

आयकर अपीलिय अधिकरण, 'बी' न्यायपीठ, चेन्नई  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
'B' BENCH, CHENNAI

श्री महावीर सिंह, उपाध्यक्ष एवं श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष

**BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT AND  
SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER**

आयकर अपील सं./ITA No.: 1809/CHNY/2015

निर्धारण वर्ष /Assessment Year: 2006-07

**The DCIT,**  
Corporate Circle -1,  
63-A, Race Course Road,  
Coimbatore

**M/s. Maheswara Sugars Limited,**  
v. (Subsequently got amalgamated with  
M/s. Bannari Amman Sugars Ltd  
w.e.f. 1.1.2007)  
C/o. P.N. Raghavendra Rao & Co.,  
23/2, Viswa Paradise Apartments,  
IInd Floor, Kalidas Road, Ramnagar,  
Coimbatore – 641 009.

**PAN: AAACD 6151G**

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by  
प्रत्यर्थी की ओर से/Respondent by

: Shri P. Sajit Kumar, JCIT  
: Shri R. Vijayaraghavan, Advocate

सुनवाई की तारीख/Date of Hearing : 19.01.2022

घोषणा की तारीख/Date of Pronouncement : 31.01.2022

**आदेश /O R D E R**

**PER MAHAVIR SINGH, VP:**

This appeal by the Revenue is arising out of order of  
Commissioner of Income Tax (Appeals)-1, Coimbatore in Appeal

No.178/14-15, vide order dated 26.05.2015. The original assessment was framed by the Income ACIT, Circle-12(1), Bangalore for the assessment year 2006-07 vide order dated 25.03.2008 u/s.143(3) of the Income Tax Act, 1961 (hereinafter the 'Act'). Subsequently, the assessment was reopened and reassessment was framed by ACIT, Company Circle 1(2), Coimbatore vide order dated 31.03.2014 u/s.143(3) r.w.s. 147 of the Act.

2. The assessee, M/s. Maheswara Sugars Ltd., is a company engaged in the manufacture and sale of sugar till the year 2006. The said company was existing as an independent corporate entity. However on 01.01.2007 the assessee company namely Maheswara Sugars Ltd., was amalgamated with M/s. Bannari Amman Sugars Limited, Coimbatore, as scheme of amalgamation was approved by Hon'ble Madras High Court in Company Petition Nos.187 and 188 of 2007, vide order dated 06.11.2007 w.e.f. 01.01.2007.

3. At the outset, the Id.counsel for the assessee stated that the AO reopened the assessment by issuing notice u/s.148 of the Act and reassessment order was passed u/s.143(3) r.w.s. 147 of the

Act vide order dated 31.03.2014 and the same was challenged before CIT(A). The CIT(A) adjudicated the issue of reopening against the assessee but the CIT(A) allowed the appeal of assessee on merits. Now, the Id.counsel for the assessee stated that assessee want to raise the issue of reopening under Rule 27 of Income Tax Appellate Tribunal Rules, 1963. The assessee moved a petition claiming that the assessee has not preferred an appeal against the order of CIT(A) rejecting the assessee's ground for reopening of assessment. The assessee has raised following two grounds:-

1. The CIT(A) erred in confirming the reopening, without considering that reopening was beyond 4 years from the end of the assessment year and all the details regarding unabsorbed depreciation were available and considered for completion of the assessment and hence reopening was without jurisdiction.

2. The CIT(A) ought to have appreciated that there was no omission on the part of the assessee disclose truly all materials and hence reopening is without jurisdiction.

4. When these reopening grounds raised under Rule 27 of Income Tax Appellate Tribunal Rules, the same was confronted to Id. Senior DR, but he has not raised any objection against the raising of issue under Rule 27 of the Rules. Hence, we admit the petition and will adjudicate, because this is purely a legal issue.

5. Brief facts are that the assessment year involved is 2006-07 and original assessment was framed by the AO u/s.143(3) of the Act, vide order dated 25.03.2008. Subsequently, the AO issued notice u/s.148 of the Act for reopening of assessment dated 27.02.2013. Admittedly this notice u/s.148 of the Act is beyond 4 years as the assessment year involved is 2006-07. The Id.counsel for the assessee drew our attention to the reasons recorded, which are enclosed in assessee's paper-book page 2 and the relevant reads as under:-

“The assessee company has filed its return of income on 31.10.2006 for th4 A.Y. 2006-07 showing net loss of (-)Rs 4,75,19,541. The return was processed u/s 143(1) on 28.08.2007 accepting the return income. Later the case was selected for scrutiny, the scrutiny assessment was completed u/s 143(3) on 25.03.2008 determining a loss of (-)Rs 2,79,26,240/-. A sum of Rs 6,38,22,436/- and Rs 20,15,02,830/- was determined as unabsorbed business loss and Depreciation respectively from the A.Y. 1999-2000 to 2006-07, and allowed to be carried forward for set off from future income.

The assessee company originally incorporated as a sugar mill in the co-operative sector, which become unviable & changed hands to M/s. Khoday's Group, then M/s Nagarjun Fertilizers Group and finally, it was taken over by M/s Bannari Amman Group on 07.02.2006 and the name of the sugar mill was changed from M./s Madeshwara Sugars to M/s Maheswara Sugars Mills Ltd. .

Later it was seen from the records that the factor/ was not in operation for more than 5 years. The assessee company has claimed unabsorbed depreciation loss from A.Y. 1999-2000 to 2005-06. As per the computation statement of the assessee enclosed to the return of income. For the A.Y. 2003-03 to- 2005-06, it appears that the company was not operative during these years, except for sale of sugars by Tahsildar in terms of the Government order.

As per Sec 32(1) of the income tax Act, depreciation on plant and machinery etc to be allowed where owned wholly or partially by the assessee & used for the purpose of business. But in this case as the factory

was not in operation for 5 years and there was no activity of production or use of plant and machinery.

Therefore the depreciation allowed for the A.Y. 2003-04 to 2005-06 is not allowable as the plant and machinery was not in use and thus the excess depreciation claimed has to be disallowed.

In view of the above, I have reason to believe that income chargeable to tax, has escaped assessment within the meaning of Sec 147.”

The Id.counsel for the assessee then took us through the assessment order i.e., original assessment order which is enclosed at assessee's paper-book, page 5 and stated that as reasons recorded by the AO that the assessee's factory was not in operation for more than 5 years, this information was available with the AO during the original assessment proceedings and AO has noted this fact in the very first paragraph and the relevant paragraph reads as under:-

“The assessee company originally incorporated as a sugar mill in the co-operative sector became unviable and changed hands to M/s. Khodays Group and then to M/s. Nagarjuna Fertilizers Group and finally, it was taken over by M/s. Bannari Amman Group of Coimbatore and the entire share holding of the company was taken over by the Bannai Amman Group on 7.02.06. The factory was not in operation for more than 5 years and there were considerable dues payable to various government organizations, banks and other financial institutions, the sugar cane growers, etc., which were settled from out of the share capital introduced by the new management.”

The Id.counsel for the assessee then took us through the entire assessment order and stated that computation and claim of

unabsorbed depreciation losses from assessment years 1999-2000 to 2005-06 was claimed and allowed in original assessment and Id.counsel drew our attention to computation made by the AO in original assessment proceedings which reads as under:-

The total income is computed as under:

Loss as per the Profit & Loss account	(2,22,99,020)
Add: Depreciation as per I.T.Act	87,17,941
Less:25% of the bad debts claimed by the assessee company disallowed as discussed in Para No.5	30,90,721
Total Loss to be carried forward to A.Y. 2007-08	(2,79,26,240)

The details of the losses to be carried forward are as under:

Sl. No.	A.Y.	Business Loss	Unabsorbed depreciation	Total
1	1999-2000	2,45,328	2,57,50,250	2,59,95,578
2	2000-2001	4,43,68,809	2,99,95,355	7,43,64,164
3	2000-02	-	4,28,90,292	4,28,90,292
4	2002-03	-	3,30,61,263	3,30,61,263
5	2003-04	-	2,56,06,140	2,56,06,140
6	2004-05	-	1,99,11,022	1,99,11,022
7	2005-06	-	1,55,70,567	1,55,70,567
8	2006-07	1,92,08,299	87,17,941	2,79,26,240

The Id.counsel stated that the AO in original assessment proceedings has noted the facts and now in subsequent reassessment proceedings, the AO on the same set of facts want to reopen the assessment. He stated that very reasons are recorded

from records i.e., assessment records and no new tangible materials are brought on record for reopening of assessment. The Id.counsel stated that assessee's case squarely falls under the proviso to section 147 of the Act and there is no iota of arguments or whisper about any failure on the part of the assessee to disclose all necessary material facts fully and truly for completion of assessment and reopening of assessment is after a period of 4 years from the end of assessment year. Even the original assessment was completed u/s.143(3), reopening is not at all permissible. The Id.counsel for the assessee relied on the decisions of Hon'ble Supreme Court in the case of CIT vs. Foramer France, (2003) 264 ITR 566 and Hon'ble Madras High Court in the case of CIT vs. RPG Transmissions Ltd., [2014] 48 taxmann.com 57. In view of the above, the Id.counsel stated that even on merits, assessee's case is fully covered and CIT(A) has rightly allowed the claim of assessee.

6. On the other hand, the Id.Senior DR could not point out either from the reasons recorded or in the reassessment order, there is mention of any failure on the part of the assessee to disclose any material fact not disclosed by the assessee. He admitted that reopening is beyond 4 years and original assessment was completed

u/s.143(3) of the Act. The Id.CIT-DR only relied on the decision on the Hon'ble Supreme Court in the case of CIT vs. PVS Beedies Pvt. Ltd., 237 ITR 13 (SC). He particularly read out para 9 of AO which states that "*re-opening of the assessment order is squarely covered by the principle laid down by the Hon'ble Supreme Court in the case of CIT vs. PVS Beedies Pvt Ltd.*" Apart from this, he could not controvert the above submissions made by the Id.counsel for the assessee.

7. We have heard rival contentions and gone through facts and circumstances of the case. We have perused the materials placed before us. Admittedly, the reopening is beyond 4 years and original assessment is completed u/s.143(3) of the Act. We have also gone through the reasons recorded as well as original assessment order. We noted that the reasons for reopening and the issue examined by the AO in original assessment proceedings are exactly the same. There is no difference. As we have already extracted the reasons recorded as well as the finding of the AO in original assessment proceedings, we could not point out what is the failure of the assessee to disclose fully and truly the material facts for completion of assessment of the assessee. We have gone through the decision

of Hon'ble Supreme Court in the case of CIT vs. Foramer France, (2003) 264 ITR 566, wherein the Supreme Court has affirmed the decision of Hon'ble Allahabad High Court in the case of Foramer France vs. CIT, (2001) 247 ITR 436. The Hon'ble Supreme Court affirming the decision of Hon'ble Allahabad High Court in the case of Foramer France, *supra* held that

14. Having heard learned counsel for the parties, we are of the view that these petitions deserve to be allowed.

15. It may be mentioned that a new Section substituted Section 147 of the Income-tax Act by the Direct Tax Laws (Amendment) Act, 1987, with effect from April 1, 1989. The relevant part of the new Section 147 is as follows : "147. If the Assessing Officer, has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this Section and in sections 148 to 153 referred to as the relevant assessment year) :

Provided that where an assessment under Sub-section (3) of Section 143 or this Section has been made for the relevant assessment year, no action shall be taken under this Section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under Section 139 or in response to a notice issued under Sub-section (1) of Section 142 or Section 148 or to disclose fully and truly all material facts necessary for his assessment for that assessment year."

16. This new Section has made a radical departure from the original Section 147 inasmuch as clauses (a) and (b) of the original Section 147 have been deleted and a new proviso added to Section 147.

17. In Rakesh Aggarwal v. Asst. CIT (1997] 225 ITR 496, the Delhi High Court held that in view of the proviso to Section 147 notice for reassessment

under Section 147/148 should only be issued in accordance with the new Section 147, and where the original assessment had been made under Section 143(3) then in view of the proviso to Section 147, the notice under section 148 would be illegal if issued more than four years after the end of the relevant assessment year. The same view was taken by the Gujarat High Court in *Shree Tharad Jain Yuvak Mandal v. ITO* [2000] 242 ITR 612.

18. In our opinion, we have to see the law prevailing on the date of issue of the notice under Section 148, i.e., November 20, 1998. Admittedly, by that date, the new Section 147 has come into force and, hence, in our opinion, it is the new Section 147 which will apply to the facts of the present case. In the present case, there was admittedly no failure on the part of the assessee to make a return or to disclose fully and truly all material facts necessary for the assessment. Hence, the proviso to the new Section 147 squarely applies, and the impugned notices were barred by limitation mentioned in the proviso.”

7.1 Furthermore, the Hon'ble Madras High Court in the case of *CIT vs. RPG Transmissions Ltd.*, [2014] 48 taxmann.com 57, held as under:-

“22. We find from the reasons set out in the assessment orders that the assessee has explained and disclosed the entire facts which would constitute a full disclosure and, therefore, we have no hesitation to hold that the reopening of assessment is barred by the proviso to section 147. Further, the facts which emerge from the assessment order as well as the order of Commissioner of Income-tax (Appeals) are well founded and in terms of the principles laid down by the apex court. For the aforesaid reasons, we find that the Tribunal has correctly appreciated the facts in holding that the reopening of the assessment orders are barred by limitation. We find that the Commissioner of Income-tax (Appeals) as well as the Tribunal has concurrently held from the facts that the proviso to section 147 would not apply to the facts of this case and since it is a finding of fact that too which is essentially based on the principles which are gathered from the judgments referred to above, we find that the Assessing Officer has departed from the said principles in arriving at a conclusion that the proviso to section 147 would apply in the instant case. We see no reason to deviate from the finding of fact and, hence, the appeal of the Revenue fails on this ground. Therefore, the first part of the substantial question of law No. 1 in T. C. (A.) Nos. 310 to 312 of 2007 with regard to the invocation of extended period of time under the proviso to section 147 is answered in the affirmative and in favour of the assessee.”

8. In view of the above, we quash the reassessment on reopening and hence, this issue of assessee's petition under Rule 27 is allowed.

9. Coming to Revenue's appeal, even on merits the CIT(A) has categorically held that the assessee is eligible for carry forward of depreciation for the assessment years 2002-03 to 2004-05. The observation of CIT(A) in para 11 reads as under:

11. In the case of the appellant company, the asset could not be put to use during the Asst. Year 2002-03 to 2004-05 for reasons beyond the control of the company. In the case of CIT vs. Tranvancore Chemicals & Mfg. Co. Ltd., reported in 142 Taxman 316 (Ker), the Hon'ble High Court stated that **“the test of actual user is to be applied only in the year of purchase i.e., when the new asset is first put to use. Subsequently, on its merger into the Block of Assets, depreciation is allowable irrespective of the fact whether individual items in the Block has been put to use or not”**. In this case the assessee raised a contention though the factory was under lockout so long as the buildings, plant and machinery and other fixed assets relating to that factory formed an integral part of the Block of Assets owned by the assessee company and depreciation is allowable on such assets. The consensus of judicial opinion is in favour of adopting the liberal interpretation. Though it is true that a machinery generally depreciates with actual user, the judicial decisions indicate that it is not necessary to import this concept for interpreting the expression “used” in the statute. In the case of CIT Vs Vayithri Plantations Ltd [1981] 128 ITR 675 (MAD), it has been held that, so long as the machinery is kept for use, it could be stated that the machinery should be used for the purpose of business. Any forced idleness of the machinery cannot disentitle the assessee from getting the relief. The appellant also relied on the decision of the jurisdictional High Court in the case of CIT Vs Chennai Petroleum Corporation Ltd 37 taxmann.com 332 (MAD). The Jurisdictional High Court held that by **“so long as the assessee's business was a going concern and the plant got**

**ready for use but due to certain extraneous circumstances it could not be put to use, the said fact could not stand in the way of granting relief under Section 32”.** Considering all the judicial decisions, it is evident that the sugar factory in the case of the appellant was closed due to circumstances beyond the control of the assessee. However, subsequently after re-opening from 24.12.2006, the appellant company started production using the same machinery and is regularly doing the business operation. In view of this, the Assessing Officer is directed to allow the claim of carried forward unabsorbed depreciation for the Asst. years 2002-03 to 2004-05 to be carried forward and set-off in subsequent Asst. Years. This issue in the grounds of appeal is allowed.”

Hence, on merits also, the Revenue’s appeal is dismissed.

10. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the court on 31<sup>st</sup> January, 2022 at Chennai.

Sd/-

(मनोज कुमार अग्रवाल)

**(MANOJ KUMAR AGGARWAL)**

लेखा सदस्य /ACCOUNTANT MEMBER

Sd/-

(महावीर सिंह )

**(MAHAVIR SINGH)**

उपाध्यक्ष /VICE PRESIDENT

चेन्नई/Chennai,

दिनांक/Dated, the 31<sup>st</sup> January, 2022

**RSR**

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|------------------------|--------------------------|------------------------------|
| 1. अपीलार्थी/Appellant | 2. प्रत्यर्थी/Respondent | 3. आयकर आयुक्त (अपील)/CIT(A) |
| 4. आयकर आयुक्त /CIT    | 5. विभागीय प्रतिनिधि/DR  | 6. गार्ड फाईल/GF.            |