

T.C.(A).No.1100 of 2007

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.01.2025

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CORAM:

**THE HONOURABLE DR.JUSTICE ANITA SUMANTH
and
THE HONOURABLE MR.JUSTICE G. ARUL MURUGAN**

T.C.(A).No.1100 of 2007

Commissioner of Income Tax
Madurai.

.. Appellant

VS

The Ramco Cements Ltd.,
Formerly known as Madras Cements Ltd
'Ramamandiram'
Rajapalayam-626 117.
Virudhunagar District.
(Cause title amended vide Court order dated 12.7.22
made in CMP.No.7536/19 in TC.No.1100/07)

.. Respondent

Prayer : Appeal filed under Section 260A of the Income-Tax Act, 1961
against the order of the Income-Tax Appellate Tribunal Madras 'C' Bench,
dated 26.12.2002 in ITA No.872/M/2000 for Assessment Year 1996-97.

For Appellant : Mr.J.Narayanaswamy
Senior Standing Counsel
For Respondent : Mr.P.J. Rishikesh

JUDGMENT



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(Delivered by Dr.ANITA SUMANTH..J)

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This appeal relates to assessment year 1996-97 and has been admitted on 18.09.2007 on the following substantial questions of law:

‘1. Whether in the facts and circumstances of the case, the Tribunal was right in holding that the expenditure incurred on replacement of old machinery by new machinery would amount to revenue expenditure?’

2. Whether in the facts and circumstances of the case, the Tribunal was right in holding that the assessing officer cannot give any finding on the eligibility to benefit of Sec.35(i)(iv), while the matter has been referred to and is pending before the competent authority?’

3. Whether in the facts and circumstances of the case, the Tribunal was right in allowing 100% depreciation to fly ash silo treating it as a pollution control equipment?’

4. Whether in the facts and circumstances of the case, the Tribunal was right in treating the amount adjusted by IFCI from the new loan sanctioned by it towards interest payable on earlier loans as interest actually paid by the assessee within the time stipulated under Section 43AB?’

5. Whether in the facts and circumstances of the case, the Tribunal was right in holding that excise duty, customs duty, windmill power receipts etc. do not form part of the total turnover for the purpose of calculating the benefit u/s.80HHC?’

6. Whether in the facts and circumstances of the case, the Tribunal was right in granting full depreciation on the dumpers even though there was no evidence adduced that they had used it for more than 180 days, or even received the same in their site prior to 180 days?’

2. We have heard Mr.Narayanaswamy, learned Senior Standing



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Counsel appearing for the Income Tax Department/appellant and

Mr.P.J.Rishikesh, learned counsel appearing for the assessee/respondent.

Question of law No.1: *Whether in the facts and circumstances of the case, the Tribunal was right in holding that the expenditure incurred on replacement of old machinery by new machinery would amount to revenue expenditure?*

3. The first question relates to the allowance of expenditure under section 37 of the Income tax Act 1961 (Act) incurred on replacement of old machinery by new machinery. In the year in question, the assessee had made a claim in terms of Section 37 of the Act, of a sum of Rs.1,02,59,853/- towards expenditure on Belt Bucket Elevator (BBE). While completing the assessment, the assessing authority observes that the BBE was used for feeding the kiln and for operation of the cement mill.

4. The claim came to be negated on the ground that it was capital in nature and also for the reason that the machinery had itself not been commissioned. However, depreciation was granted at 25% on the ground that the machineries were put to use for more than 180 days which finding runs counter to the observation that the machinery has not yet been commissioned. The authority also notes that the expenditure had been capitalized in the accounts.



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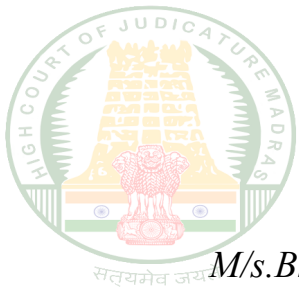
5. He makes a distinction between a claim for current repairs under Section 31 and for allowance of expenditure under section 37. Since the replacement of a manual system by a mechanized system cannot be understood as 'repairs' (See *Lurcott V.Wakley Wheeler*¹), such replacement of such a system can only be on capital account as the benefit obtained by the assessee was substantial and enduring.

6. In the case on hand, the matter travelled in first appeal to the Commissioner of Income Tax (Appeals), (CIT(A)) who upheld the order of assessment following the decision of the appellate authority for the previous years. A second appeal was filed by the assessee before the Income Tax Appellate Tribunal (Tribunal), and the Members of the Tribunal took it upon themselves to inspect the mill.

7. At this juncture, an objection is raised by Mr.Narayanaswamy to the procedure followed by the Tribunal. According to him, the members of the Tribunal ought not to have undertaken the exercise of inspection the mill, as they can hardly be construed to be experts in the field of cement production and technology.

8. He refers to the decision in the case of *C.I.T., Delhi vs*

¹ All ER Rep 41



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M/s.Bharti Cellular Ltd² that, according to him, supports the contention that if at all one were to undertake such exercise, it is best left to the experts in that field. This decision relates to deduction of tax at source by that assessee in the context of interconnect charges/access/port charges to BSNL.

9. The matter was highly technical in nature, and adjudication of the tax dispute called analysis of the nature of services rendered by the payee. It is in that context that the Supreme Court had directed the CBDT to issue directions to all officers that, in matters requiring an understanding of technology, the Department need not proceed solely on the basis of the records available with officers but can avail the assistance of technical experts.

10. They note that with the emergence of our country as part of BRICS and with the surge in technological advancement, one must take benefit of the available technology including human resources. Their directions are as follows:

Before concluding, we are directing CBDT to issue directions to all its officers, that in such cases, the Department need not proceed only by the contracts placed before the officers. With the emergence of our country as



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one of the BRIC countries and with the technological advancement matters such as present one will keep on recurring and hence time has come when Department should examine technical experts so that the matters could be disposed of expeditiously and further it would enable the Appellate Forums, including this Court, to decide legal issues based on the factual foundation. We do not know the constraints of the Department but time has come when the Department should understand that when the case involves revenue running into crores, technical evidence would help the Tribunals and Courts to decide matters expeditiously based on factual foundation. The learned Attorney General, who is present in Court, has assured us that our directions to CBDT would be carried out at the earliest.

11. We do not find that the above directions militate against the procedure followed by the Tribunal. The inspection undertaken has enabled the Tribunal to understand the layout and segments of the factory, the manner in which the processes are carried out and the contribution of those processes to the ultimate output.

12. While undoubtedly, matters to be decided by the technical experts are best left to those entities/persons, discretion is always available with an authority to decide whether external assistance is required. In the present matter the decision of the members to inspect the mill is judicious and not, in any way, perverse, or an excess of jurisdiction. We are hence not persuaded to accept the submissions of Mr. Narayanaswamy on this score.



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13. On merits, he would submit that the conclusion of the Tribunal reversing the order of the first appellate authority and assessment and allowing the claim of the assessee, was incorrect. In doing so, the Tribunal has referred to a slew of decisions as follows:

- i) *CIT v. Mahalakshmi Textile Mills Ltd.*³
- ii) *CIT vs. Mahalakshmi Textiles Mills Ltd.*⁴
- iii) *CIT vs. Salem Co-op. Spinning Mills Ltd.*⁵
- iv) *CIT vs. Co-op. Sugars Ltd.*⁶
- v) *CIT vs. Narsimha Textile (P) Ltd.*⁷
- vi) *CIT vs. Sri Hari Mills Ltd.*⁸
- vii) *CIT vs. Haridas Bhagath & Co. (P) Ltd.*⁹
- viii) *CIT vs. Andavar Calendering Mills Ltd.*¹⁰
- ix) *CIT vs. Ooty Deeprakash*¹¹
- x) *CIT vs. Rex Talkies*¹²
- xi) *CIT vs. Madras Auto Services (P) Ltd.*¹³
- xii) *Alembic Chemicals Works Co. Ltd. vs. CIT*¹⁴
- xiii) *CIT vs. Jagatjit Indus. Ltd.*¹⁵
- xiv) *CIT vs. Hindustan Times Ltd.*¹⁶
- xv) *CIT vs. Steel Complex Ltd.*¹⁷
- xvi) *CIT vs. Asher Textiles Ltd.*¹⁸

14. The Tribunal has noted the position that what was replaced was

3 56 ITR 256 (Mds.)

4 66 ITR 710 (SC)

5 148 ITR 176

6 225 ITR 343 (Ker.)

7 238 ITR 351 (Mds.)

8 237 ITR 188 (Mds.)

9 240 ITR 169 (Mds.)

10 210 ITR 815 (Mds.)

11 237 ITR 892 (Mds.)

12 148 ITR 560 (Ker.)

13 233 ITR 468 (SC.)

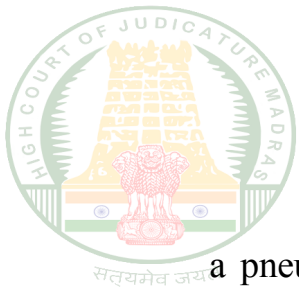
14 177 ITR 377 (SC)

15 241 ITR 556 (Del.)

16 241 ITR 509 (Del.)

17 238 ITR 1054 (Ker.)

18 240 ITR 483 (Mds.)



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a pneumatic conveying system. The system that replaced the old system ie., the BBE, is pollution free and reduces the consumption of electricity.

To be noted, these finding emanate from the material available on record before the authorities in support of the position that the shift from pneumatic conveyer to BBE, was for power conservation and elimination of pollution.

15. Mr.Narayanaswamy has cited the following cases:

- i) *Commissioner of Income Tax vs. Sri Mangayarkarasi Mills (P) Ltd.*¹⁹
- ii) *Commissioner of Income Tax vs. Sarangpur Cotton Mfg. Co. Ltd.*²⁰
- iii) *Indore Municipal Corporation vs. Commissioner of Income Tax*²¹
- iv) *North Karnataka Expressway Ltd. vs. The Commissioner of Income Tax-10*²²
- v) *Moradabad Toll Road Co. Ltd. vs. Assistant Commissioner of Income Tax*²³
- vi) *Commissioner of Income Tax-10 v. West Gujarat Expressway Ltd.*²⁴

16. Of the above, he refers solely to the judgment in the case of *Sri Mangayarkarasi Mills Limited*²⁵, particularly paragraph 14 onwards. He argues that the BBE was a capital asset, pointing out that there is nothing

19 (2009) 315 ITR 0114 (SC)

20 (2017) 393 ITR 0108 (SC)

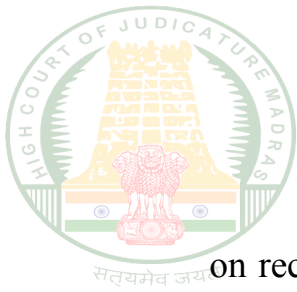
21 (2001) 247 ITR 0803 (SC)

22 (2015) 372 ITR 145 (Bombay)

23 (2014) 369 ITR 403 (Delhi)

24 (2017) 390 ITR 398 (Bombay)

25 Foot Note Supra (19)



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on record to support the submissions that the new asset saved power and reduced pollution.

17. Per contra, Mr.Rishikesh relies on the findings of the Tribunal and on the following decisions:

- i) *L.H. Sugar Factory & Oil Mills (P.) Ltd. v. Commissioner of Income-tax*²⁶
- ii) *Commissioner of Income-tax v. Associated Cement Companies Ltd.*²⁷
- iii) *Commissioner of Income-tax v. P.J.Chemicals Ltd.*²⁸
- iv) *Commissioner of Income-tax v. Bongaigaon Refinery & Petro Chemicals Ltd.*²⁹
- v) *Tuticorin Alkali Chemicals & Fertilizers Ltd. v. Commissioner of Income-tax*³⁰
- vi) *Commissioner of Income-tax v. Madras Auto Service (P.) Ltd.*³¹
- vii) *Commissioner of Income-tax v. Coats Viyella India Ltd.*³²
- viii) *Commissioner of Income-tax, Madurai v. Saravana Spg. Mills (P.) Ltd.*³³
- ix) *Taparia Tools Ltd. v. Joint Commissioner of Income-tax, Nasik*³⁴
- x) *Hatsun Agro Products Ltd. v. Joint Commissioner of Income-tax*³⁵
- xi) *Joint Commissioner of Income Tax v. Hatsun Agro Products Ltd.*³⁶

26 (1980) 4 Taxman 5 (SC)

27 (1988) 38 Taxman 110A (SC)

28 (1994) 76 Taxman 611 (SC)

29 (1997) 91 Taxman 124 (Gauhati)

30 (1997) 93 Taxman 502 (SC)

31 (1998) 99 Taxman 575 (SC)

32 (2002) 124 Taxman 797 (Madras)

33 (2007) 163 Taxman 201 (SC)

34 (2015) 55 taxmann.com 361 (SC)

35 (2018) 99 taxmann.com 220 (Madras)

36 (2020) 114 taxmann.com 172 (SC)



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- xii) *Commissioner of Income-tax v. Sudharshan Chemicals Industries Ltd.*³⁷
- xiii) *Commissioner of Income-tax v. Catapharma (India) (P.) Ltd.*³⁸

18. Of the above, he refers to the judgement of the Supreme Court in *Saravana Spinning Mills (P) Limited*³⁹ and of this Court in *Hatsun Agro Products Ltd*⁴⁰. On first principles, he submits that there has been no enduring benefit that has been brought about by replacement of the pneumatic system by BBE. The submissions in relation to power efficiency and pollution efficiency are clearly part of the record and there are findings in the order of the lower authorities to show that this view was canvassed by the assessee before the lower authorities with all supporting material.

19. We have heard both learned counsel and taken note of the cases cited by them. The claim of expenditure in regard to replacement of machinery has been a burning issue in the State of Tamil Nadu. Claims were made either under Section 31 relating to ‘current repairs’ or in terms of Section 37 of the Act being a claim of expenditure.

37 (2000) 112 Taxman 511 (Bombay)

38 (2007) 162 Taxman 455 (SC)

39 Foot Note Supra (33)

40 Foot Note Supra (36)



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20. In *Saravana Spinning Mills (P) Limited*⁴¹ and *Sri Mangayarkarasi Mills Limited*⁴², the Supreme Court considered claims under Section 31 of the Act. The Bench adumbrates the components of a mill and the processes involved therein, stating at paragraph 10, as follows:

10. From the above facts, it is clear that Blow Room, Carding, Combing, Drawing, Roving, Spinning and Winding are different Departments/Divisions in a textile mill. In each Department/Division there are several machines. Each of the above Departments/Divisions perform different functions and the functioning of each Department/Division produces a different Output which is carried forward to the next Department/Division having different machines therein. For example, in the Blow Room there are different beaters (machines) which open the raw- cotton and remove the dirt therefrom. That cotton is forwarded to the Carding Department in which there are Carding Machines equipped with Autolevelers which produces Silver which is then carried forward to the Combing Department. It is important to note that each Department has different items of machines, for example, in the Blow Room we have machines called as Beaters. Similarly, in the Carding Department we have Carding Machines with Autolevelers. If the Autoleveler fails, the Carding Machine becomes non-functional. If an Autoleveler is to be repaired then that repair would come within the connotation of the word "current repairs" because it is a part of the Carding Machine. Even if in a given case, replacement of an Autoleveler could come within the connotation of the word "current repairs" if the old part is not available in the market. It is a "current repair" because the Carding Machine remains as an asset without any

41 Foot Note Supra (33)

42 Foot Note Supra (19)



change even after repair or replacement of the autoleveler. To give an example, a Compressor is an important part of an Air-condition Machine. Repair of the Compressor will come in the connotation of the word "current repairs" in [Section 31\(i\)](#) of the said Act because the assessee does not replace the Air-condition Machine. At the highest, he replaces a part of the Air-condition Machine. So is in the case of the picture tube in a Television Set, when the picture tube is replaced the Television Set is not replaced, therefore, such repairs alone can come within the connotation of the word "current repairs" in [Section 31\(i\)](#) of the said Act as it stood at the material time. They are effected to preserve and maintain the asset, viz, air- conditioner or carding machine. Lastly, it cannot be said that the textile mill constitutes a plant as it is one continuous process of manufacture beginning from Blow Room to the Winding Section. As stated above, different Outputs flow from different Segments of production like Blow Room, Carding, Combing, Roving, Winding etc. In the case of a textile mill there is no process whereby raw-material is fed on one end and the finished product comes out at the other end without intervention in-between. For example, in the case of continuous Casting Machine in the Steel Industry we have one continuous integrated process under which scrap (raw material) is put in and what comes out is steel or iron or aluminium. Another example, in the case of "Pasteurization Plant" we have three chambers and Ducts. In the first milk is collected, in the second it is heated and in the third it is cooled. Duct carries hot and cold water. The raw material is Raw Milk, the end product is the pasteurized milk. In the Heat chamber there is the heater. In the Cooling Chamber we have cooling plant which has a concept similar to air-condition plant. Such a process is one integrated process. Therefore, the Tribunal and the High Court erred in holding that the manufacturing process in the textile mill is one continuous integrated process.

21. A distinction is made between the processes in a spinning mill



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vis a vis and those in a steel industry or air conditioning plant for the reason that, in a spinning mill, each Department deploys different items of machineries and hence the replacement of machines in a particular department would come within the connotation of the term 'current repairs'.

22. We are in this case concerned with a cement manufacturing plant and the claim is not under Section 31 but under Section 37 of the Act. In *Saravana Spinning Mills*⁴³, this distinction has been noted at paragraphs 14 and 15 to following effect:

14. Some of the decisions cited on behalf of the assesseees are not being discussed by us as they deal with cases falling under Section 37. That section is a residuary section. Under Section 37, a particular item of expenditure may be deductible if the expenditure does not fall within Sections 30 to 36; that it should have been incurred in the accounting year; that it should be in respect of a business carried on by the assessee; that it should not be on personal account of the assessee; that it should not be in the nature of capital expenditure and that it should be spent wholly and exclusively for business. Whether expenditure is 'revenue' or 'capital in nature' would depend upon several factors, namely, nature of the expenditure, nature of the business activity etc. For example, construction of the building for self-use may be capital in nature whereas in the hands of the builder a building constitutes his stock-in-trade and, therefore, on the sale of the building the expenditure has to be revenue. Therefore, the builder would be entitled to deduct such expenditure from the sale proceeds/gross income.

43 Foot Note Supra(33)



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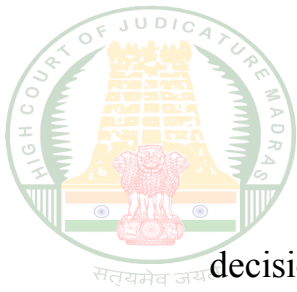
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Therefore, whether an expenditure is revenue or capital in nature would depend on the facts of each case. We do not wish to express any opinion on the applicability of Section 37(1) in the present case. There were certain civil appeals wrongly tagged with the present batch which will be decided separately by us as they concern with Section 37(1). Hence we do not wish to express any opinion on applicability of Section 37(1).

15. Before concluding, one aspect needs to be discussed. It was submitted on behalf of the assessee, in the present case, that although the assessee had claimed deduction under Section 31(i), they should be permitted to claim deduction under Section 37(1) as on facts it has been held by CIT(A), Tribunal and the High Court that the expenditure was revenue in nature. We find no merit in this contention. As stated above, even if the expenditure incurred is revenue in nature, still it may not fall in the connotation of the words "current repairs" under Section 31(i) which test has not kept in mind. As held by Chagla C.J. in the case of New Shorrock Spinning and Manufacturing Co. (supra) all repairs do not attract Section 31(i) even though the expenditure is revenue in nature. Therefore, the basic test, which had not been applied, in the present case, by CIT(A), Tribunal and the High Court, is whether the expenditure came within the expression "current repairs". Instead all the three authorities proceeded on the footing that since the expenditure was revenue it constituted "current repairs". It is for this reason that we have interfered with the concurrent findings given by CIT(A), Tribunal and the High Court.

23. A claim under Section 37 in regard to replacement of machinery has been looked into by a subsequent judgment of the Supreme Court in *CIT V. Sri Mangayarkarasi Mills Limited*⁴⁴. At paragraph 14 of that

44 Foot Note Supra (19)



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decision, and referring to the earlier decision in *Saravana Spinning Mills*⁴⁵

the Bench states as follows:

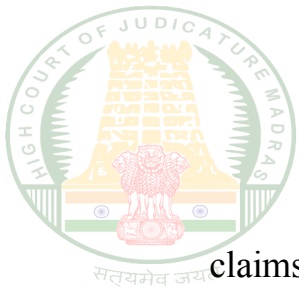
14. The first issue that needs to be resolved is whether each machine in a textile mill is an independent item or merely a part of a complete spinning mill, which only together are capable of manufacture, and there is no intermediate marketable product produced. In our view, this issue has been satisfactorily answered by the recent decision of this Court in CIT v. Saravana Spinning Mills (P) Ltd. ((2007) 7 SCC 298). In that case this Court has held unambiguously that "each machine in a segment of a textile mill has an independent role to play in the mill and the output of each division is different from the other." Dealing with a ring frame in a textile mill, this Court has held that it is an "independent and separate" machine. Further, it is accepted that each machine in a textile mill is part of the integrated process of manufacture of yarn and is integrally connected to the other machines in the mill for production of the final product. However, this interconnection does not take away the independent identity and distinct function of each machine. Thus, each machine in a textile mill should be treated independently as such and not as a mere part of an entire composite machinery of the spinning mill. As stated above, it can at best be considered part of an integrated manufacture process employed in a textile mill.

24. The Supreme Court, in *Saravana Spinning Mills (P) Limited*⁴⁶ and *Sri Mangayarkarasi Mills Limited*⁴⁷, has noted the scheme of operation of a spinning mill as well as the distinction between the nature of

45 Foot Note Supra (33)

46 Foot Note Supra (33)

47 Foot Note Supra (19)



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claims, in terms of Section 31 and Section 37.

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25. The position was clarified further in a subsequent judgement of the Supreme Court which is on point, in *CIT V. Ramaraju Surgical Cotton Mills*⁴⁸, and turns on a claim under Section 37 of the Act by an assessee similarly placed with the present assessee, barring the differences between the nature of products manufactured. The Supreme Court observes that there are number of tests that are required to be looked into while deciding whether an item of expenditure is revenue or capital. One such parameter is whether the replacement of that asset had resulted in an increase in production capacity. This is a universal parameter, applicable both in the context of a textile mill and cement production plant.

26. In the event that the replacement had resulted in the production capacity being status quo, evidently, the replacement would be revenue in nature and in an event where the production capacity had stood enhanced, the inference was that the expenditure was capital in nature.

27. In *Ramaraju Surgical Cotton Mills*⁴⁹ the comparative details of production capacity were unavailable on record. The matter was hence remitted to the Commissioner of Income Tax (Appeals) for denovo

48 294 ITR 328

49 Foot Note Supra (48)



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consideration, including specifically on the point relating to production capacity, and the assessee was given liberty to place the necessary details before the authority.

28. We are given to understand that several appeals touching on the same question have been remitted to the first appellate authority by this Court and Mr.Narayanaswamy confirms that the Department has accepted the position that increase or otherwise in production capacity would be an important and critical parameter to determine whether the expenditure incurred on replacement of machinery is revenue or capital.

29. The Department, he says, has accepted the claim under Section 37 as allowable, in circumstances where the assessee has been able to demonstrate that the production capacity has remained static, both pre and post replacement of machinery.

30. In view of this admitted position, we propose to decide this issue, based on the factual position that the production capacity has not increased. In fact, the Departmental Representative accede to the fact that the production capacity has not been enhanced, but only states that that is not the sole relevant parameter (See internal page 6 of Tribunal's order, paragraph 7).



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31. In addition, and to satisfy ourselves of this aspect, we had sought the requisite comparative production details for the relevant period, and the same have been produced under compilation dated 21.01.2025, copies of which have been supplied to the revenue as well. The details are as follows:

<i>Place of Factory</i>	<i>Unit of Measurement</i>	<i>Installed Capacity (Maximum production Capacity)</i>		
		<i>Assessment Year 1995-96</i>	<i>Assessment Year 1996-97</i>	<i>Assessment Year 1997-98</i>
<i>Ramasamy Raja Nagar, Tamil Nadu</i>	<i>Tons</i>	<i>7,50,000</i>	<i>7,50,000</i>	<i>7,50,000</i>
<i>Jayanthipuram, Andhra Pradesh</i>	<i>Tons</i>	<i>11,00,000</i>	<i>11,00,000</i>	<i>11,00,000</i>
<i>TOTAL CAPACITY</i>		<i>18,50,000</i>	<i>18,50,000</i>	<i>18,50,000</i>

32. The tabulation is supported by extracts from the Annual Reports for the relevant financial years (Schedule M). Schedule M establishes categorically that there is no increase in the production capacity either in RR Nagar factory or in Jayanthipuram factory which remain constant at 7,50,000 and 11,00,000 tonnes per annum respectively both pre and post the year of replacement. In the RR Nagar factory in fact, the actual production for the year ending 1996-97 is in excess of the installed capacity. This is attributable, according to the learned assessee counsel on instructions, to improved technology and better production efficiency.



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33. In light of the above position and seeing as the installed capacity has remained constant over the years in question without there being any increase thereof, we are of the considered view that the expenditure incurred would be revenue in nature.

34. The first substantial question of law is answered in favour of the assessee and against the revenue.

Question of law No.2: Whether in the facts and circumstances of the case, the Tribunal was right in holding that the assessing officer cannot give any finding on the eligibility to benefit of Sec.35(i)(iv), while the matter has been referred to and is pending before the competent authority?

35. This very issue has come up for consideration in T.C.Nos.2632 and 2633 of 2006 and by order dated 09.12.2024, we have decided the question adverse to the assessee following an order of the Tribunal dated 26.12.2002 for AY 1996-97 that has not been agitated by the assessee but accepted. Hence, and in the interests of consistency, this substantial question of law is answered in favour of the revenue and against the assessee.

Question of Law No.3: Whether in the facts and circumstances of the case, the Tribunal was right in allowing 100% depreciation to fly ash silo



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treating it as a pollution control equipment?

36. The assessee had claimed 100% depreciation on a 'Fly Ash handling system'. The depreciation claimed was a sum of Rs.2,78,90,013/- and the relevant Entry in the depreciation table in Appendix I of the Income Tax Rules, 1962 in terms of Section 2(iv)(e) of the Act reading as follows:

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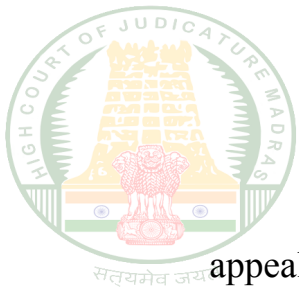
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(iv) Air pollution control equipments, being— . . .

'(e) Ash handling system and evacuation system'.

37. The assessing authority was of the view that the above Entry required an eligible assessee to both 'handle' fly ash, meaning to contain it, as well as to evacuate it in a proper fashion. In the assessee's case, fly ash is an input for the manufacture of cement. The fly ash was being stored in large silos or storage tanks and was being channelised from those tanks into the processes of cement manufacturing.

38. Thus, according to the officer, the assessee was merely storing the fly ash and there was no compliance with the condition relating to evacuation. Being of this view, he rejected the claim for depreciation. In



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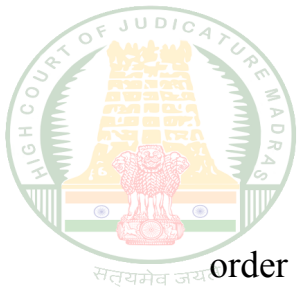
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appeal, the CIT(A) agreed with the assessing authority, being of the view that the system cannot be treated as an air pollution control equipment in terms of the relevant Entry.

39. The Tribunal reversed the above findings noting that the silos that were used to contain fly ash, achieved the purpose of both reducing air pollution as well as 'evacuation' as it channelised the fly ash into the manufacturing process. The Tribunal disagreed with the findings of the lower authorities that the condition relating to 'evacuation' would be satisfied only by the disposal of the fly ash outside the premises of the assessee.

40. Mr.Narayanaswamy would defend the orders of the assessing authority and CIT(A) pointing out that the intention behind the full grant of depreciation at 100% was to ensure the removal of the fly ash from the premises. He would point out that had it been the intention of the Statute to merely provide for the use of fly ash, the entry would not have contain the term 'evacuation'. According to him, the dominant object of the entry was the evacuation of fly ash outside the premises and not the mere storage of fly ash, which is the activity engaged in by the assessee.

41. Per contra, learned counsel for the assessee would support the



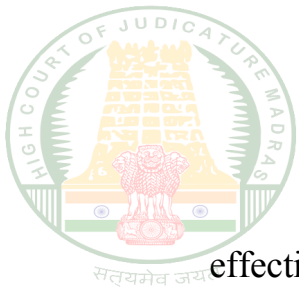
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order of the Tribunal pointing out that the findings had been rendered by the Tribunal only after examination of the factory premises. The findings of the Tribunal have been rendered after an inspection of the factory, where the silos had been seen and the Members taken note of the fact that the containment of the fly ash had been achieved.

42. Having heard both learned counsel, we are of the considered view that the assessee must succeed. It is true that the entry in question reads '*Ash handling system and evacuation system*'. The grant of 100% depreciation is thus for a process that must both contain and evacuate fly ash that pollutes the air. It is nobody's case that the silos installed in the factory do not achieve the purpose of handling/containing the pollutant.

43. The main objection taken by the authorities is that the fly ash has not been disposed outside the premises but has only been used in production. We do not see the merit in this objection as we are of the view that the condition concerning 'evacuation' would stand fulfilled by any measure of ensuring that the fly ash has been effectively used.

44. The mode and manner of disposal is irrelevant so far as it is efficient and achieves the object of removal from the atmosphere. Needless to say, the use of fly ash in the manufacturing process has



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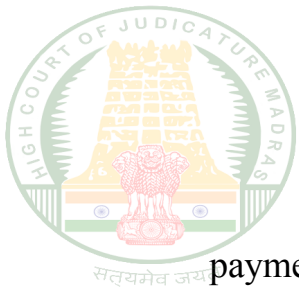
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effectively rid the premises of the pollutant, and in a gainful manner. We wonder what could be a better mode of evacuation. We hence agree with the conclusions of the Tribunal that the method followed by the Assessee for containment and use of fly ash effectively achieves the twin objects of both handling/containing the fly ash as well as evacuates it from the premises by channelising it into the production process.

45. For that matter, any effective methodology/machinery that is followed/installed by an assessee to contain the dispersion of fly ash would satisfy the object and intendment of this requirement. The Assessee is entitled for the grant of 100% depreciation in this regard. This substantial question of law is answered in favour of the assessee and against the revenue.

Question No.4: *Whether in the facts and circumstances of the case, the Tribunal was right in treating the amount adjusted by IFCI from the new loan sanctioned by it towards interest payable on earlier loans as interest actually paid by the assessee within the time stipulated under Section 43AB?*

46. The assessee had made a provision for a sum of Rs.3,50,02,516/- towards payment of interest to IFCI and claimed the same as deduction under Section 43B of the Act on the ground that the



payment had been made prior to the due date.

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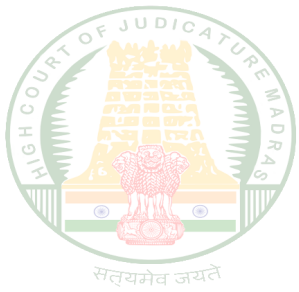
47. The issue was taken up for verification by the assessing officer, who noted from the financials that the outstanding amount had, in fact, not been paid to IFCI as claimed. He, hence, proposed to disallow the interest on the ground that Section 43B requires actual payment as a pre-condition for allowance of deduction which condition was not satisfied in the present case.

48. The stand of the assessee was that it had applied for an additional loan from IFCI which had been sanctioned and hence the interest payments could be taken as adjusted against the fresh disbursements of the loans. However, since it had been unable to establish before the assessing authority that the fresh loan had, in fact, been paid over to it, the assessing authority invoked the proviso to Section 43B and disallowed the amount in terms of the following discussion:

‘The proviso to S.43B stipulates two conditions for allowing the claim:

- i) The amount is actually paid by the assessee on or before the due date.*
- ii) And the evidence of such payment is furnished by the assessee along with the return.*

According to the Assessee it has met both the above conditions. The liability to pay interest was extinguished by adjusting the interest payable towards disbursed of fresh



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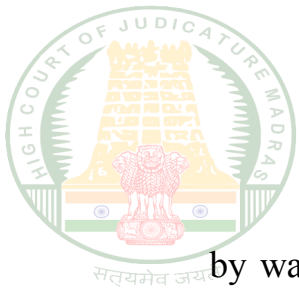
loan and the letter of the IFCI acceding to the request of the Company furnished along with the return of Income amounted to furnishing of evidence of payment.

The issue revolves around the scope of the expression “actually paid”. According to the Assessee the extinguishment of liability would amount to actual payment. The Assessee’s argument is not accepted for the reason that the adjustment of interest payable cannot be equated with the expression “actually paid”. The S.43B also requires the assessee to furnish evidence of payment along with the return. This implies actual out go of money from the assessee to the financial institution. In this case, there is only adjustment of the interest payable. As allowance is based only on actual payment and not on the basis of adjustment the claim is disallowed. If the intention of the legislative was to include adjustments of the type claimed by the assessee the term actually paid would not have been used.

In view of the above, the claim is not accepted.’

49. The CIT(A) sustains the disallowance, as against which the assessee filed an appeal before the Tribunal. The Tribunal has reversed the orders of the lower authorities returning a finding that the claim was in order, since the amount had actually been paid by the assessee.

50. We are unable to glean any support for the above conclusion by the Tribunal from the records. In fact, the findings of the assessing authority are contrary insofar as the assessee was specifically asked to provide materials in support of the submission that the loan had been disbursed, which it had been unable to do. We too sought such a clarification from the assessee requiring it to produce some material, either



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by way of bank statement or letter of corroboration from the bank to no avail.

51. In such circumstances, we are of the considered view that the findings of the Tribunal that the amount had actually been paid by the assessee is sans any material to support the same. The provisions of Section 43B, insofar as they relate to the condition of actual payment, call for a strict satisfaction and the failure of the assessee to have produced any material in this regard is fatal to its case.

52. This substantial question of law is answered in favour of the revenue and against the assessee.

Question No.5: *Whether in the facts and circumstances of the case, the Tribunal was right in holding that excise duty, customs duty, windmill power receipts etc. do not form part of the total turnover for the purpose of calculating the benefit u/s.80HHC?*

53. Both learned counsel would accede to the position that this issue is to be answered in favour of the assessee by virtue of the judgment of the Bombay High Court in *CIT V. Sudharshan Chemicals Industries Limited*⁵⁰. The relevant portion of the judgment reads as follows:

6. We find merit in the contentions of the assessee. Under Section 80HHC, the Legislature intends that the



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profits from exports should not be taxed. For this purpose, a formula has been introduced whereby if the business is of composite nature then the proportionate profit relatable to the export business is to be found out by multiplying the profits of a business by the export turnover and dividing the product by the total turnover. This formula finds place in Section 80HHC(3) as it stood at the relevant time. Under Clause (b) of the Explanation to Section 80HHC, export turnover is defined to mean sale proceeds received in India by the assessee in foreign exchange. Under the said definition, export turnover is defined to mean the sale proceeds of any goods which are exported out of India but which will not include freight or insurance. Clause (ba) defines total turnover to exclude freight or insurance. This Clause (ba) explains the turnover in a negative manner so as to exclude freight or insurance. Therefore, a combined reading of the' above two clauses shows that they include anything which has nexus with the sale proceeds. Correspondingly, they show that they exclude everything which has no nexus with the sale proceeds. Further, the meaning of export turnover in Clause (b) of the Explanation to Section 80HHC, therefore, clearly shows that export turnover did not include excise duty and sales tax. The export turnover is the numerator in the above formula whereas the total turnover is the denominator. The above formula has been prescribed to arrive at the profits from exports. In the circumstances, the above two items, namely, sales tax and excise duty, cannot form part of the total turnover. In fact, if the denominator was to include the above two items and if the numerator excluded the above two items then the formula would become unworkable. In the circumstances, we are of the view that in order to ascertain the export profits, the above two items cannot be introduced to inflate the total turnover artificially in order to reduce the benefit which an assessee is entitled to. Ultimately, the object of Section 80HHC is required to be kept in mind in order to encourage exports. The Legislature has applied the above formula in order to find out the profits derived from the exports. In this



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connection, Section 80HHC(1) may also be noticed. Under Section 80HHC(1), it is, *inter alia*, provided that where an assessee is engaged in the business of exports of any goods, there shall be allowed in computing the total income of the assessee, a deduction of the profits derived by the assessee from the export of such goods. In other words, in computing the total income of such an assessee, profits derived by the assessee from the exports are deductible. The above expression, namely, "profits derived from exports" also finds place in Section 80HHC(3)(a). It says that where the export is of goods, the profits derived from such export shall be the amount which bears to the profits of the business, the same proportion as the export turnover in respect of such goods bears to the total turnover of the business. In fact, the earlier section 80HHC(3) consisted of two parts, namely, whether the assessee carried on a business as 100 per cent. exporter and secondly whether the assessee carried on a composite business. In the latter case, it was provided that the profits derived from exports shall be the amount which bears to the profits of the business as computed under the head "Profits and gains of business", the same proportion as the export turnover to the total turnover. The emphasis is on the words "profits derived from the exports". Therefore, weightage must be given to such profits. Such profits cannot be reduced artificially by including statutory levies in the denominator, namely, total turnover. Therefore, the turnover should be restricted to such receipts which have an element of profit in it. It is only the actual sale price which is relevant. Anything charged by the assessee by way of excise duty and sales tax cannot be taken into account as they do not have any element of profit. Even according to the accounting principles, such levies do not form part of the profit and loss account. In fact, they are shown as liability in the balance-sheet. In the circumstances, the above two items cannot be included in the total turnover. We prefer this interpretation as it advances the object sought to be achieved by the Legislature. Lastly, we are of the view that sales tax and excise duties are levied under the separate enactments



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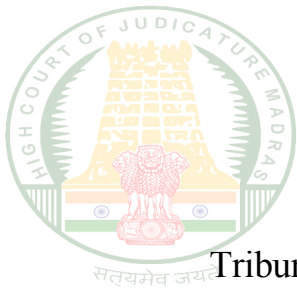
which have different objects. We are concerned with Section 80HHC which is a separate code by itself. Hence, the general definition of the word turnover or the case law dealing with the said definition under the Sales Tax Act which is a State levy, cannot be imported into Section 80HHC of the Income-tax Act. Hence, we do not find any merit in these appeals.

54. Hence, this question of law is answered in favour of the assessee and against the revenue.

Question No.6:*Whether in the facts and circumstances of the case, the Tribunal was right in granting full depreciation on the dumpers even though there was no evidence adduced that they had used it for more than 180 days, or even received the same in their site prior to 180 days?’*

55. The assessee had claimed depreciation of 25% on dumpers purchased from Bharath Earth Movers Limited (BEML), Bangalore. The assessing authority had noted that both the dumpers had been dispatched from BEML only on 29th of September, 1995 as established by the gate passes produced.

56. Having regard to the distance that the dumpers had to travel to reach from Bangalore to reach the assessee's factory at Jayanthipuram, the claim of the assessee for full depreciation was rejected and depreciation was granted for part of the year at 12.5%. The order of the assessing authority was confirmed by the CIT(A) as well. In second appeal, the



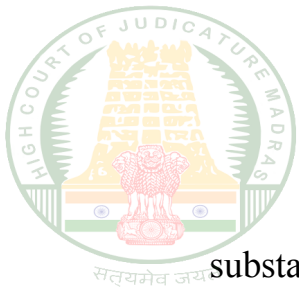
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Tribunal reversed the orders of the lower authorities giving the benefit of doubt to the assessee.

57. A categoric finding of fact is rendered by the Assessing Officer as well as the first appellate authority to the effect that no evidence has been produced by the assessee before the authorities to establish that the dumpers had been received in its premises and put to use prior to 01.10.1995. This could very easily been done either by showing gate pass at the time of receipt of vehicles or any other documentation to indicate receipt and use of the same prior to 01.10.1995.

58. Since the assessee has admittedly not done so, we are of the view that the Tribunal ought not to have reversed the orders of the lower authorities. The Tribunal proceeds on the concept of passive user which is not applicable to the fact and circumstances of the present case. The benefit of depreciation to a passive user would require the user to establish that it was in possession of the asset but was unable to use the asset for a certain period on account of factors beyond its control.

59. In the present case, even the assessee being in possession of the asset prior to 01.10.1995 is in doubt and has not been established. Hence, we reverse the order of the Tribunal on this account and answer this



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substantial question of law in favour of the revenue and against the assessee.

60. In fine, substantial questions 1,3 and 5 are answered in favour of the assessee and substantial questions 2,4,6 are answered in favour of the revenue.

61. This Tax Case (Appeal) stands disposed in terms of this order.

No costs.

[A.S.M., J] [G.A.M., J]
22.01.2025

sl
Index:Yes
Speaking order
Neutral Citation:Yes



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DR. ANITA SUMANTH,J.
and
G. ARUL MURUGAN.,J
sl

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22.01.2025