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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO. 421 OF 2015**

The Pr.Commissioner of Income-Tax-4 ... Appellant

vs.

M/s. Larsen and Toubro Ltd. ... Respondent

.....

Mr.Suresh Kumar for the Appellant.

Mr.J.D.Mistry, Senior Advocate a/w. Mr.A.K. Jasani for the Respondent

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CORAM : A.S. OKA & A.K. MENON, JJ.

DATE : 6th NOVEMBER, 2017

JUDGMENT (Per A. K. Menon)

1. In this appeal under section 260A of the Income Tax Act, 1961 being aggrieved by the order dated 27th August, 2014 in ITA/4771/Mum/2005 by which the revenue's appeal was dismissed in relation to assessment year 1997-98, the revenue is in appeal before us. Cross appeals were filed in the matter of orders passed under Section 143(3) read with Section 147. By a common order passed in appeals, the Tribunal allowed the appeal of the assessee in part and dismissed the appeal of the Revenue.

2. The assessee was aggrieved by reopening of the assessment under Section 147 as also disallowance of a claim of depreciation in respect of its clinker/cement factory at Gujarat. The assessee had claimed depreciation in

respect of the machinery installed and put to use in the production of cement. A trial run was conducted for one day and the quantity produced was small. The assessee was apparently unable to establish that after the trial run, commercial production of clinker was initiated within reasonable time. According to the Assessing Officer, trial runs continued till October, 1997 before a reasonable quantity of cement was produced.

3. According to the Assessing Officer, use of machinery for trial production was not for the purpose of business and therefore depreciation could not be allowed. The Assessing Officer disallowed the claim for depreciation on the ground that the plant was only used for trial runs. The Assessing Officer had found that the trial runs continued till October 1997 and this fact had not been controverted by the appellant nor had the appellant produced any evidence to show as to when exactly commercial production commenced.

4. In appeal, the Commissioner of Income Tax (Appeals) confirmed the disallowance finding that there was a long gap between the first trial run, subsequent trial runs and commercial production. The CIT (Appeals) confirmed the disallowance by concluding that the user of the assets during the year should be actual, effective and real user in the commercial sense and that some technical snag had developed in the plant and therefore the trial run was stopped.

5. The Tribunal found that there was no merit in the action of the authorities below in denying the claim of depreciation and the Tribunal relied upon an order of this Court in *CIT vs. Industrial Solvents & Chemicals Pvt. Ltd., (Mumbai)*¹ In the facts of that case it was found that in respect of assessment year 1962-63, construction of the Assessee's building and erection of the plant and machinery were completed by end of December, 1960 / January, 1961. The plant was initially charged with raw material in February 1961, but the finished product was not in marketable state. The question before the Court was, on the aforesaid facts whether the assessee could have "set up" business by August, 1961 and therefore entitled to expenses incurred thereafter, as expenses incurred in the course of business. The Assessing Officer found that the erection of the plant was completed in the month of March 1961 and trials commenced which continued upto September, 1961 and expenses claimed came to be disallowed on the basis that this was expenditure only on experiments preparatory to the commencement of the business and not for carrying on the business. This Court thereafter considering various decisions held in favour of the assessee came to the conclusion that by installation and erection of machinery in that case the assessee had set up his business by 19th August, 1961 was entitled to the expenses incurred thereafter as expenses incurred in the course of its business.

1 119 ITR 615

6. In the present case the Tribunal, after having considered the orders passed by the Assessing Officer and the CIT (Appeals) was of the view that there was no merit in the denial of depreciation in respect of plant and machinery and that even if the same was to be used for trial production business of manufacture of 'Clinker', the assessee would be entitled to claim depreciation. The Tribunal also relied upon the decision of the Gujarat High Court in *ACIT vs Ashima Syntex*² which held that even trial production would fall within the ambit of “used for the purpose of business” and once used the assessee could not be deprived of the benefit of a claim for depreciation merely on the basis that the period of use was very short.

7. The Tribunal followed the decision of this Court in *Industrial Solvents (supra)* and held that once the plant commenced operations and a reasonable quantity of product is produced, the business is set up even if product was sub-standard and not marketable. In the case of *Industrial Solvents (supra)*, the Company was new and depreciation was allowed. Following the aforesaid decision the Tribunal directed the Assessing Officer to verify the period of use and restrict depreciation to 50% if the Assessing Officer found that the machinery was used for less than 180 days during the year under consideration.

8. In facts of the present case, we find that the issue is no longer res integra in view of the decision of *Industrial Solvents & Chemicals (P) Ltd.*

2 251 ITR 133 (GUJ)

(*supra*). We have no hesitation in holding that the Order of the Tribunal cannot be faulted inasmuch as the jurisdictional High Court has already held that once plant commences operation and even if product is substantial and not marketable, the business can said to have been set up. Mere breakdown of machinery or technical snags that may have developed after the trial run which had interrupted the continuation of further production for a period of time cannot be held ground to deprive the assessee of the benefit of depreciation claimed.

9. Other question proposed by the Revenue is in relation to computation of book profit under Section 115 JA of the Income Tax Act. The Assessing Officer had held that the provision is toward unexpected liability and therefore was required to be added to the book profit under Section 115JA of the Income Tax Act. The CIT appeals deleted the addition. It was found that item in question was not an item of profit and loss account but was an item of the Trading Account. This aspect we find had been called into question in Income Tax Appeal (L) No. 2010 of 2006 in respect of year 1988-89 and which has been dismissed albeit on the ground of limitation. In the result, in our view no substantial questions of law arise for our consideration. Hence the appeal is not entertained. The appeal is accordingly dismissed. No costs.

(A.K. MENON, J.)

(A.S. OKA, J.)