Maharana Mills P. Ltd.

Vs

Income-Tax Appellate Tribunal, Ahmedabad, and Others.

Civil Appeal No. 612 of 1975

(CJI R. S. Pathak, M. H. Kania JJ)

03.05.1989

JUDGMENT

M. H. KANIA J. –

1. This is an appeal from the judgment of a Division Bench of the High Court of Gujarat in Special Civil Application No. 1797 of 1972 on a certificate granted under article 133(1) of the Constitution of India. The relevant facts are as follows :

> The assessee is a private limited company and carries on the business of manufacturing and selling textiles at Porbundar in Saurashtra in the Gujarat State. Before, 1948, Porbundar was part of Princely State of that name. No income-tax was levied by the erstwhile Porbundar State prior to 1948. In 1948, there was a merger of several Princely States and as a result of the merger, the State of Saurashtra was formed. No income-tax was levied by the State of Saurashtra till 1949 when it promulgated the Saurashtra Income-tax Ordinance. Under that Ordinance, provision was made for the grant of depreciation allowance based on the written down value. The said Ordinance defined "written down value" as follows :
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> "Written down value" means :
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> (a) in case of assets acquired in the previous year, the actual cost to the assessee; and
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> (b) in the case of assets acquired before the previous year, the actual cost to the assessee less all depreciation actually allowed to him under the Ordinance or allowed under any act repealed thereby or which would have been allowed to him if the Indian Income-tax Act, 1922, was in force in the past."

On January 26, 1950, the State of Saurashtra became a part of the Union of India as a Part B State. The Indian Income-tax Act, 1922, became applicable to the State of Saurashtra from April 1, 1950, under the provisions of the Finance Act, 1950. By section 13 of the Finance Act of 1950 which provides for repeals and savings, the Saurashtra Income-tax Ordinance was repealed. Section 12 of that Act provided for the removal of difficulties as follows ([1950] 18 ITR (St.) 90) :

> "If any difficulty arises in giving effect to the provisions of any of the Acts, rules or orders extended by section 3 or section 11 to any State or merged territory, the Central Government may, by order, make such provision, or give such direction, as appears to it to be necessary for removing the difficulty."

In exercise of the powers conferred upon it by section 12 of the Finance Act, 1950, the Central Government issued an order known as the Taxation Laws (Part B States) (Removal of Difficulties) Order, 1950. Clause 2 of the Order of 1950 reads as follows ([1951] 19 ITR (St..) 10) :

> "Computationation of aggregate depreciation allowance and the written decided onwn value. - In making any assessment under the Indian Income-tax Act, 1922, all depreciation actually allowed under any laws or rules of a Part B State relating to income-tax and super-tax or any law relating to tax on profits of business, shall be taken into account in computing the aggregate depreciation allowance referred to in sub-clause (c) of the proviso to caluse (vi) of sub-section (2) and the written down value under clause (b) of sub-section (5) of section 10 of the said Act :
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> Provided that wherein respect of any asset, depreciation has been allowed for any year both in the assessment made in the Part B State and in the taxable territories, the greater of the two sums allowed shall only be taken into account."

This Order was made by the Central Government on December 2, 1950. Subsequently, on March 9, 1953, in exercise of the powers conferred upon it by section 60A of the Indian Income-tax Act, 1922, an Explanation was added by the Central Government to the above clause 2 of the order of 1950 with effect from that date and that Explanation was in the following terms ([1953] 23 ITR (St.) 67) :

> "For the purposes of this paragraph, the expression 'all depreciation actually allowed under any laws or rules of a Part B State' means and shall be deemed to have always meant the aggregate allowance for depreciation taken into account in computing the written down value under any laws or rules of a Part B State or carried forward under the said laws or rules." In CIT v. D. B. R. Mills Ltd. [1956] 29 ITR 210, the Hyderabad High Court held that this Explanation was ultra vires the pwoers of the Central Government under section 60A of the Indian Income-tax Act, 1922. After the said decision of the High Court, the Central Government issued a ntofication on May 8, 1956, in exercise of the powers conferred upon it by section 12 of the Finance Act, 1950, and under this notification an Explanation in identical terms as the earlier Explanation inserted by an order made under section 60A of the Indian Income-tax Act, 1922, was added to clause 2 of the Removal of Difficulties Order, 1950. As far as the appellant-assessee is concerned, it was assessed under the Indian Income-tax Act from 1940- 41 in respect of the income arising or deemed to arise in British India from 1940-41 onwards. For these years, the income of the assessee was computed on receipt basis, but in calculating the world income, depreciation was taken into consideration for arriving at the income outside British India. The assessee was also assessed for the assessment year 1949-50 under the Saurashtra Income-tax Ordinance, 1949. From the assessment year 1950-51 onwards, the assessee was assessed under the Indian Income-tax Act, 1922 (referred to hereinafter as "the Indian Income-tax Act"). The assessment years with which we are concerned are the assessment years 1957-58, 1958-59 and 1959-60, the corresponding previous years being the calendar years 1956, 1957 and 1958, respectively. It is the case of the assessee that, during the course of the assessment of the assessee's income under the Act of 1922, depreciation was allowed for the assessment year 1950-51 and thereafter on the original cost of the assets as reduced by the depreciation allowance given under the Saurashtra Income-tax Ordinance, 1949. The respective written

down values for the assessment years 1951-52 and 1952-53 were fixed on the basis of the written down value for the assessment year 1950-51. However, subsequently, the Income-tax Officer concerned, having jurisdiction over the case of the petitioner, rectified the calculations of depreciation allowance by further reducing the written down value of the assets of the assessee by adopting the procedure which has been set out in paragraph 7 of the petition filed by the assessee. What was done by the Income-tax Officer was that the written down value taken for the assessment year 1940-41 by the Income-Tax Officer, Bombay, was taken as the starting point. From this written down value, the depreciation that was actually allowed to the assessee in respect of the assessment years 1940-41 to 1944-45 was deducted. For the assessment years 1945-46 to 1948-49, the written down value was calculated after calculating the depreciation allowance which would be allowed under the Rules. For the assessment year 1949-50, the depreciation allowance as calculated under the Saurashtra Income-tax Ordinance, 1949, was deducted. For the assessment years 1950-51 to 1952-53, the depreciation allowance actually deducted under the assessment orders passed under the Indian Income-tax Act was calculated and for the assessment year 1953-54, the depreciation allowance was calculated under rule 8 of the Indian Income-tax Rules, 1922, made under the Indian Income-tax Act. For the assessment years 1954-55 to 1956-57, depreciation was calculated on the basis of the above recitification order. The contention of the assessee is that the depreciation for the previous years should have been calculated only on the basis of clause 2 of the Taxation Laws (Part B States) (Removal of Difficulties) Order, 1950, which provided for computation of the aggregate depreciation allowance on the basis of the deduction which was actually allowed under the provisions of the Saurashtra Income-tax Ordinance, 1949. Regarding the Explanation which was added as set out earlier, the contention of the assessee was that it was ultra vires the powers of the Central Government as it was not necessary for the removal of any difficulty. This contention of the assessee was rejected by the income-tax authorities as well as by the Income-tax Appellate Tribunal. For the assessment years 1957-58 and 1959-60, the assessee again contended before the income-tax authorities and the Tribunal that the Explanation to clause 2 as notified in 1956 was ultra vires the powers of the Central Government. It was contended by the assessee before the Tribunal that the decision of this court in CIT v. Dewan Bahadur Ramgopal Mills Ltd. [1961] 41 ITR 280; [1961] 2 SCR 318, which upheld the validity of the Explanation, was no longer good law in view of the decision of this court in Straw Products Ltd. v. ITO [1968] 68 ITR 227. The Contention of the assessee was rejected by the Tribunal by its order dated April 16, 1969. From this decision of the Tribunal, at the instance of the assessee, a reference was made to the Gujarat High Court in which the following question was raised :

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the depreciation allowable and not 'actually allowed' under the Saurashtra Income-tax Ordinance, 1949, should be taken into account in computing the aggregate depreciation allowance and written down value under section 10(2)(vi) of the Indian Income-tax Act, 1922 ?"

This reference was numbered as Reference No. 45 of 1970. On August 17, 1972, the High Court held that in its advisory jurisdiction under the Income-tax Act, it could not go into the question of the vires of the said Explanation and answered the question against the assessee. Thereafter, the assessee filed Special Civil Application No. 1797 of 1972 from which this appeal arises. In this

special Civil Application, the vires of the Explanation added by the Central Government by its notification dated by 8, 1956, in exercise of the pwoers under section 12 of the Finance Act of 1950 as well as the assessments made on the assessee for the assessment years 1957-58 to 1959-60 were challenged. The Division Bench of the Gujarat High Court, in its impugned judgment, pointed out that the decision of this court in CIT v. Dewan Bahadur Ramgopal Mills Ltd. [1961] 41 ITR 280 had upheld the validity of the said Explanation. The Gujarat High Court noted that the decision of this court in Straw Products Ltd. v. ITO [1968] 68 ITR 227, arose from the merged State of Bhopal. Some of the arguments which did not find favour with this court in the case of CIT v. Dewan Bahadur Ramgopal Mills Ltd. [1961] 41 ITR 280 were acdepted by a Bench of seven learned judges of this court in the case of Straw Products [1968] 68 ITR 227. The Gujarat High Court pointed out that in its decision in the case of Straw Products [1968] 68 ITR 227 (SC), this court had considered the decision in the case of Dewan Bahadur Ramgopal Mills Ltd. [1961] 41 ITR 280 (SC) and explained that decision by stating that the Supreme Court was satisfied that, on the facts of that case, a difficulty had arisen and it was for removing that difficulty that the Order of 1956 was issued. The Division Bench of the Gujarat High Court considered the decision of this court in Dewan Bahadur Ramgopal Mills Ltd. [1961] 41 ITR 280 (SC) as binding and, following the same, dismissed the special civil application filed by the assessee.

Mr. Salve made two submissions before us. The first submission made by him was the same as made on behalf of the assessee before the High court, namely, that there was no difficulty which had arisen in giving effect to the provisions of the Indian Income-tax Act in the State of Saurashtra and hence the pre-condition on which the Central Government was authorised to make an order under the Removal of Difficulties Order and add the Explanation had never come into existence and hence adding of the Explanation was without any authority of law and invalid and of no legal effect. The next submission urged by Mr. Salve was that it is the fundamental scheme of the Indian Income-tax Act that, generally speaking, almost the entire cost of a capital asset used for purposes of the business or profession should be allowed to be written off by way of depreciation. This could be done in more than one way. It could be done by allowing a fixed percentage of the actual cost to be deducted as depreciation allowance every year till the entire cost is written off. This is known as the straight line method. The other is the method of calculating the depreciation on the basis of written down value. Written down value would be determined by deducting a fixed percentage of the original cost of the asset in the assessment year relevant to the previous year in which the asset was acquired and thereafter giving the same percentage of the written down value determined in the footing of the original cost less the depreciation already allowed. Taking into account the definition of the term "written down value" contained in section 10, sub-section (5), of the Indian Income-tax Act, 1922, the basic scheme under the said act appears to be that, in determining the written down value for depreciation allowance, the taxing authority can deduct only such amounts as have been allowed earlier by way of deduction. It was submitted by him that this position was accepted in the decision of this court in Straw Products Ltd. v. ITO [1968] 68 ITR 227. In the present case, if the impugned Explanation was applied, the result would be that the written down value of the capital asset of the assessee acquired priot to 1949, would be determined by making deductions for depreciation allowance which was not actually allowed to the assessee during the assessment years 1945-46 to 1948-49. This result would follow from the manner in which the written down value was claculated under the Saurashtra Income-tax Ordinance of 1949. It was urged by him that in exercise of its delegated pwoers, it was not open to the Central Government to enact such Explanation. In order to examine this contention, it would be useful to bear in mind some of the provisions of the Indian Income-tax Act. In that Act, the charge of income-tax is in respect of "total income" of the previous year. The expression "total income", very briefly stated, is defined in clause (15) of section

2 as meaning the total amount of income, profits and gains computed in the manner laid down in the Act. Chapter III of the Act deals with the various heads of income chargeable to income-tax and section 10 deals with head of income in respect of the profits and gains of business, profession or vocation carried on by the assessee. Sub-section (2) of section 10 deals with the allowances which have to be made in the computation of the profits and gains from business, profession or vocation and clause (vi) of the said sub- section provides for depreciation. The relevant portion of clause (vi) ran as follows :

> "In respect of depreciation of such buildings, machinery, plant or furniture being the property of the assessee, a sum equivalent, where the assets are ships other than ships ordinarily plying on inland waters, to such percentage on the original cost thereof to the assessee as may in any case or class of cases be prescribed and in any other case, to such percentage on the written down value thereof as may in any case or class of cases be prescribed."

The expression "written down value" as used in sub-section (2) of section 10 of the Act has been defined in sub-section (5) of section 10. The relevant part of clause (b) of the said sub-section runs as follows :

> "in the case of assets acquired before the previous year, the actual cost to the assessee less all depreciation actually allowed to him under this Act, or any Act repealed thereby, or under executive orders issued when the Indian Income-tax Act, 1886 (II of 1886), was in force...
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> Provided that in case of building previously the property of the assessee and brought into use for the purposes of the business, profession or vocation after the 28th day of February, 1946, 'written down value' means the actual cost to the assessee reduced by an amount equal to the depreciation calculated at the rate in force on that date that would have been allowable had the building been used for the aforesaid purposes since the date of its acquisition by the assessee and had the provisions of this Act relating to the allowance for depreciation been in force on and from the date of acquision."

In CIT v. Dewan Bahadur Ramgopal Mills Ltd. [1961] 41 ITR 280 (SC), the very Explanation added by the notification dated May 8, 1956, which is challenged before us, came up for consideration before a Constitution Bench of this court.

The facts in that case were that prior to January 26, 1950, when the erstwhile State of Hyuderabad merged in the Union of India and became a Part B State, the respondent-company was assessed to income-tax under the Hyderabad Income-Tax Act, under which depreciation allowance was given to it on the basis of the written down value of its assets, such as buildings, machinery, plants, etc., in accordance with clause (c) of section 12(5) of that Act, which provided that in the case of assets acquired before the previous year and before the commencement of the Act, the written down value would be the actual cost to the assessee less (i) depreciation at the rates applicable to such assets calculated on the actual cost for the first year since acquisition and for the next year on the actual cost diminished by the depreciation allowance for one year and so on, for each year up to the commencement of that Act, and (ii) depreciation actually allowed to the assessee on such assets for each financial year after the commencement of the Act. After the merger of Hyderabad with the Union of India, by sections 3 and 13 of the Finance Act, 1950, the taxation laws in force in that

State were repealed and the Indian Income-tax Act, 1922, was extended to that area; and, in exercise of the powers conferred by section 12 of the Finance Act, 1950, the Central Government issued a notification dated December 2, 1950, called the Taxation Laws (Part B States) (Removal of Difficulties) Order, 1950. Paragraph 2 of the Order provided that (see [1951] 19 ITR (St.) 10) "in making any assessment under the Indian Income-tax Act, 1922, all depreciation actually allowed under any laws of rules of a Part B State.... shall be taken into account in computing the aggregate depreciation allowance referred to in sub-clause (c) of the provision to section 10(2)(vi) and the written down value under section 10(5)(b) of the said Act :

For the assessment year 1951-52, the respondent was assessed for the first timeunder the Indian Income-tax Act, and basing its claim on paragraph 2 of the aforesaid Order, it asked for depreciation allowance in respect of its assets by working out the value thereof at their inception and deducting therefrom such depreciation as was allowed for the three assessment years in which it was assessed under the Hyderabad Income-tax Act. By an order dated November 30, 1951, the Income-tax Officer disallowed the respondent's claim on the ground that it was against the principle inherent in granting depreciation allowance which must decrease from year to year. The matter was taken up to this court and while it was pending there, on May 8, 1956 (see [1956] 30 ITR (St.) 2), the Central Government issued a notification in exercise of its pwoers conferred on it by section 12 of the Finance Act, 1950, whereby an Explanation was added to the aforesaid paragraph 2 as follows ([1956] 30 ITR (St.) 2) :

> "For the purpose of this paragraph, the expression 'all depreciation actually allowed under any laws or rules of a Part B State' means and shall be deemed always to have meant the aggregate allowance for depreciation taken into account in computing the written down value under any laws or rules of a Part B State carried forward under the said laws or rules."

The respondent challenged the validity of the notification of 1956 and also its applicability to the present case on grounds (1) that it was ultra vires the powers conferred on the Central Government by section 12 of the Finance Act, 1950, (2) that in contravened article 14 of the Constitution, and (3) that, in any case, it could have no retrospective effect.

It was held by this court that the true scope and effect of section 12 of the Finance Act, 1950, was that it was for the Central Government to determine if any difficulty of the nature indicated in the section arises and then to make such order or give such direction, as appeared to it to be necessary to remove the difficulty, the Legislature having left the matter to the executive.

In the present case, a difficulty had arisen because if depreciation actually allowed under the Hyderabad Income-tax Act was taken into account in computing the aggregate depreciation allowance and the written down value, an anomalous result would follow, namely, depreciation allowance to be allowed to the assessee in the accounting year under the Indian Income-Tax Act would be more than what was allowed in previous years under the Hyderabad Income-tax Act. Consequently, the Central Government was within its power under section 12 in making the notification dated May 8, 1956.

It was also held that the notification of 1956 applied to all those to whom paragraph 2 of the Taxation Laws (Part B States) (Removal of Difficulties) Order, 1950, was applicable and created no unequal treatment of persons in like situation. Accordingly, the notification did not contravene article 14 of the Constitution. In the course of the leading judgment, S. K. Das J. set out the chain of

events which led to the notification dated May 8, 1956, under section 12 of the Finance Act, 1950, being issued which we have already set out earlier and went on to state as follows ([1961] 41 ITR 280, 287) :

> "The basic and normal scheme of depreciation under the Indian Income- tax Act is that it decreases every year, being a percentage of the written down value which in the first year is the actual cost and in succeeding years the actual cost less all depreciation actually allowed under the Income-tax Act or any Act repealed thereby, etc. The Hyderabad Income-tax Act not having been repealed by the Income-tax Act but by the Finance Act, 1950, there was a difficulty in allowing depreciation to an assessee in a Part B State in the first year of assessment under the Indian Income-tax Act. This difficulty was sought to be removed by paragraph 2 of the Removal of Difficulties Order, 1950. If, however, depreciation actually allowed under the Hyderabad Income-tax Act was taken into account in computing the aggregate depreciation allowance and the written down value in anomalous result would follow as in the present case, namely, depreciation allowance to be allowed to the assessee in the accounting year under the Indian Income-tax Act would be more than what was allowed in previous years under the Hyderabad Income-Tax Act. This would create a disparity and be against the scheme of the Indian Income-tax Act. It was, therefore, necessary to explain paragraph 2 of the Removal of Difficulties Order 1950, to assimilate or Harmonise the position regarding depreciation allowance, and the Explanation added in 1953 or 1956 was obviously intended to remove the difficulty arising out of that disparity or disharmony."

It is not disputed that, if this decision is to be followed, both the contentions urged by learned counsel, Mr. Salve, before us must be negatived. The decision clearly lays down that a difficulty had come into existence and the Central Government had, in exercise of the power delegated to it, issued the said notification in 1956 adding the said Explanation to resolve difficulty. The court took the view that, under the scheme of the Indian Income-tax Act, in respect of the assets acquired before the relevant previous year, depreciation is to be allowed on the bias of the original costless depreciation in respect of the earlier years, viz., the years intervening between the relevant previous year and the year of acquision. Where any tax on income was levied during any of these intevening years, the actual cost would have to be reduced by the depreciation actually allowed but in respect of such intervening years when there was no tax levied on income depreciation on a notional basis would have to be deducted from the actual cost of the asset. In deducting an amount on account of such notional depreciation, there seems to be nothing against the basic scheme of though Income-tax Act. These are the conclusions which flow from the said decision of this court in the case of Dewan Bahadur Ramgopal Mills Ltd. [1961] 41 ITR 280 (SC). The said decision has been rendered by a Bench comprising five learned judges of this court and must normally be regarded as binding upon us. The question, however, is whether the said decision needs to be reconsidered in view of two later decisions of this court which we shall presently discuss. The first of the said two decisions cited by Mr. Salve is that in the case of Madeva Upendra Sinai v. Union of India [1975] 98 ITR 209 (SC). The said decision has been rendered by a majority of four learned judges out of five comprising the Bench which decided the case. In that case, the challenge was to the validity of the second proviso to clause 2 of the Taxation Laws (Extension to Union Territories) (Removal of Difficulties) Order No. 2 of 1970, which was deemed to have come into force on April 1, 1963. In brief, this clause provided that in making nay assessment under the Indian Income-tax Act, 1922, all depreciation actually allowed under the local laws shall be taken into account in computing the written down value. The second proviso to that clause was as follows ([1975] 98 ITR 209, 221) :

> "Provided further that where in respect of any period, no depreciation was actually allowed under the local law or the depreciation actually allowed cannot be ascertained, depreciation in respect of that period shall be calculated at the rate for the time being in force under the Income-tax Act, 1961, or under the Indian Income-Tax Act, 1922.... and the depreciation so calculated shall be deemed to be the depreciation actually allowed under the local law."

The majority judgment took the view that the existence or arising of difficulty was the sine qua non for the exercise of the power under clause 7 of the Taxation Laws (Extension to Union Territories) Regulation, 1963. The "difficulty" contemplated by that clause had to be a difficulty arising "in giving effect to" the provisions of the Act, etc., and not a difficulty arising exercise the power under the clause only to the extent it was necessary for applying or giving effect to the Act, etc., and no further. The second proviso to clause 2 of the said Order of 1970 sought to raise the taxable income of the assessee inconsistently with the scheme of the Income-tax Act, and was ultra vires the pwoers of the Central Government under clause 7 of the 1963 regulation and the Revenue was not entitled to levy tax on the basis of the depreciation allowance computed in accordance with that proviso. It was further held that the said second proviso to clause 2 of the 1970 Order would, in the implementation of the Act, create difficulties rather than remove them. It was further held that the key word in clause (b) of section 43(6) of the Income-tax Act, 1961, is "actually". It is the antithesis of that which is merely speculative, theoretical or imaginary."Actually" cxontra-indicates a deeming construction of the word "allowed" which it qualifies. It cannot be stretched to mean "notionally allowed" or merely allowable on a notional basis in Straw Products Ltd. [1968] 68 ITR 227 (SC), a challenge was made to the validity of sub-clause (b) of the Explanation to paragraph 2 of the Taxation Laws (Merged States) (Removal of Difficulties) Order, 1949, inserted therein by the Taxation Laws (Merged States) (Removal of Difficulties) Amendment Order, 1962. It was held that the said sub-clause of the said Explanation was ultra vires the powers of the Central Government under section 6 of the Taxation Laws (Extension to Merged States and Amendment) Act, 1949, under which it was purported to be made, since no "difficulty" was proved to have arisen justifying the invocation of the power under section 6; and the Revenue authorities were not entitled to levy tax on the basis of depreciation allowance computed in accordance with sub-clause (b) of the said Explanation to paragraph 2 of the Order. It was held that the expression "depreciation actually allowed" connotes, under section 10(2)(vi) of the Indian Income-tax Act, 1922, under clause 2 of the Taxation Laws (Merged States) (Removal of Difficulties) Order, 1949, and the notification under section 60A of the Income-tax Act, depreciation taken into account in assessing the income of an assessee arising from carrying on business and does not mean depreciation merely allowable or applicable under the taxing provision (see [1968] 68 ITR 227 at p. 236). The court took the view that the exercise of the power under section 6 of the Taxation Laws (Extension to Merged States and Amendment) Act, 1949, to make provisions or to issue directions as may appear necessary to the Central Government is conditioned by the existence of a difficulty arising in giving effect to the provisions of any Act, rule or order extended by section 3 to the Merged States. The section does not make the arising of a difficulty a matter of subjective satisfaction of the Government : it is a condition precedent to the exercise of power, and existence of the condition, if challenged, must be established as an objective fact. It may be mentioned that the decision in the case of CIT v. Dewan Bahadur Ramgopal Mills Ltd. [1961] 41 ITR 280 (SC) was noticed and discussed in this judgment but it was pointed out that in that case the difficulty had arisen because as pointed out by the court in that case, but for the Explanation, a difficulty would have arisen in that the depreciation allowance allowed to assessee under the Indian Income-tax Act would have been more than the depreciation allowance under the Hyderabad Income-tax Act.

After giving our anxious consideration to the matter we find ourselves unable to accept the submissions of Mr. Salve, learned counsel for the assessee. As pointed out by us earlier, it was frankly conceded by leaned counsel that unless we took the view that the decision of this court in CIT v. Dewan Bahadur Ramgopal Mills Ltd. [1961] 41 ITR 280 (SC) was not good law or, at least, that it needed reconsideration by a larger Bench we must follow that decision and the appeal of the assessee must be dismissed. It is the undisputed position that the very provision which is challenged before us was earlier challenged before a Constitution Bench of this court in the aforementioned case and the challenge was negatived. The main plank of learned counsel's argument is that in the case of Straw Products Ltd. v. ITO [1968] 68 ITR 227 (SC), a view has been taken which is inconsistent with the view taken in CIT v. Dewan Bahadur Ramgopal Mills Ltd. [1961] 41 ITR 280 (SC). Now, in fact, we find that a Bench comprising of seven learned judges of this court in the case of Straw Products Ltd. [1968] 68 ITR 227 (SC) has considered the decision of this court in Dewan Bahadur Ramgopal Mills Ltd. [1961] 41 ITR 280 (SC) and has observed that the case could be distinguished because in that case there was a difficulty which had, in fact, arisen and hence, it was necessary to issue the Removal of Difficulties Order, 1956. The observations of this court in that case (at pages 237 and 238 of the aforesaid Report) only show that this court disapproved the interpretation given to the decision in the case of Dewan Bahadur Ramgopal Mills Ltd. [1961] 41 ITR 280 (SC) by the Madhya Pradesh High Court, namely, that it was a matter for the subjective satisfaction of the Government to decide whether a difficulty had arisen and it was not open to the court to investigate that question. it was pointed out that in Dewan Bahadur Ramgopal Mills Ltd [1961] 41 ITR 280 (SC), this court was satisfied that, in fact, a difficulty had arisen and that difficulty had to be removed and for removing the difficulty, the Order of 1956 was issued. On a fair reading of the decision in the case of Straw Products [1968] 68 ITR 227 (SC), along with the decision in the case of Dewan Bahadur Ramgopal Mills Ltd. [1961] 41 ITR 280 (SC), it appears to us that the view taken in Straw Products Ltd. [1968] 68 ITR 227 (SC), is that although it is for the Government to subjectively satisfy itself that a difficulty of the kind set out in those decisions has arisen before an order can be issued under the power to issue orders for removal of difficulties, that satisfaction is not conclusive, as suggested by the High Court of Madhya Pradesh, and it is the duty of the court concerned to examine for itself as to whether there was a reasonable basis for the Government to have come to such a conclusion. Anyway, although it is not for the court to determine for itself in the first instance whether such a difficulty, as comtemplated, had arisen, it is open to the court to see whether the Government had a sound basis to come to the conclusion that such a difficulty had arisen. The decision in the case of Straw Products Ltd. [1968] 68 ITR 227 (SC), therefore, in no way casts a doubt on the decision of this court in Dewan Bahadur Ramgopal Mills Ltd. [1961] 41 ITR 280 (SC). The other case relied upon by Mr. Salve, namely Madeva Upendra Sinai v. Union Of India [1975] 98 ITR 209 (SC) has cast no doubt whatever on the decision of this court in Dewan Bahadur Ramgopal Mills Ltd. [1961] 41 ITR 280 (SC), but the court there took the new that the existence of a difficulty was the sine qua non for the exercise of the power under clause 7 of the Taxation Laws (Extension to Union Territories) (Removal of Difficulties) Regulation, 1963.

It is not disputed that the decision of the Constitution Bench of this court in the case of Dewan Bahadur Ramgopal Mills Ltd. [1961] 41 ITR 280, is binding on us. In the light of what we have discussed earlier, we do not feel that it is necessary to direct this matter to be place before a larger Bench so that the decision in Dewan Bahadur Ramgopal Mills Ltd. [1961] 41 ITR 280 (SC), could be reconsidered. In fact, in case of Straw Products [1968] 68 ITR 227, a larger Bench of this court did consider that decision and came to the conclusion that, on the facts of that case, the decision was correct. In view of this, we fail to see how any useful purpose would be served by referring this

appeal to a larger Bench. Moreover, problems of the type which have arisen in these cases are not likely to recur hereafter except very rarely. In view of this, we would prefer to follow the decision in CIT v. Dewan Bahadur Ramgopal Mills Ltd. [1961] 41 ITR 280 (SC), and the appeal of the assessee must stand dismissed.

Even apart from what we have stated in the foregoing paragraph, we may point out that in the present case, the Saurashtra Income-Tax Ordinance was repealed by section 13 of the Finance Act, 1950, and not by any provision of the Indian Income-tax Act. As observed in the case of CIT v. Dewan Bahadur Ramgopal Mills Ltd. [1961] 41 ITR 280, 287 (SC), the basic and normal scheme of depreciation under the Indian Income-tax Act is that it decreases every year, being a percentage of the written down value which in the first year is the actual cost and in succeeding years actual cost less all depreciation actually allowed under the Indian Income-tax Act or any Act repealed thereby, etc. In that case, an anomalous situation arose because the Hyderabad Income- tax Act was not repealed by the Indian Income-tax Act but by the Finance Act, 1950, and hence, a difficulty arose in allowing depreciation to an assessee in a Part B State. In the present case also, the Saurashtra Income-tax Ordinance having been repealed not by the Indian Income-tax Act but by section 13 of the Finance Act 1950, a similar difficulty had come into existence, and hence we fail to see how it can be said that the Government had no good basis to come to the conclusion that a difficulty had, in fact, arisen as contemplated in the case of Dewan Bahadur Ramgopal Mills Ltd. [1961] 41 ITR 280 (SC).

In the result, the appeal fails and is dismissed. However, considering the facts and circumstances of the case, there will be no order as to costs.

Appeal Dismissed.

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