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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ ITA 1132/2011

+ ITA 1133/2011

+ ITA 1134/2011

% **Date of Decision : 6th February, 2012.**

CIT

.... Appellant

Through: Mr. Sanjeev Sabharwal, sr. standing
counsel

versus

LAKSHMIJI SUGAR MILLS LTD

.... Respondent

Through: Mr. Anil Sharma, Adv.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE R.V. EASWAR

SANJIV KHANNA,J: (ORAL)

1. These appeals by the Revenue under Section 260A of the Income Tax Act, 1961 pertain to the assessment years 2002-03, 2005-06 and 2006-07 and are directed against the order dated 13.4.2011 passed by the Income Tax Appellate Tribunal ('tribunal', for short).

2. Ld. counsel for the appellant-revenue submits that Assessing Officer has rightly disallowed the claim of depreciation on the ground that the sugar mill had stopped functioning and was not in operation. It is submitted that the mill could not have been put into operation as it was incapacitated by lack of funds etc.



3. We have examined the said contention but do not find any merit in the same. For the assessment year 2002-03, the Assessing Officer observed that the assessee's mill/factory had remained closed during the year under consideration. The Assessing Officer refers to the reply furnished by the assessee. In the reply it was stated that efforts were made for revival and restarting the company and subsequently, mill/factory re-started on 19.12.2006. Before the Assessing Officer, the respondent assessee had submitted as under:-

“The machineries installed at the Sugar Mill are very ready machineries which are to be kept at all time in working condition because of the seasonal industries. The production can be commenced at any time when they will get clearance and working capital funds. Machineries are to be kept in working condition at all time so that the production can be started without loss of time in the season period. The machineries since have to be kept in working condition, therefore, the claim of depreciation is justified and the company has accordingly claimed the depreciation on machineries. Similar other assets were also being kept ready and therefore, the claim of depreciation may be allowed to the appellant company. In this connection, we wish to bring to your kind notice that to start machineries specially in the sugar mill, if they are not kept ready for production, takes a minimum 2 to 3 months time to start which is very much costly for the sugar mill during the season time which is hardly 4 to 5 months are required to commence it and therefore, the machineries have to be kept at ready and in working so as to commence



the production without any loss of time. Under these circumstances, the claim of depreciation is justified.”

4. The CIT(Appeals) and the tribunal, having considered the factual background of the present case, have come to the conclusion that the machinery was actually and in fact ready for use and hence depreciation is to be allowed. The findings recorded by the tribunal read as under:-

“10. It was also submitted that there is no dispute that the mill remains closed because of the fact that the company had become sick and a Scheme of Rehabilitation was sanctioned by BIFR and the Scheme of Rehabilitation was under implementation. It is also submitted that the mill remained closed due to non availability of sugar cane and because of this reason also that due to non payment of wages to the workers, they had stopped working in the mill. It is also submitted that due to non availability of funds, electricity was disconnected and working capital was not available with the company. It is also submitted that the efforts were made by the company for its revival and re-starting of the mill and it was subsequently reopened on 19.12.2006 and since that date, the mill is working and the same plant & machinery are being used in manufacturing activity of sugar. It is also submitted that the mill was closed on 29.2.2000 and in the meeting held on 27.2.2002, BIFR recommended winding up to the company and referred the matter to the Hon’ble Delhi High Court. In its judgment dated 31.3.2006, Hon’ble Delhi High Court had adjourned the winding up petition and sanctioned revival scheme of the assessee company. It is submitted that thereafter, the mill



was re-started from 19.12.2006. It is also submitted that on page No.5 of the paper book for assessment year 2002-03, there is copy of daily report for 26.12.2006 as per which, 542 qtls. of sugar was produced on that date and 1315 qtls of sugar was produced till that date in financial year 2006-07. It is also submitted that the time lag between the actual re-starting of the mill after the order of Hon'ble Delhi High Court has to be considered in the light of this aspect that sugar mill is a seasonal industry and it does not run through out the year. It is submitted that in the intervening period, the plant was ready for use throughout and the same could not be used for the reasons beyond the control of the assessee company and hence, there was passive user of the plant and therefore, as per various judgments of Hon'ble Delhi High Court cited above, claim of the assessee regarding depreciation should be allowed.

11. We have heard the rival submissions and have gone through the material available on record. We find that there is no dispute regarding these facts that the mill was stopped working on 29.2.2000 and since then, it was not functional till it was again started on 19.12.2006. In its meeting held on 27.2.2002, BIFR recommended winding up to the company and referred the matter to Hon'ble Delhi High Court. These facts are noted by the Hon'ble Delhi High Court in its judgment date 31.3.2006. As per this judgment, Hon'ble Delhi High Court has held that normally in the circumstances as in this case, the rehabilitation scheme of the company could have been dismissed but in view of some other aspects, Their Lordships held that an attempt can be made to revive the company under the scheme and they have sectioned



the revival scheme with certain conditions. After this judgment of Hon'ble Delhi Court on 31.3.2006, the mill has stated to have been re-started working from 19.12.2006 and in the very first week till 26.12.2006, the company has produced 1315qtls. Of sugar in the light of these facts, we find that the mill was not functional in the intervening period for the reasons beyond the control of the assessee company but immediately after the revival scheme was sanctioned by Hon'ble Delhi High Court, the mill started working in the beginning of next sugar season. We also find that the computation of income/loss for assessment year 2002-03 submitted by the assessee along with return of income Is available on page No.2 of the paper book in which the assessee company has worked out net loss of Rs.1,31,46,774/- after claiming depreciation as per IT Rules of Rs.1,32,69,049/-. The Profit & Loss Account of the assessee company for the year ended 31.3.2002 is available on page No.20 of the paper book in which the assessee has claimed deduction on account of administrative and selling expenses of Rs.1,87,864/-, employee's emoluments Rs 1,78,680/-, repairs and maintenance Rs 21,774/- and misc. expenses of Rs. 32,967/-. Neither in the original assessment nor in the re-assessment order passed by the Assessing Officer on 12.11.2007, there is any disallowance out of these expenses claimed by the assessee as noted above. Out of depreciation claim of the assessee also of Rs. 1.32.69.049/- as per the computation of income available on page No.2 of the paper book, the Assessing Officer has disallowed depreciation on plant & machinery to the extent of Rs.1,29,13,240/- and it means that the Assessing Officer has allowed depreciation on remaining assets of the assessee company. Remaining assets of the assessee company include



residential building, factory building, furniture and fixture, tube well, vehicles, fire fighting equipments, computers etc. It means that except depreciation on plant and machinery, the Assessing Officer himself has allowed deduction on account of all other expenses and depreciation on all other assets.”

5. Thereafter, the tribunal has referred to the word “used” and held that it includes both passive and active user. In ***CIT versus Refrigeration and Allied Industries Ltd.*** (2001) 247 ITR 12 (Del.), Section 32 of the Act was interpreted and the expression ‘used’ was expounded and explained as:

*“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 Corporation 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 62 (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.”

6. Keeping in view the factual background of the present case; the finding that the plant and machinery were kept ready for use with the intention and desire to make it operational as soon as liquid funds were made available and the fact that the factory was ultimately made operational, we do not find that any substantial question of law arises. Appeals are dismissed. No costs.

SANJIV KHANNA, J

R.V.EASWAR, J

FEBRUARY 06, 2012/vld