclusion that a building which was used as a hotel or a cinema theatre could not be given depreciation on the basis that it was a plant. We must add that the Court said (page 225): "To differentiate a building for grant of additional depreciation by holding it to be a 'plant' in one case where a building is specially designed and constructed with some special features to attract the customers and the building not so constructed but used for the same purpose, namely, as a hotel or theatre would be unreasonable." This observation, is in our view, limited to buildings that are used for the purposes of hotels or cinema theatres and will not always apply otherwise. The question, basically, is a question of fact, and where it is found as a fact that a building has been so planned and constructed as to serve an assessee's special technical requirements, it will qualify to be treated as a plant for the purposes of investment allowance."

In **Nowrangroy Metals Pvt. Ltd. Vs. Joint Commissioner of Income-tax (Assessment) 2003 (Vol 262) ITR, page 231**, the Division Bench of the Gauhati High Court held that a mill building specially constructed for the purpose of housing a mill is a 'plant within the meaning of Sections 32, 43(3).

In **Commissioner of Income-tax vs. Victory Aqua Farm Ltd. 2004 (vol. 271) ITR, page 530**, a Bench of the Kerala High Court came to the conclusion that specially designed ponds in which prawns were grown are plant. A Division Bench of the Gujarat High Court in **Commissioner of Income-tax vs. Amol**

Dicalite Ltd. , 2006 (vol.286) ITR page 648, came to the conclusion that an ore shed performs the function of plant and is an integral part of the plant.

The line of demarcation between what is a 'plant' or not is a very thin one. Each case will have to be decided with reference to the particular facts of the case. It, however, needs to be noted that the definition of 'plant' in Section 43(3) is not an exhaustive definition. It is only inclusive in nature. Therefore, there is a wide scope for including in the definition many items. It is clear that the legislature by including, ships, vehicles, and books in the definition of plant, had widened the scope of the word 'plant'. As noted above, now the legislature has stepped in and specifically excluded buildings from the definition of the word 'plant'. This itself indicates that prior to the exclusion with effect from 1.4.2004, buildings if specifically constructed and falling within the guidelines of the various authorities referred to here-in-above could be treated as 'plant'. The various authorities referred to above also indicate that a very wide amplitude has been given to term 'plant'. The definition of 'plant' engulfs within its ambit many diverse subjects, such as, ships sailing on the high seas, books used by lawyers or engineers and scalpels used by doctors.

In the present case, the ITAT, on the basis of the material placed before it came to the conclusion that the buildings of the poultry sheds had been specifically designed with a view to protect the birds from disease. They had been designed to ensure proper lighting and circulation of air; proper and scientific feeding arrangement; proper water system; proper arrangement for collection of manure and droppings; proper arrangement for medication and vaccination; and a right environment conducive for laying of eggs by the birds. These buildings had been designed in a manner so as to protect the birds and increase their productivity. The argument made on behalf of the revenue that the building can be used with certain modification for certain other purposes cannot be accepted. It is how the building is designed which is the main factor which is to be taken into consideration. The law is clear that if it is found that the building has been designed specifically to further the cause of manufacture or production then the same is a plant. Applying the aforesaid tests, we hold that the poultry sheds are plant within the meaning of Section 243, as it then stood.

As far as the second question is concerned that need not delay us for long. It is totally covered by a judgement of the apex Court rendered in **South India**

Viscose Ltd. Vs. Commissioner of Income-tax, 1997, Vol. 227 ITR, page 286. The apex Court in this judgement held as follows:-

> "On a proper construction of the provisions contained in Part I to Appendix I to the Rules relating to extra shift depreciation allowance it must be held that for the purpose of claiming the said allowance the assessee must establish that the concern had worked double shift or triple shift and if he succeeds in establishing that the concern had actually worked double shift or triple shift on particular days in the previous year, extra shift depreciation allowance would be allowable in accordance with the formula laid down in the said provision on the various items of machinery or plant except the items against which the letters N.E.S.A are inscribed in sub-items (ii) of the Table in Part I of Appendix I as well as the items of machinery and plant expressly specified to which the general rate of depreciation of 10 percent was applicable. Except these excluded items the extra shift depreciation allowance would be allowable on all items of machinery and plant on which normal depreciation is allowance and has been allowed."

Thereafter, the apex Court on consideration of the entire law went on to hold thus:-

> "For the reasons aforementioned, it must be held that extra shift allowance had to be calculated on the basis of number of days during which the concern had actually worked double shift or triple shift and the said allowance was not required to be calculated on the basis of the number of days a particular item of machinery or plant had worked double shit or triple shift."

It is, therefore, absolutely clear that extra shift allowance has to be calculated not in respect of any

particular item or machinery which has been used for double shift or triple shift. If it is shown that any portion of the plant has worked extra shift then the benefit is available in respect of the entire plant except the items of machinery or plant against which the letters S.E.S.A. are inscribed in sub-section (ii) of Table in Part I of Appendix-I or those which have been specifically excluded from the grant of extra shift depreciation allowance. Therefore, there is no error in the order of the learned Tribunal.

Keeping in view the aforesaid discussion, both the questions are decided against the revenue and in favour of the assessee. The Registrar General of this Court is directed to send the copy of this judgement to the Income tax appellate tribunal, Chandigarh Bench.

(Deepak Gupta), J.

24th June, 2008 **(Kuldip Singh), J.**

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