

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.08.2021

CORAM

The Honourable Mr.Justice T.S.SIVAGNANAM

and

The Honourable Mr.Justice SATHI KUMAR SUKUMARA KURUP

T.C.A.Nos.1202 to 1207 of 2008

and

T.C.A.Nos.357 & 358 of 2009

T.C.A.Nos.1202 to 1207 of 2008 :-

Sundaram Non-Conventional Energy
Systems Limited,
98A, 7th Floor, Dr.Radhakrishnan Salai,
Mylapore, Chennai-600 004.

.. Appellant

-VS-

The Assistant Commissioner of Income Tax,
Company Circle VI(4),
Chennai-600 034.

.. Respondent

Appeals under Section 260A of the Income Tax Act, 1961 against the order dated 31.12.2007 made in I.T.A.Nos.1076, 1077, 1078, 1079, 1080 & 1081/Mds/2006 on the file of the Income Tax Appellate Tribunal 'C' Bench, Chennai for the assessment years 1997-98 to 2002-03 respectively.

T.C.A.Nos.357 & 358 of 2009 :-

Sundaram Non-Conventional Energy
Systems Limited,
98A, 7th Floor, Dr.Radhakrishnan Salai,
Mylapore, Chennai-600 004.

.. Appellant

-VS-

The Assistant Commissioner of Income Tax,
Company Circle VI(4),
Aayakar Bhavan, New Block,
7th Floor, 121, M.G.Road, Chennai-600 034.

.. Respondent

Prayer in T.C.A.No.357 of 2009 :- Appeal under Section 260A of the
Income Tax Act, 1961 against the order dated 05.11.2008 made in
I.T.A.No.201/Mds/2008 on the file of the Income Tax Appellate Tribunal
'C' Bench, Chennai for the assessment year 2003-04.

Prayer in T.C.A.No.358 of 2009 :- Appeal under Section 260A of the
Income Tax Act, 1961 against the order dated 11.02.2009 made in
I.T.A.No.875/Mds/2008 on the file of the Income Tax Appellate Tribunal
'D' Bench, Chennai for the assessment year 2004-05.

For Appellant : Mr.Sri Ganesh
(In all Appeals)

For Respondent : Mr.J.Narayanaswamy,
(In all Appeals) Senior Standing Counsel

COMMON JUDGMENT

(Delivered by T.S.Sivagnanam, J.)

T.C.A.Nos.1202 to 1207 of 2008 have been filed by the assessee under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as “the Act”) questioning the correctness of the order dated 31.12.2007, made in I.T.A.Nos.1076, 1077, 1078, 1079, 1080 & 1081/Mds/2006 passed by the Income Tax Appellate Tribunal 'C' Bench, Chennai (for brevity “the Tribunal”) for the assessment years 1997-98 to 2002-03 respectively, which were admitted on 27.08.2008, on the following substantial question of law:-

“Whether the Tribunal was justified in denying relief u/s 80-IA of the Act, when the appellant has satisfied all the conditions mentioned therein?”

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2. There are two other appeals viz., T.C.A.Nos.357 and 358 of 2009, which were also filed by the assessee challenging the order dated

05.11.2008 made in I.T.A.No.201/Mds/2008 on the file of the Income Tax Appellate Tribunal 'C' Bench, Chennai for the assessment year 2003-04 and the order dated 11.02.2009 made in I.T.A.No.875/Mds/2008 on the file of the Income Tax Appellate Tribunal 'D' Bench, Chennai for the assessment year 2004-05. These two appeals have been tagged along with T.C.A.Nos.1202 to 1207 of 2008, as the orders impugned therein follows the order passed by the Tribunal dated 31.12.2007.

3.T.C.A.Nos.357 and 358 of 2009 were admitted on 15.06.2009, on the following substantial question of law:-

“Whether on the facts and circumstances of the case, the Tribunal was justified in denying relief under Section 80-IA of the Act, when the appellant has satisfied all the conditions mentioned therein?”

4.We have elaborately heard Mr.Sri Ganesh, learned counsel for the assessee and Mr.J.Narayanaswamy, learned Senior Standing Counsel for the Revenue.

5.The undisputed facts are that the assessee-company is engaged in the business of generation and distribution of electricity and for the assessment years under consideration, they filed their return of income and claimed deduction under Section 80-IA of the Act. The said claim was rejected by the Assessing Officer on the ground that the assessee had leased out the windmills and it amounts to transfer and the windmills, which were leased out, were previously used by the lessor-company, who had claimed 100% depreciation and therefore, the windmills having been previously used for any purpose, the assessee does not fulfil the conditions stipulated in sub-section (3) of Section 80-IA of the Act. Aggrieved by such order, the assessee preferred appeal before the Commissioner of Income Tax (Appeals)-V, Chennai (for brevity “the CIT(A)”). The CIT(A), by order dated 30.01.2006, allowed the appeals filed by the assessee. Aggrieved by the same, the Revenue preferred appeals before the Tribunal, which were allowed and this is how the assessee is before us by way of the present tax case appeals.

6.The short question, which falls for consideration in this batch of cases is whether the assessee fulfils the conditions stipulated under Section 80-IA(3) of the Act. The said provision reads as follows:-

“Section 80-IA(3):-

This section applies to an undertaking referred to in clause (iv) of sub-section (4) which fulfils all the following conditions, namely :-

(i) it is not formed by splitting up, or the reconstruction, of a business already in existence;

Provided *that this condition shall not apply in respect of an undertaking which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such undertaking as is referred to in section 33B, in the circumstances and within the period specified in that section.*

(ii) it is not formed by the transfer to a new business of machinery or plant previously used for any purpose;

Provided *that nothing contained in this sub-section shall apply in the case of transfer, either in whole or in part, of machinery or plant previously used by a State Electricity Board referred to in clause (7) of*

section 2 of the Electricity Act, 2003 (36 of 2003), whether or not such transfer is in pursuance of the splitting up or reconstruction or reorganisation of the Board under Par XIII of that Act.

Explanation 1 – For any purposes of clause (ii), any machinery or plant which was used outside India by any person other than the assessee shall not be regarded as machinery or plant previously used for any purpose, if the following conditions are fulfilled, namely :-

(a) such machinery or plant was not, at any time previous to the date of the installation by the assessee, used in India;

(b) such machinery or plant is imported into India from any country outside India; and

(c) no deduction on account of depreciation in respect of such machinery or plant has been allowed or is allowable under the provisions of this Act in computing the total income of any person for any period prior to the date of the installation of machinery or plant by the assessee.

Explanation 2 – Where in the case of an undertaking, any machinery or plant or any part

thereof previously used for any purpose is transferred to a new business and the total value of the machinery or plant or part so transferred does not exceed twenty per cent of the total value of the machinery or plant used in the business, then, for the purposes of clause (ii) of this sub-section, the condition specified therein shall be deemed to have been complied with.”

7.Thus, the two conditions, which are required to be cumulatively fulfilled are that the undertaking should not be formed by splitting up or the reconstruction of a business already in existence. There is no such allegation against the assessee. Thus, the assessee has fulfilled Condition No.1 as mentioned above. The second condition is that the undertaking is not formed by the transfer to a new business of machinery or plant previously used for any purpose. It is not in dispute that the windmills have been leased out by the assessee-company.

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8.The question would be whether entering into a lease transaction would amount to transfer. This issue is no longer *res integra* and has been

decided by the Hon'ble Supreme Court in the case of ***Bajaj Tempo Ltd., vs. CIT*** reported in ***(1992) 3 SCC 78 (SC)***, wherein the Hon'ble Supreme Court held as follows:-

*“10.Reverting to the Bombay decision on which the High Court relied for answering the question against the assessee we would assume for purposes of this case that lease of the building amounted to transfer. Yet what is significant is that the High Court did not examine the impact of word 'formed'. It proceeded on basis that once lease amounted to transfer the assessee became ineligible from claiming any exemption. The Court further repelled the contention advanced on behalf of assessee on strength of Calcutta decision in *Commissioner of Income Tax, West Bengal-II v. Sainthia Rice & Oil Mills*, 82 ITR [1971] 778 Cal. that transfer of building to the new business to disentitle the undertaking should have been of the assessee himself. In our opinion this aspect of the Bombay decision was correctly decided and the tribunal was not justified in deciding in favour of assessee on this ground. We therefore endorse the view of Bombay High Court and Punjab and Haryana High*

Court in Phagoo Mal Sant Ram v. Commissioner of Income Tax, Patiala, 74 ITR [1969] 734 of this extent that, 'previously used in any other business' cannot be construed so narrowly as to confine it to building of the assessee only. But we do not approve of the Bombay view that if a new undertaking is established in a premises taken on lease then it, always, amounts to formation of the undertaking by transfer of the building previously used as the decision was given without examining the scope of the word 'formed' which as we have indicated above, was construed by this Court in Textile Machinery Corporation Ltd which approved a decision of Delhi High Court in Commissioner of Income Tax v. Ganga Sugar Corporation Ltd. 'Form' according to the dictionary has different meanings. In the context in which it has been used it was intended to connote that the body of the company or its shape did not come up in consequence of transfer of building, machinery or plant used previously for business purpose. Use of the negative before word 'formed' further strengthens it. In other words building, machinery or plant used previously in other business should not result in the undertaking being formed by it.

The transfer to take out the new undertaking out of purview of sub-section (1) must be such that but for transfer the new undertaking could not have come into being. In our opinion, on facts found by the tribunal, the part played by taking the building on lease was not dominant in formation of the company. The High Court was therefore not justified in answering the question in favour of the revenue.”

9.Thus, the legal position having been enunciated in the aforementioned decision, lease cannot tantamount to transfer. One more condition, which is required to be fulfilled by the assessee, is that the undertaking is not a new business with plant or machinery previously used for any purpose. The question is as to how the words “previously used” have to be interpreted in the case on hand.

10.The argument of Mr.J.Narayanaswamy, learned Senior Standing Counsel is that the Tribunal is right in concluding that the lessor having claimed 100% depreciation on the said asset, the asset is an used asset for

the purpose of generation of electricity and the assessee's claim is clearly barred.

11. On a plain reading of the above statutory provision would clearly show that the words “previously used” would mean actual physical use of the asset and not deemed to have been previously used. The benefit claimed by the assessee in the case on hand is a deduction under Section 80-IA, which is a deduction, which was brought to encourage industrial growth. Therefore, the correct way to interpret the words “previously used” would mean actual physical use of the asset. There was nothing brought on record by the Assessing Officer that the asset was put to actual physical use for any purpose before the lease transaction and the inference drawn by the Assessing Officer is solely based upon the claim for depreciation made by the lessor. This, in our considered view, cannot be the correct way of interpretation of a beneficial provision, which provides for deduction in certain cases, where conditions are fulfilled and the object of granting such deduction was to promote industrial growth. Therefore, the CIT(A) is right

in its observation that a lease transaction would not amount to a transfer and merely because the lessor had claimed 100% depreciation on the said asset cannot make the asset as 'previously used' to disqualify the asset from claiming deduction. In fact, in the decision in ***Bajaj Tempo Ltd.***, (supra), the Hon'ble Supreme Court did not approve the decision of the Bombay High Court, which was referred to by the Assessing Officer in the case of ***Capsulation Services Pvt. Ltd. vs. CIT*** reported in (1973) 91 ITR 566 (Bom.) and it was observed that “previously used in any other business” cannot be construed so narrowly as to confine it to building of the assessee (therein) only.

12.Further, the Hon'ble Supreme Court did not approve the view of the Bombay High Court that if a new undertaking is established in a premises taken on lease then it, always, amounts to formation of the undertaking by transfer of the building previously used. The Hon'ble Supreme Court came to such conclusion by observing that the said decision was given without examining the scope of the word “formed”, which was

construed by the Hon'ble Supreme Court in ***Textile Machinery Corporation Ltd. vs. CIT*** reported in ***(1997) 186 ITR 195***, which approved the decision of the High Court of Delhi in ***CIT vs. Ganga Sugar Corporation Ltd.*** reported in ***(1973) 92 ITR 173 (Del)***. Further, it was held that building, machinery or plant used previously in other business should not result in the undertaking being formed by it. The transfer to take out the new undertaking out of the purview of sub-section (1) must be such that but for transfer the new undertaking could not have come into being.

13.The decision of the Hon'ble Supreme Court in ***Bajaj Tempo Ltd.*** (supra), was followed in ***CIT vs.Nayyars Minerals Export (P.) Ltd.*** reported in ***(1998) 231 ITR 864 (HP)***, wherein it was held that hiring of certain machineries from sister concern would not amount to transfer as provided under Section 80J(4)(ii) of the Act.

14.In the light of the above, we find that the Tribunal committed an error in reversing the order passed by the CIT(A).

15.For all the above reasons, the tax case appeals are allowed, the orders passed by the Tribunal are set aside and the orders passed by the CIT(A) are restored and consequently, the substantial questions of law are answered in favour of the assessee. No costs.

(T.S.S., J.) (S.S.K., J.)
16.08.2021

Index: Yes/ No
Speaking Order : Yes/ No

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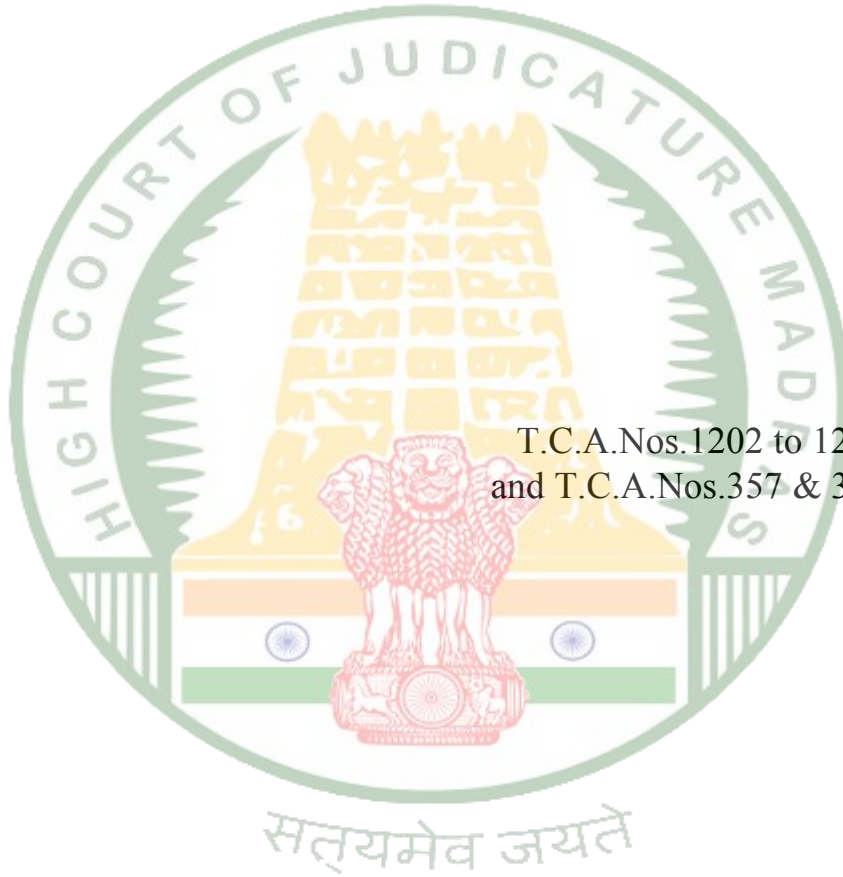
To

- 1.The Assistant Commissioner of Income Tax,
Company Circle VI(4),
Aayakar Bhavan, New Block,
7th Floor, 121, M.G.Road, Chennai-600 034.
- 2.The Income Tax Appellate Tribunal 'C' Bench, Chennai.
- 3.The Income Tax Appellate Tribunal 'D' Bench, Chennai.

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