

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 06.07.2021

CORAM:

**THE HON'BLE MR. JUSTICE M.DURAI SWAMY
AND
THE HON'BLE MRS.JUSTICE R.HEMALATHA**

T.C.A.No.62 of 2015

The Commissioner of Income Tax,
Trichy.

... Appellant

Vs.

M/s.KMC Speciality Hospitals India Ltd.,
(Formerly Sea Horse Hospitals P. Ltd.)
No.6, Royal Road, Trichy.

... Respondent

Appeal preferred under Section 260A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal, Madras, "C" Bench, dated 05.05.2014 in I.T.A.No.458/Mds/2014 for the Assessment Year 2007-08.

For Appellant : Mr.M.Swaminathan,
Senior Standing Counsel
assisted by
Ms.V.Pushpa,
Junior Standing Counsel

For Respondent : Mr.K.Ravi

JUDGMENT

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

Challenging the order passed in I.TA.No.458/Mds/2014 in respect of the Assessment Year 2007-08 on the file of the Income Tax Appellate Tribunal, Chennai, "C" Bench, the Revenue has filed the above appeal.

2.It is the case of the assessee that for the Assessment Year 2007-08, the return of income was filed on 26.10.2007, admitting business loss of Rs.65,22,677/- and carried forward loss of Rs.18,39,06,826/-, which included depreciation allowance of Rs.17,73,84,149/-. The case was selected for scrutiny and notice under Section 143(2) was issued on 18.09.2008 and after due process of hearing, the assessment order under Section 143(3) was issued on 22.12.2009, accepting the loss return of Rs.65,22,677/- and determining the losses carried forward for set off against future profits as Rs.18,39,06,826/-. The Assessing Officer, thereafter, on 01.02.2011, proposed to withdraw under Section 154 of the Income Tax Act, the depreciation allowance of Rs.13,71,60,209/-, as according to him, the

depreciation relating to the Assessment Year 1997-98 and 1998-99 are required to be withdrawn. The assessee, by their letter dated 22.03.2011, has objected to the proposed rectification under Section 154 as the same was not a matter of “mistake apparent on the face of the record”. Based on the objection, the Assessing Officer has dropped the proceedings under Section 154. Thereafter, notice under Section 148 for the Assessment Year 2007-08 was issued on 23.03.2011, which was served on the assessee on 28.03.2011 citing the same reason as in the proposal under Section 154 of the Act. The assessee thereafter contested the said notice and the re-opening of the assessment. However, the Assessing Officer completed the assessment on 29.12.2011, withdrawing the carry forward of unabsorbed depreciation allowance to an extent of Rs.13,71,60,209/- and determined the total income/(loss) as Rs.4,67,46,621/- for the Assessment Year 2007-08. Challenging the order of assessment, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals) and the Commissioner of Income Tax (Appeals) dismissed the appeal. Aggrieved over the same, the assessee preferred an appeal before the Income Tax Appellate

Tribunal and the Tribunal allowed the appeal. Challenging the order passed by the Income Tax Appellate Tribunal, the Revenue has filed the above appeal.

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

“Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the assessee is entitled to carry forward the unabsorbed depreciation of Rs.13,71,60,209/- pertaining to AY 1997-1998 and 1998-99 and set off against the income of Assessment Year 2007-08 which is beyond the period of eight assessment years, in the light of amendment w.e.f AY 1997-98 putting a cap of eight years for carry forward of depreciation and the amendment w.e.f. 2002-03 removing the said cap of eight years for carry forward?”

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4.When the appeal is taken up for hearing, Mr.M.Swaminathan, learned senior standing counsel appearing for the appellant–Revenue fairly submitted the substantial question of law that arose for

consideration in the above appeal has already been decided against the Revenue and in favour of the assessee in the following judgments:

(i)[2021] 127 taxmann.com 805 (Madras) [Harvey Heart Hospitals Ltd. Vs. Assistant Commissioner of Income Tax] wherein the Division Bench held as follows:

“ ...

5. Aggrieved over the same, the appellant has filed the above Tax Case Appeal raising the following substantial questions of law: "

(i) Whether the Tribunal was right in law in holding that the assessment made u/s. 153C r/w Sec. 143(3) is valid especially when there are no incriminating materials seized warranting such an assessment on the appellant?

(ii) Whether the Tribunal is right in not confirming the view of the Assessing Officer that the business income arising out of sale of fixed assets is to be treated only as short term capital gains under section 50 of the Income-tax Act even though the depreciable assets were sold?

(iii) Whether the Tribunal was right in law in holding that the unabsorbed depreciation relating to Assessment Year 1997-98 to 2000-2001 is not eligible for set off against any income of the appellant for the Assessment Year 2005-06?"

6.1.Mr. R. Sivaraman, learned counsel appearing for the appellant submitted that he is not making any submission with regard to questions of law Nos. 1 and 2 and therefore, this court need not give any finding with regard to the same in this Tax Case. The learned counsel made his submission only with regard to 3rd question of law *i.e.* with regard to unabsorbed depreciation relating to assessment year 1997-98 to 2000-2001 is not eligible for set off against any income of the appellant for the Assessment Year 2005-06.

6.2.The learned counsel further submitted that the Hon'ble Division Bench of this court, in identical circumstances, in the Judgment reported in *CIT v. S & S Power Switchgear Ltd.* 2009 (318) 187 (Mad.) held that in view of the amended provisions of section 32(2), with effect from 1-4-1997, the deeming fiction of treating the earlier years' unabsorbed depreciation as current year depreciation was removed and the period available for absorbing the unabsorbed depreciation against the profit of the succeeding years was limited to eight years. Further, the Division Bench held that the clarification of the Finance Minister in the Parliament was also to the effect that the cumulated unabsorbed depreciation brought forward as on 1-4-1997 could still be set off against the taxable business profit or income under any other head for the assessment year 1997-

98 and seven subsequent years. In view of the said position, the Division Bench held that the assessee was entitled to the unabsorbed depreciation brought forward as on 1-4-1997 and could set it off against short-term capital gains.

6.3. On the same lines, the Hon'ble Division Bench in an unreported Judgment dated 14-9-2020 made in *CIT v. Sanmar Speciality Chemicals Ltd.*, [2020] 122 taxmann.com 212/428 ITR 237 (Mad.), held that the assessee is entitled to carry forward the loss without any restriction on the time limit.

6.4. The Hon'ble Supreme Court, in the Judgment reported in *CIT v. Bajaj Hindustan Ltd.* [2019] 103 taxmann.com 32/261 Taxman 558 held that unabsorbed depreciation pertaining to the assessment year 1997-98 to 2001-02 can be carry forward and adjusted after the lapse of eight assessment years in view of the section 32(2) as amended by the Finance Act, 2001.

6.5. The learned counsel for the appellant also submitted that the 3rd questions of law raised in the present Tax Case Appeal is covered by the above decisions of the Hon'ble Apex Court and the Division Benches of this court, hence, the Tax Case Appeal should be allowed.

7. Ms. K.G. Usha Rani, learned counsel for Mr. T.R. Senthil Kumar, learned Standing Counsel appearing for the

respondent submitted that the issue involved in the above Tax Case Appeal is covered by the decisions of the Hon'ble Apex Court and the Division Benches of this court.

8. Since the learned counsel appearing for the appellant has not made any submission with regard to the questions of law Nos. 1 and 2, we are not adverting to any finding with regard to the same. In view of the submissions made by the learned counsel on either side, following the Judgments passed by the Hon'ble Apex Court and the Division Benches of this court, cited *supra*, the order passed by the Income-tax Appellate Tribunal is liable to be set aside. Accordingly, the same is set aside. The 3rd question of law is decided in favour of the appellant. The Tax Case Appeal stands allowed. No costs. Consequently, the connected Miscellaneous Petition is closed.”

(ii)[2020] 122 taxmann.com 212 (Madras) [Commissioner of Income Tax, Chennai Vs. Sanmar Speciality Chemicals Ltd.] wherein the Division Bench held as follows:

“ ...

3. The appeal was admitted on 2-12-2019 on the following substantial question of law :

"Whether, on the facts and in the circumstances of the

case, the Tribunal was right in holding that the assessee is entitled for carry forward of the depreciation loss pertaining to the assessment year 1997-98 to the present assessment year 2006-07, which is beyond the eight year period mandated under the provisions of section 32 of the Act?"

4.The short issue, which falls for consideration, is as to whether, in the facts and circumstances of the case, the Tribunal was right in permitting the assessee to carry forward the depreciation loss pertaining to the assessment year 1997-98 to the present assessment year namely 2006-07, which is beyond the eight year period mandated under the provisions of section 32 of the Act.

5.The revenue is before us by referring to the decision of the High Court of Calcutta in the case of Peerless General Finance & Investment Co. Ltd. v. CIT [2016] 73 taxmann.com 257/242 Taxman 209 and submitting that an identical issue was considered by the Calcutta High Court wherein the assessee was not granted relief. It is further submitted that the said decision of the Calcutta High Court was tested for its correctness by the Hon'ble Supreme Court and the special leave petition filed against the judgment of the Calcutta High Court was dismissed in the decision in Peerless General Finance & Investment Co. Ltd. v. CIT

[2016] 73 taxmann.com 258/242 Taxman 173/380 ITR 165 (SC).

6. After elaborately hearing the learned Senior Standing Counsel appearing for the appellant-Revenue, we are of the considered opinion that the reliance placed on the decision in the case of Peerless General Finance & Investment Co. Ltd. (supra), would, in no manner, assist the case of the Revenue. We say so after referring to Circular No. 14/2001 dated 22-11-2002 issued by the Central Board of Direct Taxes, which are Explanatory Notes on Provisions relating to Direct Taxes. Paragraph 30 of the said circular deals with modification of provisions relating to depreciation.

7. For better appreciation, we quote paragraphs 30.1 to 30.5 of the said circular as hereunder :

"30.1 Under the existing provisions of section 32 of the Income-tax Act, carry forward and set-off of unabsorbed depreciation is allowed for 8 assessment years.

30.2 With a view to enable the industry to conserve sufficient funds to replace plant and machinery, specially in an era where obsolescence takes place so often, the Act has dispensed with the restriction of 8 years for carry forward and set-off of unabsorbed depreciation. The Act has also clarified that in computing the profits and gains

of business or profession for any previous year, deduction of depreciation under section 32 shall be mandatory.

30.3 Under the existing provisions, no deduction for depreciation is allowed on any motor car manufactured outside India unless it is used (i) in the business of running it on hire for tourists, or (ii) outside India in the assessee's business or profession in another country.

30.4 The Act has allowed depreciation allowance on all imported motor cars acquired on or after 1st April, 2001.

30.5 These amendments will take effect from the 1st April, 2002, and will, accordingly apply in relation to the assessment year 2002-2003 and subsequent years."

8. From paragraph 30.2 of the above circular, it is clear that the restriction of 8 years for carry forward and set-off of unabsorbed depreciation was dispensed with, with a view to enable the industries to conserve sufficient funds to replace plant and machinery.

9. The learned Senior Standing Counsel appearing for the Revenue would point out that those amendments took place with effect from 1-4-2002 and would accordingly apply in relation to the assessment year 2002-03 and the subsequent years whereas in the assessee's case, the depreciation loss, which they sought to carry forward is for

the assessment year 1997-98.

10. The proper manner, in which, the modification has to be understood, is to the effect that from the assessment year 2002-03, if the eight years' period was not lapsed, then the assessee would be entitled to carry forward the loss without any restriction on the time limit. This aspect has been dealt with elaborately in the decision of the Division Bench of the Gujarat High Court in the case of General Motors India (P.) Ltd. v. Dy. CIT [2012] 25 taxmann.com 364/210 Taxman 20/[2013] 354 ITR 244 wherein the relevant portions are as follows :

"37.The CBDT Circular clarifies the intent of the amendment that it is for enabling the industry to conserve sufficient funds to replace plant and machinery and accordingly the amendment dispenses with the restriction of 8 years for carry forward and set-off of unabsorbed depreciation. The amendment is applicable from assessment year 2002-03 and subsequent years. This means that any unabsorbed depreciation available to an assessee on 1st day of April, 2002 (A.Y. 2002-03) will be dealt with in accordance with the provisions of section 32(2) as amended by Finance Act, 2001 and not by the provisions of section 32(2) as it stood before the said amendment. Had the intention of

the Legislature been to allow the unabsorbed depreciation allowance worked out in A.Y. 1997-98 only for eight subsequent assessment years even after the amendment of section 32(2) by Finance Act, 2001 it would have incorporated a provision to that effect. However, it does not contain any such provision. Hence keeping in view the purpose of amendment of section 32(2) of the Act, a purposive and harmonious interpretation has to be taken. While construing taxing statutes, rule of strict interpretation has to be applied, giving fair and reasonable construction to the language of the section without leaning to the side of assessee or the revenue. But if the legislature fails to express clearly and the assessee becomes entitled for a benefit within the ambit of the section by the clear words used in the section, the benefit accruing to the assessee cannot be denied. However, Circular No. 14 of 2001 had clarified that under section 32(2), in computing the profits and gains of business or profession for any previous year, deduction of depreciation under section 32 shall be mandatory. Therefore, the provisions of section 32(2) as amended by Finance Act, 2001 would allow the unabsorbed depreciation allowance available in the A.Ys. 1997-98, 1999-2000, 2000-01 and 2001-02 to be

carried forward to the succeeding years, and if any unabsorbed depreciation or part thereof could not be set off till the A.Ys. 2002-03 then it would be carried forward till the time it is set-off against the profits and gains of subsequent years.

38. Therefore, it can be said that, current depreciation is deductible in the first place from the income of the business to which it relates. If such depreciation amount is larger than the amount of the profits of that business, then such excess comes for absorption from the profits and gains from any other business or business, if any, carried on by the assessee. If a balance is left even thereafter, that becomes deductible from out of income from any source under any of the other heads of income during that year. In case there is a still balance left over, it is to be treated as unabsorbed depreciation and it is taken to the next succeeding year. Where there is current depreciation for such succeeding year the unabsorbed depreciation is added to the current depreciation for such succeeding year and is deemed as part thereof. If, however, there is no current depreciation for such succeeding year, the unabsorbed depreciation becomes the depreciation allowance for such succeeding year. We are of the considered opinion that any unabsorbed

depreciation available to an assessee on 1st day of April 2002 (A.Y. 2002-03) will be dealt with in accordance with the provisions of section 32(2) as amended by Finance Act, 2001. And once the Circular No. 14 of 2001 clarified that the restriction of 8 years for carry forward and set-off of unabsorbed depreciation had been dispensed with, the unabsorbed depreciation from A.Y.1997-98 upto the A.Y. 2001-02 got carried forward to the assessment year 2002-03 and became part thereof, it came to be governed by the provisions of section 32 (2) as amended by Finance Act, 2001 and were available for carry forward and set-off against the profits and gains of subsequent years, without any limit whatsoever."

11. A similar issue was considered by a Division Bench of the Bombay High Court in the case of CIT v. Bajaj Hindustan Ltd. [IT Appeal Nos. 134 to 136 and 140, 141 and 148 of 2018, dated 13-6-2018] following the decision in the case of CIT v. Hindustan Unilever Ltd. [2016] 72 taxmann.com 325/[2017] 394 ITR 73 (Bom.). The special leave petition filed by the Revenue against the above decision was dismissed by the Hon'ble Supreme Court in the decision in Pr. CIT v. Bajaj Hindustan Ltd. [SLP (C) Diary No. 48020 of 2018, dated 25-1-2019].

12. In the decision of the Punjab & Haryana High Court in the case of CIT v. G.T.M. Synthetics Ltd. [2013] 30 taxmann.com 83/[2012] 347 ITR 458], an identical issue was considered in the following terms :

'8. The effect of omission of the aforesaid proviso was enumerated by the Central Board of Direct Taxes, vide Circular No. 794 dated 9-8-2000 [(2000) 245 ITR (Statute)] 21 that the unabsorbed depreciation allowance could be set-off against the income under any other head even where the business was not carried on.

Clause 22 of the said circular which is relevant is as under:

"22. Requirement of continuance of same business for set-off of unabsorbed depreciation dispensed with:

22.1 Under the existing provisions of sub-section (2) of section 32 of the Income-tax Act, carried forward unabsorbed depreciation is allowed to be set-off against profits and gains of business or profession of the subsequent year, subject to the condition that the business or profession for which depreciation allowance was originally computed continued to be carried on in that year. A similar condition in section 72 for the purpose of carry forward and set-off of unabsorbed business loss was removed last year.

22.2 With a view to harmonise the provisions relating carry forward and set-off of unabsorbed depreciation and unabsorbed loss, the Act has dispensed with the condition of continuance of same business for the purpose of carry forward and set-off of unabsorbed depreciation.

22.3 This amendment will take effect from 1st April, 2001, and will, accordingly, apply in relation to the assessment year 2001-2002 and subsequent years."

9. The CIT(A) and the Tribunal, thus, rightly allowed unabsorbed depreciation relevant to the assessment year 1996-97 to be set-off against the income from long term capital gains and income from other sources for the assessment year 2001-2002.'

13. Recently, in the decision of a Division Bench of the Bombay High Court in the case of Pr. Commissioner of Income Tax v. Gunnebo India (P.) Ltd. [2019] 104 CCH 227, the issue was considered in favour of the assessee after referring to the decision of the Division Bench of the Gujarat High Court in the case of General Motors India (P.) Ltd., wherein the relevant portions read thus :

"3. The Revenue carried the matter in appeal. The Appellate Tribunal dismissed the appeal of the Revenue making the following observations- "16. We have

observed that the current year's depreciation is allowed to be set-off against the income from business as well as against the other heads of income and unabsorbed depreciation in carry forward and become part of the depreciation of the subsequent year and the total depreciation becomes current year's depreciation as per section 32(1) of the Act, which is allowed to be set-off against the income under any head of income. As per the provisions of section 32(2) of the Act r.w.s. 70, 71 and 72 of the Act, it becomes very clear that the total depreciation comprising of the depreciation of the relevant assessment year along with the unabsorbed depreciation of the earlier years becomes the total current year's depreciation which is allowed to be set off against income under any head of income including long term capital gain. Accordingly, we find no reason to interfere with the order of CIT(A) qua this issue and the same is hereby upheld. We also hold that as per provisions of section 72 of the Act, the unabsorbed business loss (other than speculative loss) of earlier years shall be allowed to be set-off only against the profits and gains from business carried on by the assessee of the current year and so on. We order accordingly. However, our above decision with respect to ground nos. (i) and (ii)

raised in memo of appeal filed by Revenue should be read in conjunction with and subject to our findings with respect to ground nos. (iii) and (iv) which are decided by us in the preceding para's of this order and the computation shall be made accordingly."

4. Having heard the learned counsel for parties and having perused the documents on record, we do not find any error in the order of the Appellate Tribunal. Gujarat High Court in the case of General Motors India (P.) Ltd. (supra) had considered somewhat similar issue, of course in the backdrop of the assessee's challenge to a notice of reopening of the assessment. The Gujarat High Court had held and observed as under -

"38 Therefore, it can be said that, current depreciation is deductible in the first place from the income of the business to which it relates. If such depreciation amount is larger than the amount of the profits of that business, then such excess comes for absorption from the profits and gains from any other business or business, if any, carried on by the assessee. If a balance is left even thereafter, that becomes deductible from out of income from any source under any of the other heads of income during that year. In case there is a still balance left over, it is to be treated as unabsorbed depreciation and it is

taken to the next succeeding year. Where there is current depreciation for such succeeding year the unabsorbed depreciation is added to the current depreciation for such succeeding year and is deemed as part thereof. If, however, there is no current depreciation for such succeeding year, the unabsorbed depreciation becomes the depreciation allowance for such succeeding year. We are of the considered opinion that any unabsorbed depreciation available to an assessee on 1st April, 2002 (asst. yr. 2002-03) will be dealt with in accordance with the provisions of section 32(2) as amended by Finance Act, 2001. And once the Circular No. 14 of 2001 clarified that the restriction of 8 years for carry forward and set-off of unabsorbed depreciation had been dispensed with, the unabsorbed depreciation from asst. yr. 1997-98 up to the asst. yr. 2001- 02 got carried forward to the asst. yr. 2002-03 and became part thereof, it came to be governed by the provisions of section 32(2) as amended by Finance Act, 2001 and were available for carry forward and set-off against the profits and gains of subsequent years, without any limit whatsoever."

14. In our considered view, the above decisions will

clearly enure to the benefit of the respondent - assessee.

15. Accordingly, the above tax case appeal is dismissed and the substantial question of law is answered against the Revenue. No costs.”

5.Mr.K.Ravi, learned counsel appearing for the respondent submitted that in view of the ratio laid down by the Hon'ble Division Bench of this Court in the judgments in *[2021] 127 taxmann.com 805 (Madras)* and *[2020] 122 taxmann.com 212 (Madras)*, cited supra, the above appeal may be dismissed.

6.Having regard to the submissions made by the learned counsel on either side, following the ratio laid down in *[2021] 127 taxmann.com 805 (Madras) [Harvey Heart Hospitals Ltd. Vs. Assistant Commissioner of Income Tax]* and *[2020] 122 taxmann.com 212 (Madras) [Commissioner of Income Tax, Chennai Vs. Sanmar Speciality Chemicals Ltd.]*, the question of law is decided against the

Revenue and in favour of the assessee. Accordingly, the Tax Case Appeal is dismissed. No costs.

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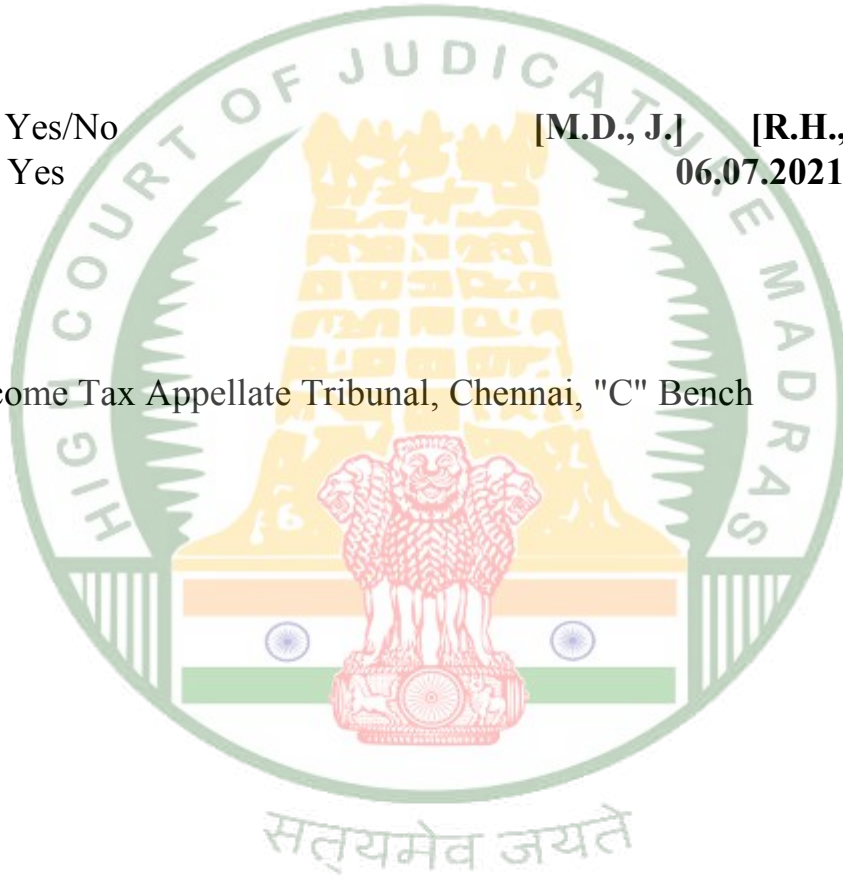
To

1.The Income Tax Appellate Tribunal, Chennai, "C" Bench

[M.D., J.]

[R.H., J.]

06.07.2021



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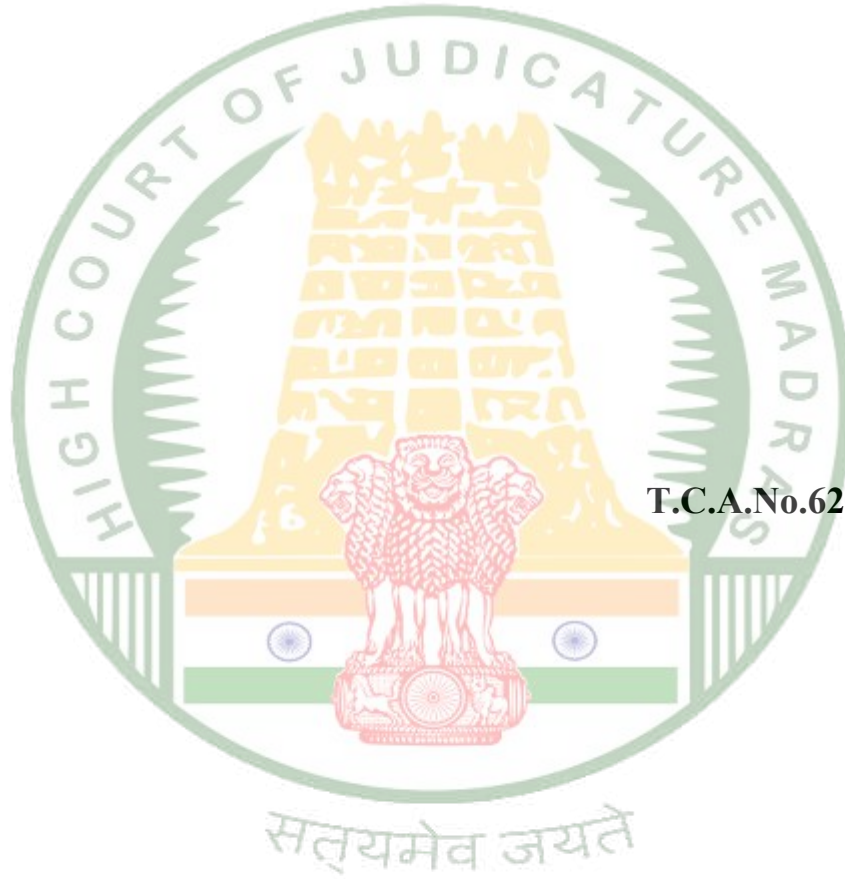
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