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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.07.2019

CORAM

THE HON'BLE MR.JUSTICE T.S.SIVAGNANAM
AND
THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Tax Case (Appeal) Nos.655, 656 and 657 of 2009

M/s.Tenzing Match Works
Boopathy Buildings, Virudhunagar Road
Sivakasi, PAN : AABFT5787A ... Appellant in all the appeals

- Vs -

- 1.The Deputy Commissioner of Income Tax
Circle I, Virudhunagar ..Respondent in TCA No.655 of 2009
2. The Assistant Commissioner of Income Tax,
Circle I, Virudhunagar.
..Respondent in TCA No.656 & 657 of 2009

Prayer : Appeals under Section 260A of the Income Tax Act, 1961, against the common order dated 27.01.2009 passed by the Income Tax Appellate Tribunal "B" Bench, Chennai in I.T.A.Nos.462/MDS/2008, 474/MDS/2008 and Cross Objection No.59/MDS/2008 in ITA No.474/MDS/2008 for the assessment year 2005-2006, preferred against the order passed by the Commissioner of Income Tax(Appeals)-II, Madurai dated 27.12.2007 for the assessment year 2005-2006 against the order dated 21.09.2007 passed by the Deputy Commissioner of Income Tax, Circle I, Virudhunagar under section 143(3) of the Income Tax Act, 1961 Madurai PANGIR No.AABFT5787A

For Appellant : M/s.A.S.Sriraman

For Respondent : Ms.S.Premalatha, Junior Standing Counsel
for M/s.M.Swaminathan

C O M M O N J U D G M E N T
(Judgment of the Court was delivered by T.S.SIVAGNANAM, J.)

These appeals by the assessee is filed under Section 26A of the Income Tax Act, 1961 as directed against the common order dated 27.01.2019 passed by the Income Tax Appellate Tribunal,



Chennai "B" Bench in I.T.A.Nos.462/MDS/2008, 474/MDS/2008 and Cross Objection No.59/MDS/2008 for the assessment year 2005-06. The appeals have been admitted by the order dated 27.10.2000 on the following substantial questions of law.

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"1. Whether the Appellate Tribunal is correct in law in rejecting the claim of depreciation on the wind mill even though the said wind mill was commissioned as well as started generation of electricity based on the materials placed on record?

2. Whether the Appellate Tribunal is correct in law in sustaining the action of the respondent in rejecting the claim of additional depreciation as a consequence to the rejection of depreciation on the facts and in the circumstances of the case?"

2. The assessee is a partnership firm engaged in the business of manufacture of safety matches; it filed its return of income for the Assessment Year under consideration 2005-06 on 31.03.2005, admitting a total income of Rs.23,47,370/-. The return was processed under Section 143(1) of the Act and subsequently, the case was selected for scrutiny and after discussion, the assessment was completed under Section 143(3) of the Act, by an order dated 21.09.2007. Two issues arose in the assessment proceedings, which were decided against the assessee viz., the claim for depreciation in respect of one wind mill established by the assessee and the claim for additional depreciation on the very same wind mill. The Assessing Officer was of the view that the assessee did not generate the electricity before the end of the assessment year ie., on 31.03.2005 and what was generated was less than one unit and the actual generation took place on 31.03.2004 and therefore, the wind mill cannot be stated to have been used by the assessee for the purpose of business. Since the claim for depreciation was rejected, the claim for additional depreciation was also rejected. The assessee preferred appeal before the Commissioner of Income Tax (Appeals)-II, Madurai [hereinafter referred to as CIT (A)].

3. The CIT(A), by an order dated 27.12.2007 allowed the appeal in part viz., that the assessee is entitled for the claim for depreciation, but rejected the claim for additional depreciation, by relying upon the decision of the Chennai Tribunal in I.T.A.Nos.307/Mds/2000 dated 06.09.2005. The assessee filed an appeal as against that portion of the order, which was decided in favour of the revenue and the Revenue filed an appeal against that portion of the order, which was decided in favour of the assessee, and the assessee also filed cross objection. The tribunal, by the impugned order,



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rejected the case of the assessee in its entirety ie., it rejected the claim for depreciation and held that if the claim for depreciation has been rejected, the claim for additional depreciation should also be rejected. This is how the assessee is before us by way of these appeals.

4. The answer to the substantial question of law No.1 hinges upon the interpretation to be given to Section 32 (1) (iia). The said provision states that in respect of depreciation of machinery or plant (other than ships and air crafts) owned wholly or partly by the assessee and used for the purpose of business, deduction shall be allowed. The tribunal, by interpreting the term "used", relied upon the decision in the case of "The Deputy CIT -Vs- Yellamma Dasappa Hospital (2007 290 ITR 353 Kar), "CIT -Vs- Maps Tours and Travels (2003 260 ITR 655 Mad), "Dineshkumar Gulabchand Agrawal -Vs- CIT (2004) 267 ITR 768 (Bom) and "B.Malini and Co., -Vs- CIT (1995) 214 ITR 192 (Bom).

5. Before we consider the applicability of these decisions, we need to take note of the following facts, which is very relevant in the instant case. As mentioned above, the assessee established a wind mill and it is the case of the assessee that electricity generation commenced from 31.03.2005. The competent authority to certify this is the Tamil Nadu Electricity Board, from whom the assessee obtained a certificate dated 02.04.2005, from the Executive Engineer (M&O) (Wind Mill), Palladam. This certificate shows that the assessee had effected supply of electricity to the Board on 31.03.2005. Further, statement was recorded from the Executive Engineer of the Board under Section 133(b) of the Act, wherein he appears to have stated, generation not started but work is over. Armed with this statement, the assessing officer stated that production of electricity as on 31.3.2005 was less than one unit and at best could be treated as trial production and the assessee having not produced electricity before 31.03.2005, cannot be stated to have put the wind mill to use for the purpose of business. It is not in dispute that the certificate issued by the competent authority states that electricity was generated on 31.3.2005, however the amount of electricity which was generated was only 0.080 units. This, according to the assessing officer, is insufficient as it can be considered only as a trial run, but actual generation of electricity took place much after 31.3.2005. The Tribunal concurred with the findings of the Assessing Officer, but had referred to the aforementioned four decisions. In our considered opinion, all the four decisions cannot be applied to the facts of the present case.



6. In the case of "B.Malini and Co., -Vs- CIT (1995) 214 ITR 192 (Bom), there was a gap of one clear previous year between installation of machinery and its usage and hence it was held that no depreciation can be claimed. In "The Deputy CIT -Vs- Yellamma Dasappa Hospital (2007 290 ITR 353 Kar), the Court found that the machinery has not been actually put to use. In "Dineshkumar Gulabchand Agrawal -Vs- CIT (2004) 267 ITR 768 (Bom), the assessee claimed depreciation upon the machinery being kept ready for use and not put to use. In "CIT -Vs- Maps Tours and Travels (2003 260 ITR 655 Mad), no evidence was placed by the assessee before the Tribunal that the cars, which were purchased by them were used. Thus, we find that all the four decisions are not applicable to the present case and are on different set of facts and figures.

7. The case of the assessee before us strengthened in the light of the following decisions. In "Principal CIT -Vs- Larsen & Toubro Ltd., 403 ITR 248 (Bom)" , the machinery for trial production was held to qualify for deduction as it would amount to using the machinery for the purpose of business. In CIT -Vs- Escorts Tractors Ltd 56 Taxmann.com 333(Delhi)", the plant and machinery kept ready for use was held to be enough to grant depreciation. In "CIT -Vs- Southern Petrochemical Industries Corporation Ltd 311 ITR 202 (Mad)", the claim for depreciation on spare parts, which were stand-by items, was held permissible. In "CIT -Vs- Geo Tech Construction 244 ITR 452 (Kerala)", it was held that an asset can be said to be in use when it is kept ready for use. It is beneficial to refer to paragraph 5 of the said judgment, which reads as follows.

"5. Section 32 of the Act deals with depreciation. There is no requirement that the assets should be used for the whole of the assessment year in question. The term used in Section 32(1) is "owned by assessee", but that does not bring in a requirement that the assessee should have remained the owner of the asset in question for the entire previous year in question. The object of the Legislature, in granting depreciation allowance under Section 32 of the Act, is to give due allowance to the assessee for wear and tear suffered by the asset used by him in his business so that the net income (total income) is duly arrived at. There is no factual dispute that the assets in question were owned by the assessee. In Machinery Manufacturers Cororation Ltd. v. CIT[1957] 31 ITR 203 (Bom), it was observed that the expression "used" in Section 10(2)(vi) of the Indian Income-tax Act, 1922 (hereinafter referred to as "the old Act") corresponding to Section 32 of the Act has to be given a wider meaning. The expression includes



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passive as well as active user. In CIT v. Dalmia Cement Ltd. [1945] 13 ITR 415 (Patna) and CIT v. Viswanath Bhaskar Sathe [1937] 5 ITR 621 (Bom), it was observed that depreciation might be allowed in certain cases even though the machinery was not in use or was kept idle. The question whether the word "used" would include both passive as well as active user was left open by the apex court in Liquidators of Pursora Ltd. v. CIT [1954] 25 ITR 265. The words "used for the purposes of the business" are capable of a larger and a narrower interpretation. If the expression "used" is construed strictly, it can be taken as connoting or requiring the active employment or the actual working of a machinery, plant or building in the business. On the other hand, the wider meaning will include not only cases where the machinery, plant, etc., are actively employed but also cases where there is, what may be described as a passive user of the same in the business. An asset can be said to be in use when it is kept ready for use. "

8. In "CIT -Vs- Refrigeration & Allied Industries Ltd 323 ITR 672", the machineries were kept under good working condition so that it could be used at any moment, all expenses relating to the said machinery (cold storage) were allowed to be claimed as depreciation. In "CIT -Vs-Shahbad Co-op Sugar Mills Ltd 12 Taxmann.com 421 (Punjab & Haryana)", the machinery which was kept ready for use was held to qualify for depreciation under Section 32 of the Act.

9. The above decisions will clearly show that even trial production machineries kept ready for use etc., were considered to be used for the purpose of business to qualify for depreciation. In "CIT -Vs- Geo Tech Construction 244 ITR 452 (Kerala)" , the machinery which was purchased by the assessee from Pondicherry was yet to reach work site at Kochi and were in transit, and the Court held that it would amount to passive use and would qualify for depreciation. Thus, we are of the considered view that the Tribunal erred in reversing the order passed by the CIT (Appeals). For all the above reasons, the substantial question of law No.1 is answered in favour of the assessee.

10. With regard to substantial question of law No.2, Ms.Premalatha, learned Standing Counsel for the Revenue would submit that at the relevant point of time Section 32(1)(iia), as it stood then relevant to the assessment year 2005-06, generation of electricity was not forming part of the Statute. However, as rightly pointed out by Mr.Sriraman, learned counsel



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for the assessee, Section 32(1)(i) included generation or generation and distribution of power. The tribunal rejected the claim for additional depreciation on the ground that the assessee being not entitled for depreciation, the question of claiming additional depreciation does not arise. The CIT (Appeals) rejected the claim of additional depreciation by relying upon an order passed by the Chennai Tribunal in I.T.A.Nos.307/Mds/2000 dated 06.09.2005. We are informed that the said decision has been reversed by this Court. In any event, there was no adjudication into the factual position as to whether the assessee, who is engaged in the business of generation of power, was entitled for additional depreciation.

11. Ms.Premalatha, learned Standing Counsel contended that the line of business activity of the assessee was manufacture of safety matches and establishing a wind mill was a new line of business. In fact, this cannot be a ground to non suit the assessee, as similar issue raised by the Revenue in "CIT -Vs- Hi Tech ARAI Ltd., (2010) 236 CTR 0321" , was rejected. Paragraph No.5 of the judgment reads as follows.

"5. In the case on hand, the assessee is stated to have set up two wind mills in addition to the already existing four wind mills and thereby increased its power generation capacity by above 50%. It is true that the assessee is a company engaged in the business of manufacture of oil seeds, moulded rubber parts, reed value assemblies apart from generation of power. After the installation of the additional wind mills, both prior to as well as after the installation of the additional wind mills, the assessee was using wind energy for generating power for its capitative consumption apart from selling the surplus power generated to the Tamil Nadu Electricity Board. As far as application of Section 32(1)(iia) of the Act, is concerned, what is required to be satisfied in order to claim the additional depreciation is that the setting up of a new machinery or plant should have been acquired and installed after 31st March 2002 by an assessee, who was already engaged in the business of manufacture or production of any article or thing. The said provision does not state that the setting up of a new machinery or plant, which was acquired and installed upto 31.03.2002 should have any operational connectivity to the article or thing that was already being manufactured by the assessee. Therefore, the contention that the setting up of a wind mill has nothing to do with the power industry, namely, manufacture of oil seeds etc. is totally not germane to the specific provision contained in Section 32(1)



(iia) of the Act. "

12. Therefore, the said contention raised by Ms. Premalatha, learned Standing Counsel does not merit consideration. The next aspect is whether generation of electricity would fall within the ambit of business of manufacture or production of any article or not. This issue appears to be no longer res integra and decided in favour of the assessee in "CIT -Vs- NTPC (2019) 103 Taxmann.com 398". In the said case, the assessee was engaged in the production of thermal power and was held to be eligible to claim additional depreciation under Section 32(1)(iia). The Court took into consideration the decision of the Constitution Bench of the Honourable Supreme Court in "State of A.P. -Vs- NTPC AIR 2002 SC 1895", wherein the Apex Court held electricity to be "goods" for the purpose of sales tax. Thus, by referring to the decision of the Constitution Bench, it was pointed out that electricity is capable of abstraction, transmission, transfer, delivery, possession, consumption and use like any other movable property. Following the same logic, to deny the benefit of additional depreciation to generating entity on the basis of electricity is not an "article" or "thing", is an artificially restrictive meaning of the provision and the benefit of additional depreciation under Section 32(1)(iia) has to be granted to the assessee. This decision will fully apply to the facts of the present case and consequently, it has to be held that the assessee is entitled for additional depreciation as well. Accordingly, the substantial question of law No.2 is also answered in favour of the assessee.

13. In result, the appeals are allowed and the substantial questions of law are answered in favour of the assessee. No costs.

Sd/-
Assistant Registrar(CO)

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Sub Assistant Registrar

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To

1. The Deputy Commissioner of Income Tax
Circle I, Virudhunagar.
2. Income Tax Appellate Tribunal "B" Bench,
Chennai.



3. The Commissioner of Income Tax (Appeals)-II,
Madras.

4. The Assistant Commissioner of Income Tax,
Circle I, Virudhunagar.

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+1cc to Mr.A.S.Sriraman, Advocate SR.No.58716

+1cc to Ms.S.Premalatha, Advocate SR.No.59052

T.C.(A) Nos.655, 656 and 657 /2009

PM(CO)

GMV(19/08/2019)