IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 01.03.2021

CORAM:

THE HON'BLE MR. JUSTICE M.DURAISWAMY
AND
THE HON'BLE MRS.JUSTICE T.V.THAMILSELVI

T.C.A.No. 269 of 2011

The Commissioner of Income Tax - LTU
Chennai. ... Appellant

v.

M/s. Lakshmi General Finance Ltd.,
(Merged with Sundaram Finance Limited)
21, Patullos Road,
Chennai. ... Respondent

Appeal preferred under Section 260A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal, Madras, "B" Bench, dated 03.12.2010 in I.T.A.No.1186/Mds/2010 for the Assessment Year 1999-2000.

For Appellant : Mr. T. Ravikumar
Standing Counsel

For Respondent : Mr. Venkatanarayanan

JUDGMENT

(Judgment was delivered by M. DURAISWAMY, J.)

Challenging the order passed in I.T.A.No.1186/Mds/2010 in respect of the Assessment Year 1999-2000 on the file of the Income Tax Appellate Tribunal, Chennai, "B" Bench (for brevity, the Tribunal), the Revenue has filed the above appeal.

2.1 The assessee company M/s. Lakshmi General Finance Limited got merged to M/s. Sundaram Finance Limited. The assessee filed its return of income for the assessment year 1999-2000 admitting total income of Rs.12,29,89,250/-. The return was processed under section 143(1a). Subsequently, a revised return was filed on 15.03.2001 reducing the total income to Rs.10,72,87,110/-, which was processed under section 143(1a). Thereafter, the assessment was reopened under section 147 on 21.03.2003 in order to disallow excess depreciation claimed by the assessee and the reassessment was completed on a total income of Rs.12,61,91,570/;- . The assessment was again reopened under section 147 on the basis of fresh information about excess depreciation laid on windmills. The reassessment was completed

withdrawing the excess depreciation of Rs.1.10 crores.

2.2 Aggrieved over the order passed by the Assessing Officer, the assessee filed an appeal before the Commissioner of Income Tax (Appeals) and the Commissioner of Income Tax (Appeals) found that though the windmills were said to be connected with Grid at 2100 hours, on 31.03.1999, the meter reading practically showed 0.01 unit of power and the Assessing Officer disallowed 50% depreciation claimed by the assessee on the ground that they were not actually commissioned during the year under consideration.

2.3 The Commissioner of Income Tax (Appeals) relied upon the decision of the Bombay High Court in **267 ITR 768 [Dinesh Kumar Gulabchand Agarwal}** wherein he Bombay High Court held that even if the asset was kept ready for use, it would not e sufficient to claim depreciation. The Special Leave Petition filed before the Hon'ble Supreme court was also dismissed by the Apex Court.

2.4 Subsequently, the assessee filed an appeal before the Income Tax Appellate Tribunal, challenging the order passed by the Commissioner of Income Tax (Appeals) and the Tribunal rejected the case of the assessee and observed that even though the production of electricity was negligibly small, the facts remained that production had started. The Tribunal held that the assessee is entitled to 50% depreciation on two windmills, but remitted the issue of actual quantification to the Assessing Officer. Challenging the order passed by the Income Tax Appellate Tribunal, the Revenue has filed the above appeal.

3.The appeal was admitted on the following substantial question of law:

> *" Whether on the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the assessee was entitled to claim depreciation on the windmills even though the wind mills had not generated any electricity during the previous year and thus there was no user of the asset for the purpose of the business of generation of*

power?"

4. Mr. Venkatanarayanan, learned counsel appearing for the respondent submitted that the issue involved in the present appeal is covered by the decisions of the Hon'ble Division Bench of this court dated 11.07.2019 made in **T.C.A. Nos. 655, 666 and 657 of 2009 [M/s. Tenzing Match Works, Sivakasi v. The Deputy Commissioner of Income Tax Circle-1, Virudhunagar]** wherein the Division Bench of this Court held as follows:-

> *" ... 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 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. 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 assess 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. ..."

5. From the above Judgment it is clear that even trial production machineries kept ready for use etc., were considered to be used for the purpose of business to qualify for depreciation and further held that it would amount to passive use and would qualify for depreciation.

6. The ratio laid down by the Hon'ble Division Bench of this Court squarely applies to the facts and circumstances of the present case.

7. The learned counsel appearing for the appellant has not produced any contra judgment in support of the Revenue.

8. In these circumstances, following the ratio laid down by the Hon'ble Division Bench (cited supra), the Tax Case Appeal is liable to

be dismissed. Accordingly, the same is dismissed. No costs.

[M.D., J.] [T.V.T.S., J.]
01.03.2021

Index : Yes/No
Internet : Yes
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To

The Income Tax Appellate Tribunal,
Chennai, "B" Bench

M. DURAISWAMY, J.
and
T.V. THAMILSELVI, J.

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