Commissioner of Income Tax-I, Chennai Vs Chennai Petroleum Corpn. Ltd.

Court: Madras High Court

Date of Decision: July 9, 2013

Citation: (2013) 262 CTR 664 : (2013) 358 ITR 314 : (2013) 218 TAXMAN 228

Hon'ble Judges: K.B.K. Vasuki, J; Chitra Venkataraman, J

Bench: Division Bench

Advocate: T. Ravikumar, for the Appellant; Venkata Narayanan and Subbaraya Aiyar, for the Respondent

Judgement

Chitra Venkataraman, J.
The following substantial questions of law are raised by the Revenue in the present Tax Case Appeal preferred as

against the order of the Income Tax Appellate Tribunal, Chennai "A" Bench dated 23.10.2009 passed in ITA. No. 1822/Mds/2006 for the

assessment year 1998-99.

1. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the assessee was entitled

to claim depreciation of Rs. 2,76,68,250/- on the Gas Sweetening Plant which was not actually used for the purpose of assessee"s business at any

time during the relevant previous year and when the condition of actual user for the purpose of business prescribed u/s 32 of the Act has not been

fulfilled?

The assessee claimed depreciation on Gas Sweetening Plant in the previous year relevant to the assessment year 1998-99. The claim was,

however, rejected by the Assessing Officer on the ground that the plant was not used at any time for the purposes of the business, as required u/s

32(1) of the income tax Act, 1961. The plant was built during the previous year relevant to the Assessment Year 1997-98, but on account of non-

availability of raw material viz., sour gas, the same was not put to use. The plant was commissioned by running a test run for the first time during the

previous year relevant to the assessment year 1997-98. Considering the trial run as equivalent to putting the said plant to use, depreciation was

allowed for the assessment year 1997-98 by the Department. However, on the ground that the assessee had not disclosed the material fact that

plant was not in use during the whole of the previous year relevant to the assessment year 1998-99, the assessment was reopened by issue of

notice u/s 148 of the income tax Act, 1961.

2. The assessee contended that the plant was ready for use for the year under consideration and the non-availability of raw material was an

impediment to put the plant to use. Hence, the claim for depreciation could not be denied; the only requirement under law was that plant was ready

for use; hence, depreciation should be allowed. The assessee further contended that the asset was in good condition and it might be ready for

actual use in any minute. The expression "used" in the Statute, hence, should be understood in wider sense and that "actual use" must be

understood to include passive use as well as active use. The assessee pointed out to the decision in the case of Commissioner of Income Tax Vs.

Oriental Coal Co. Ltd., referred to by the Revenue, to bring out the distinction between the circumstances of a lock-out and the inability to put to

use an asset on grounds beyond the control of the assessee that the claim of the assessee be favourably considered for the grant of relief. Thus,

placing reliance on the decision in the case of Commissioner of Income Tax Vs. Union Carbide (I) Ltd., , the assessee requested that the

depreciation claim be allowed.

3. In support of its contention, the assessee also placed reliance on the decisions of this Court in the case of Commissioner of Income Tax, Tamil

Nadu-I Vs. Vayithri Plantations Ltd., , decision of the Bombay High Court in the case of COMMISSIONER OF INCOME TAX, BOMBAY

Vs. VISWANATH BHASKAR SATHE., as well the decision of the Delhi High Court in the case of Capital Bus Service (P.) Ltd. Vs.

Commissioner of Income Tax, New Delhi, .

4. The claim of the assessee, however, was rejected by the Assessing Officer on the ground that when the asset had never been put to use during

the whole of the previous year relevant to the assessment year 1998-99 i.e., the second year of installation of the plant, grant of relief could not be

maintained under law. In so holding, the Assessing Officer placed reliance on the decision in the case of Oriental Coal Co. Ltd (supra). Thus, the

assessment was completed.

5. Aggrieved by this, the assessee went on appeal before the Commissioner of Income Tax (Appeals), who also rejected the assessee"s appeal,

which led to filing of further appeal before the Income Tax Appellate Tribunal.

6. In support of its contention that the machinery, even though was not working on account of non-availability of raw material, yet, in view of its

readiness to function, the relief should have been granted, the assessee placed reliance on the decision in the case of Commissioner of Income Tax

Vs. Heera Financial Services Ltd., , in the case of Commissioner of Income Tax Vs. Swarup Vegetable Products India Ltd., , in the case of

Commissioner of Income Tax Vs. Nahar Exports Ltd., and in the case of Commissioner of Income Tax Vs. Southern Petrochemical Industries

Corporation Ltd., .

7. The claim of the assessee was, however, contested by the Revenue pointing out that the decision of this Court in the case of Heera Financial

Services Ltd (supra) was distinguishable, since it related to the case of leasing out of certain films and the same could not be used by the lessee. On

the other hand, the Revenue placed reliance on the decision of the Karnataka High Court in the case of The Deputy Commissioner of Income Tax,

Special Range-4 Vs. Yellamma Dasappa Hospital, and contended that unless the machinery have been actually put to use, the requirements of law

thus not satisfied, the claim was to be rejected.

8. Referring to the decision in the case of Vayithri Plantations Ltd. (supra) the Department contended that the same related to development rebate;

hence, the relief could not be granted.

9. It is seen from the order of the Income Tax Appellate Tribunal that there were differences between the view taken by the learned Accountant

Member and the learned Judicial Member. Ultimately, it was referred to the learned Third Member.

10. A reading of the order of the Income Tax Appellate Tribunal, particularly of the learned Accountant Member, shows the reasoning that even

though Section 32 was amended and expression therein is ''used'' by reason of which, unless and until the plant was really put to use, the

depreciation could not be granted. However, going by the decision of this Court in the case of Vayithri Plantations Ltd (supra), learned Accountant

Member agreed with the contention of the assessee that once the plant was ready, the same was entitled to depreciation. Thus he rejected the

contention of the Revenue. Referring to the decision of this Court in the case of Heera Financial Services Ltd (supra), which followed the judgment

in Vayithri Plantations Ltd (supra), the learned Accountant Member held that once the plant was ready, the assessee was entitled to depreciation.

In support of its reasoning, the learned Accountant Member also referred to definition of ''block of assets'' and ultimately held that once admittedly

the gas plant was ready to use, it must have suffered some wear and tear, hence, the assessee was entitled to the claim for depreciation. In the

circumstances, the Accountant Member allowed the appeal.

11. Learned Judicial Member, however, took a different view based on the decision in the case of Commissioner of Income Tax Vs. Maps Tours

and Travels, as well as in the case of Vayithri Plantations Ltd. (supra). Learned Judicial Member pointed out that after the amendment to Section

32(1) of the income tax Act, 1961 made by Taxation Law (Amendment and Miscellaneous Provision) Act, 1986 with effect from 01.04.1988,

assets should be such, as has been used for the purpose of the business, profession or vocation for at least a part of the year. Thus, unless the

assets have been put to use, the claim of the assessee could not be granted. In this connection, learned Judicial Member referred to the decision of

the Bombay High Court in the case of Dineshkumar Gulabchand Agrawal Vs. Commissioner of Income Tax and Another, holding that the word

''used'' meant ''actually used'' and not merely ''ready for use''. Learned Judicial Member pointed out that in the case of Maps Tours and Travels

(supra), cars bought on the last day of the accounting year were not registered for being brought on road, and there was no evidence of having

used those cars before the end of the accounting year in the business of the assessee. Thus, this Court held that the assessee was not entitled to

depreciation in respect of those vehicles. Learned Judicial Member further referred to the decisions in the case of B. Malani and Co. Vs.

Commissioner of Income Tax., , in the case of Yellamma Dasappa Hospital (supra) and in the case of Dy. Commr. of Income Tax, Ahmedabad

Vs. N.K. Industries Ltd., and held that even under the amended provision, the assessee was entitled to the claim for depreciation, only if the assets

were, in fact, used for business purposes. Thus learned Judicial Member rejected the claim of the assessee.

12. On account of conflicting views of the two members, the matter was referred to the Third Member-Vice President of the Income Tax

Appellate Tribunal, who agreed with the view taken by learned Accountant Member in favour of the assessee. In coming to this conclusion,

learned Vice-President referred to the decision of the Bombay High Court in the case of Whittle Anderson Ltd. Vs. Commissioner of Income Tax,

Bombay City I, , which was also referred to by this Court in the case of Vayithri Plantations Ltd. (supra) and held that in order to claim

depreciation u/s 32 of the income tax Act, 1961, it was not necessary that machinery in question should have been actually used in the previous

year for the purposes of business. It is seen that the machinery was kept in the relevant previous year, though not actually used for the reasons

beyond the assessee''s control. Learned Vice-President referred to the decision of the Bombay High Court in the case of Visvanath Bhaskar Sathe

(supra), rendered under the 1922 Act and held that having regard to the similarity of provisions under the 1961 Act and that the decision in the

case of Visvanath Bhaskar Sathe (supra) was subsequently followed by this Court in the case of Vayithri Plantations Ltd. (supra), the claim of the

assessee merited to be considered u/s 32 of the income tax Act.

13. Referring to the decision of the Supreme Court in the case of Commissioner of Income Tax, Udaipur Rajasthan Vs. Mcdowell and Co. Ltd., ,

learned Vice President pointed out that the Apex Court remanded the case to the Assessing Officer for finding out the relevant facts and hence, the

same cannot be of any assistance. As far as the decision in the case of Maps Tours and Travels (supra) was concerned, the judgment turned on its

peculiar facts therein. However, in view of the decision of the Bombay High Court in the case of the Whittle Anderson Ltd (supra) and the decision

in the case of Visvanath Bhaskar Sathe (supra), learned Vice President agreed with the learned Accountant Member that the case of the assessee

merited to be answered in its favour. Thus, the Third Member-Vice President agreed with the Accountant Member and granted the relief.

Aggrieved by this, Revenue has preferred this Tax Case Appeal.

14. Section 32 of the income tax Act, as is relevant for consideration, reads as under:--

32. Depreciation,--(1) In respect of depreciation of--

(i) buildings, machinery, plant or furniture being tangible assets;

(ii) know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature, being intangible

assets acquired on or after the 1st day of April, 1998,

owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed-

(i) in the case of assets of an undertaking engaged in generation or generation and distribution of power, such percentage on the actual cost thereof

to the assessee as may be prescribed,

(ii) in the case of any block of assets, such percentage on the written down value thereof as may be prescribed.

15. The Supreme Court had an occasion to consider the phrase "use for the purpose of business" in the case of The Liquidators of Pursa Limited

Vs. Commissioner of Income Tax, Bihar, . The facts were that the assessee therein was carrying on business of growing sugarcane and

manufacturing and selling sugar. It commenced the process of winding up of the company by the sale of the factory and other assets in 1943. The

agreement for sale of business towards winding up provided that the vendor was to sell and demise to the purchaser for a certain sum, all the lands,

buildings, machinery and plant as on 9th August, 1943, but the stocks of manufactured sugar on that date were expressly excluded from the

agreement. The assessee continued to sell the sugar stock, valued at Rs. 6 lakhs up to June, 1944 and it went into voluntary liquidation in June,

1945. Admittedly, between 9th August 1943 and 10th December, 1943, it being the date of agreement and the date of sale of the machinery, land

and building, the assessee never used the machinery and plant for the purpose of manufacturing sugar or for any other purpose except that of

keeping them in trim and running order. On the question as to whether the assessee was entitled to depreciation during this period, the Supreme

Court considered the provisions of Section 10, as amended by Act VII of 1939, which reads as under:--

10. (1) The tax shall be payable by an assessee under the head ''Profits and gains of business, profession or vocation'' in respect of the profits or

gains of any business, profession or vocation carried on by him.

(2) Such profits or gains shall be computed after making the following allowance, namely:--

(i) to (iii)** ** ***

(iv) in respect of insurance against risk of damage or destruction of buildings, machinery, plant, furniture, stocks or stores used for the purposes of

the business, profession or vocation the amount of any premium paid;

(v) in respect of current repairs to such buildings, machinery, plant, or furniture, the amount paid on account thereof;

(vi) in respect of depreciation of such buildings, machinery plant, or furniture being the property of the assessee, a sum equivalent to such

percentage on the original cost thereof to the assessee as may in any case or class of cases be prescribed:

** ** **

(vii) in respect of any machinery or plant which has been sold or discarded, the amount by which the written down value of the machinery of plant

exceeds the amount for which the machinery or plant is actually sold or its scrap value:

Provided that such amount is actually written off in the books of the assessee:

Provided further that where the amount for which any such machinery or plant is sold exceeds the written down value, the excess shall be deemed

to be profits of the previous year in which the sale took place

** ** **

The Apex Court pointed out that the critical words which are essentially constituent for the purpose of considering the claim of the assessee was

machinery or plant ""used for the purposes of business, profession or vocation"". The words ""used for the purposes of business"" obviously means

used for the purpose of enabling the owner to carry on the business and earn profits in the business. In other words, the machinery or plant must be

used for the purpose of that business which is actually carried on and the profits of which are assessable u/s 10(1). It pointed out that the sale of

the machinery and plant was not an operation in furtherance of the business carried on by the company but was a realisation of the assets in the

process of gradual winding up of its business, which ultimately ended up with the liquidation of the company. Even if the sale of sugar be regarded

as carrying on of business, the machinery not being used and not having had any connection with the carrying on of that limited business during the

accounting year, Section 10(2)(vii) could have no application.

16. In the decision of Whittle Anderson Ltd. (supra) the word ''used'' as found in Section 10(2) of the Act, was considered by the Bombay High

Court. There, the Company which was engaged in Cotton ginning and pressing factory, entered into a pooling agreement on February 8, 1950

with two other concerns, owning in all 4 presses, which was to be in force till October 20, 1960. On the question whether ""such building,

machinery or plant"" in Clause (vii) means ""building, machinery or plant"" used for the purposes of the business, profession or vocation"", the Bombay

High Court held that even though two out of the four presses which were directly in the pooling arrangement were to remain idle, while the two

presses worked, the owners of those presses which were idle, had to keep them ready for use at any time and the contingency for their use could

also, upon the terms of the agreement, arise at any time. Having regard to the above meaning of the word ""used"", even these presses which

remained under forced idleness, were held as in use during the entire period of the year. Thus, the assessee continued to use its machinery within

the meaning of the word ""used"" u/s 10(2)(vii) and the word ""used"" in the Section should be understood in a wider sense so as to embrace passive

as well as active use. When machinery was kept ready for use at any moment in a particular factory under an express agreement from which

taxable profits were earned, the machinery could be said to be ""used"" for the purposes of the business which earned the profits although it was not

actually worked. In so holding, the Bombay High Court followed the decision of (1937) 5 ITR 626 .

17. We are in entire agreement with the view expressed by the Bombay High Court in the decision in Whittle Anderson Ltd. case (supra) following

the decision in Bhikaji Venkatesh case (supra) in the light of the decision of this Court in Vayithri Plantations Ltd case (supra).

18. Even though learned Standing counsel appearing for the Revenue contended that such decision related to the case of development u/s 33 of the

income tax Act, yet, this Court referred to the decision u/s 32 of the income tax Act in the context of the expression ''used for the purpose of

business'' as explained in Liquidators of Pursa Ltd. (supra) and held that so long as the business was going and the machinery got ready for use but

due to certain extraneous circumstances, the machinery could not be put to use, the said fact could not stand in the way of granting relief u/s 32 of

the Act.

19. As far as the decision of this Court reported in Maps Tours and Travels (supra) is concerned, if under law, there is a prohibition on the

assessee to put the cars on roads for want of registration, considering such prohibition, the claim of the assessee u/s 32 of the income tax Act could

not be granted. Thus the above said decision has to be seen in the light of the facts and circumstances of the case; hence, the same would not be of

any assistance to the assessee. In fact, learned Standing counsel appearing for the Revenue fairly stated before this Court that in the decisions in

Commissioner of Income Tax Vs. Southern Petrochemical Industries Corpn. Ltd., and Commissioner of Income Tax Vs. Southern Petrochemical

Industries Corpn. Ltd., , this Court had considered the grant of depreciation even to stand-by machinery. When that being the case, we do not find

any justifiable ground to disturb the reasoning of the majority members of the Income Tax Appellate Tribunal.

20. Under the stated circumstances, on the admitted case that business was a going concern and the machinery could not be put to use due to raw

material paucity, we reject the Revenue''s contention, thereby, confirm the majority view of the Income Tax Appellate Tribunal. In the result, the

Tax Case Appeal is allowed. No costs.