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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.06.2022

CORAM

THE HONOURABLE MR. JUSTICE R. MAHADEVAN
AND
THE HONOURABLE MR. JUSTICE MOHAMMED SHAFFIQ

T.C.A. No.622 of 2017

Principal Commissioner of Income Tax I,
No.63, Race Course Road,
Coimbatore.

.. Appellant / Respondent

Versus

M/s.Sakthi Sugars Ltd.,
180, Course Road,
Coimbatore-641 018.
PAN: AAD CS 0651 B

.. Respondent / Appellant

Appeal filed under Section 260 (A) of the the Income Tax Act, 1961 against the order dated 13.01.2017 passed by the Income Tax Appellate Tribunal "D" Bench, Chennai, in I.T.A.No.430/Mds/2015 against the order of the Commissioner of Income Tax (Appeals)-1, Coimbatore in Appeal No.366/11-12 of CIR (A) dated 30.12.2014, for the Assessment year 2009-10, as against the order of the Assistant Commissioner of Income Tax, Company Circle - I(1), Coimbatore in Assessment order vide PAN.No / GIR No.AADCS0651B, dated 30.12.2011 for the Assessment year 2009-10.

For Appellant : Mr.M.Swaminathan and
Mrs.V.Pushpa
Standing Counsel
For Respondent : Mr.Subbaraya Aiyar

JUDGMENT

(Judgment of the Court was delivered by R.MAHADEVAN, J.)

This tax case appeal has been filed by the appellant challenging the order dated 13.01.2017 passed by the Income Tax Appellate Tribunal, 'D' Bench, Chennai, in I.T.A.No.430/Mds/2015, relating to the assessment year 2009-10.



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2. By order dated 13.12.2017, this court admitted the aforesaid tax case appeal on the following substantial question of law:

"Whether the Appellate Tribunal is right in allowing depreciation on the plant and machinery of the Sivagangai Beverages Unit of the assessee when that unit never commenced commercial production and the assets were not 'put to use' for production?"

3. When the matter was taken up for consideration, the learned counsel appearing on both sides jointly submitted that the identical question of law raised herein was already decided against the Revenue, in the following decisions:-

(i) Principal Commissioner of Income Tax v. Larsen and Toubro Ltd., [403 ITR 248 (Bombay)], in which, it was held by the Bombay High Court as follows:

"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 v. Industrial Solvents & Chemicals (P) Ltd. (1979) 119 ITR 608. 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.



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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 *Asstt. CIT v. Ashima Syntex Ltd.* [2002] 122 Taxman 230 which held that even trial production would fall within the ambit of "used for the purpose of business" and once used the assess 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 & Chemicals (P) Ltd.*'s case (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 & Chemicals (P) Ltd.* (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."

(ii) *Commissioner of Income-tax, Chennai v. Lakshmi General Finance Ltd.*, [433 ITR 94 (Madras)] , wherein, it was held by this Court as follows:

"7. The case of the assessee before us strengthened in the light of the following decisions. In *"Principal CIT v. 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 v. 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 v. 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 v. Geo Tech Construction* 244 ITR 452 (Kerala)", it was held that an asset can be said to be in use when it



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is kept ready for use. It is beneficial to refer to paragraph 5 of the said judgement, 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 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 Pursa 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.



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An asset can be said to be in use when it is kept ready for use."

8. In "CIT v. 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 v. 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.

4. Following the aforesaid decisions, the substantial question of law raised in this appeal is answered in favour of the assessee. Accordingly, the present tax case appeal filed by the Revenue, stands dismissed. No costs.

Sd/-

Assistant Registrar(CS IV)

True Copy//

Sub Assistant Registrar

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To

1. The Income Tax Appellate Tribunal "D" Bench,
Chennai.
2. The Principal Commissioner of Income Tax I,
No.63, Race Course Road,
Coimbatore.
3. The Assistant Commissioner of Income Tax,
Company Circle - I(1), Coimbatore.

Copy to

The Section Officer,
VR Section,
High Court, Madras - 104.

+1cc to Mr.M.Swaminathan, Advocate, S.R.No.35437

+1cc to Mr.Subbaraya Aiyar, Advocate, S.R.No.34442

TCA No.622 of 2017

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NSK/04/07/2022