IN THE INCOME TAX APPELLATE TRIBUNAL
"J" Bench, Mumbai

Before Shri R.S. Padvekar, Judicial Member
and Shri B. Ramakotaiah, Accountant Member

ITA No. 4775/Mum/2010
(Assessment Year: 2005-06)

M/s. NRB Bearings Ltd. 15 Dhannur, Sir P.M. Road Mumbai 400001 PAN - AAACN 3479 P	Vs.	DCIT, Circle 2(2) Aayakar Bhavan, M.K. Road Mumbai 40020
Appellant		**Respondent**

Appellant by: Shri A.V. Sonde
Respondent by: Shri Sanjay Ghadgay

Date of Hearing: 20/07/2011
Date of Pronouncement: 20/09/2011

O R D E R

Per B. Ramakotaiah, A.M.

This appeal by the assessee is against the order of the CIT(A)- V, Mumbai dated 04.03.2010.

2. Assessee is contesting the issue of withdrawing the additional depreciation of ₹56,87,343/- on the plant and machinery originally allowed in the assessment order dated 30th March 2007 but withdrawn consequent to the revision order under section 263 by the CIT.

3. Briefly stated, the assessee is in the business of manufacturing needle rollers, needle bushes, needle roller cages, needle bearing cylindrical roller, spherical roller, needle roller ball and taper roller bearings. It has various units situated at different locations across India as follows:

i. Pokhran Road, Thane
ii. MIDC Industrial Area, Chikalthana, Aurangabad
iii. Additional MIDC Industrial Area, Jalna
iv. MIDC Waluj, Aurangabad
v. Uppal Inddustrial Estate, Hyderabad

Assessee claimed additional depreciation under section 32(1)(iia) in respect of new plant and machinery acquired and installed by the assessee in an unit situated at MIDC Waluj, Aurangabad. The installed capacity of the said unit had increased from 23,000 numbers as on 31st March 2004 to 32,500 numbers as on 31st March 2005. Assessee accordingly claimed depreciation under the provisions of section 32(1)(iia), which was allowed by the A.O. vide order under section 143(3). Subsequently on examination of record the CIT considered that the A.O. has not examined the issue of additional depreciation correctly and invoked provisions of section 263 to set aside the assessment order dated 30.03.2007 with a direction to examine assessee's eligibility for additional depreciation under section 32(1)(iia) and to disallow if it was found that the conditions are not satisfied. This order of the CIT was not contested as it was only a direction given to the A.O. to examine the eligibility. However, the A.O. in the consequential proceedings examined the eligibility. It was assessee's contention that provisions permit additional depreciation of the industrial undertaking which increased the installed capacity by more than 10% and the conditions are satisfied. The A.O., however, considered that the reference to the industrial undertaking was to the business as whole but not unit-wise of the industrial undertaking and, therefore, he compared the installed capacity of the whole business of the assessee and came to the conclusion that capacity was increased only by 4.5%. Accordingly, he did not allow the additional depreciation.

4. Before the CIT(A) it was contended that the reference to industrial undertaking is to be considered as unit-wise and not business as a whole and, therefore, the A.O. erred in comparing the installed capacity of the whole of the business when assessee claimed additional depreciation only on one unit which satisfies the conditions. Assessee placed reliance on the decision of in the case of Associated Cement Companies Ltd. 118 ITR 406 (Bom) and VTM Ltd. 229 CTR 70 (Mad). It was submitted that the installed capacity of the industrial undertaking situated at Waluj, Aurangabad was 23,000 numbers which was increased to 32500 numbers. Therefore there was increase of more than 10% of capacity. It was further submitted that the claim of additional depreciation was in accordance with provisions of

section 32(1)(iia) based on the certificate issued by the Chartered Accountant in Form No.3AA as prescribed under Rule 3A.

5. The CIT(A), however, did not agree with the contentions. He supported the order of the A.O. who observed that the installed capacity has to be considered of the business as a whole while assessee claimed installed capacity on a unit situated at Aurangabad. He was of the opinion that provisions of section 32(1)(iia) does not refer to the installed capacity of any particular unit of the industrial undertaking but to the industrial undertaking in respect of an assessee engaged in the business of manufacturer or production. He accordingly confirmed the order.

6. Learned counsel submitted that assessee had units at four different places and the MIDC Unit at Waluj, Aurangabad has increased its capacity by installing new machinery and the additional depreciation claimed was only with reference to that unit alone. He then referred to the provisions of section 32(1)(iia), the certificate issued by the Chartered Accountant and referred to the 'industrial undertaking' and 'new industrial undertaking' as per the provisions. He also referred to the proforma prescribed to submit that there is a distinction between assessee as a whole and a new industrial undertaking or existing industrial undertaking referred to in the provisions. Relying on the provisions of the Act and principles of law on the issue, it was his submission that additional depreciation was allowable qua industrial undertaking per se, i.e. unit, if it satisfies the conditions and not qua business of the assessee.

7. The learned D.R., however, relied on the orders of the CIT under section 263 and A.O. and the CIT(A) in the consequential proceedings. His contention that assessee having been in the business of manufacturing, the enhanced capacity can only be considered with reference to overall installed capacity of the company and not with one single unit.

8. We have considered the issue, the rival contentions and provisions of the act and relevant case law. It is on record that assessee is in the business of manufacturing various products such as needle rollers, needle bushes, needle roller cages, needle roller bearings, cylindrical roller, spherical rollers,

needle roller ball and taper roller bearings. All these products are being manufactured at different locations as stated earlier. Assessee installed additional machinery at its plant situated at MIDC Waluj, Aurangabad. The installed capacity of the said unit was increased from 23000 numbers to 32500 numbers as on 31st March 2005. This unit was originally set up in 1990. Assessee furnished Form No. 3AA justifying the claim of additional depreciation giving the details of installed capacity and increase in installed capacity. The claim was originally allowed by the AO. The A.O. in the order consequent to revised proceedings under section 263 vide para 4 did not accept the contentions by stating that as per section 32(1)(iia) increase in the installed capacity should be of the " industrial undertaking" as a whole and not a unit-wise industrial undertaking. He did not mention any of the details of the installed capacity and expansion of capacity but noticed that installed capacity of the whole business has increased by 4.5%. The dispute is as to whether the conditions under section 32(1)(iia) are satisfied for granting additional depreciation in this case.

9. The provisions of section 32(1)(iia) are as under: -

> *"(iia) in the case of any new machinery or plant (other than ships and aircraft), which has been acquired and installed after the 31st day of March, 2002, by an assessee engaged in the business of manufacture or production of any article or thing, a further sum equal to fifteen per cent of the actual cost of such machinery or plant shall be allowed as deduction under clause (ii) :*
>
> ***Provided*** *that such further deduction of fifteen per cent shall be allowed to—*
>
> *(A) a new industrial undertaking during any previous year in which such undertaking begins to manufacture or produce any article or thing on or after the 1st day of April, 2002; or*
>
> *(B) any industrial undertaking existing before the 1st day of April, 2002, during any previous year in which it achieves the substantial expansion by way of increase in installed capacity by not less than [ten] per cent:*
>
> ***Provided further*** *that no deduction shall be allowed in respect of—*
>
> *(a) any machinery or plant which, before its installation by the assessee, was used either within or outside India by any other person; or*
>
> *(b) any machinery or plant installed in any office premises or any residential accommodation, including accommodation in the nature of a guest house; or*

(c) any office appliances or road transport vehicles; or

(d) any machinery or plant, the whole of the actual cost of which is allowed as a deduction (whether by way of depreciation or other-wise) in computing the income chargeable under the head "Pro-fits and gains of business or profession" of any one previous year:

***Provided also** that no deduction shall be allowed under clause (A) or, as the case may be, clause (B), of the first proviso unless the assessee furnishes the details of machinery or plant and increase in the installed capacity of production in such form, as may be prescribed along with the return of income, and the report of an accountant, as defined in the Explanation below sub-section (2) of section 288 certifying that the deduction has been correctly claimed in accordance with the provisions of this clause.*

Explanation.—For the purposes of this clause,—

(1) "new industrial undertaking" means an undertaking which is not formed,—

(a) by the splitting up, or the reconstruction, of a business already in existence; or

(b) by the transfer to a new business of machinery or plant previously used for any purpose;

(2) "installed capacity" means the capacity of production as existing on the 31st day of March, 2002"

As seen from the above, additional depreciation at 15% of the claim shall be allowed; (a) to a new industrial undertaking which begins to manufacture or produce any article or thing on or after 1st April 2002. Assessee's case does not fall under clause (a) as it has not claimed as new industrial undertaking. Vide clause (b) of subsection (ii) any industrial undertaking existing before the 1st day of April 2002 achieves a substantial expansion by way of increased installed capacity at not less than ten per cent, additional depreciation is allowable. There is no doubt with reference to satisfying the requirement of furnishing details of machinery or plant and increase in installed capacity of production in such form as prescribed. The only issue which is contended is that the increased capacity has to be with reference to the whole of the business and not of the unit alone.

10. This argument of the A.O. cannot be accepted for various reasons. One reason is that the new industrial undertaking as per the definition means an undertaking which is not formed by splitting up or transfer from existing business. This is not a case here. However, the assessee would have

been eligible for additional depreciation had this machinery been treated as a separate industrial undertaking if there is financial independence. The Hon'ble Bombay High Court while examining the definition of new industrial undertaking in the case of CIT vs. Associated Cement Companies Ltd. 118 ITR 406 held as under: -

> *"That from the certificate of the engineer it was quite clear that the new kiln at each factory worked independently of the old kilns and if on account of lack of demand, production had to be curtailed, any of the kilns, whether old or newly erected, could be stopped. The certificate also specified the main auxiliary machinery installed together with the kiln such as crusher, raw mill, coal mill, cement mill, compressors, transformers and quarry machinery. Further, the certificate also disclosed that whereas in respect of the kilns at Bhupendra, Kistna, Chaibasa and Shahabad, the capacity of new kilns was stated to be 1,00,000 tonnes, 1,65,000 tonnes, 1,00,000 tonnes and 1,00,000 tonnes, respectively, in respect of the newly erected klin at Kistna, the capacity of the newly constructed kiln alone was much more than the capacity of the entire factory which had been shown to be only 90,000 tonnes. The certificate also showed that several amounts running into several lakhs were spent in construction of building, purchase of plant and machinery, construction of water works and railway siding and tram lines, purchaser of rolling stock and expenses of electric installation which were necessitated by the construction of the new kilns at each of the four factories had resulted in an expansion of the factory itself, yet the new kilns were completely integrated units which could be put into production independently of the other units or production therefrom could cease without affecting the production from the other kilns. Moreover, all the four kilns at the four different factories had been established with the plant and machinery newly purchased and required exclusively for the purposes of the new kilns. Therefore, even though the business or the industrial establishment as a whole had been expanded by the addition of a new kiln, each new kiln by itself constituted a new industrial undertaking within the meaning of s. 15C of the Indian I.T. Act, 1922. The Tribunal was, therefore, right in holding that the assessee was entitled to the benefit of s.15C of the Act."*

It was considered that establishment of a new industrial unit as part of an already existing industrial establishment may result in an expansion of the industry or the factory but if the newly established unit is itself an integrated independent unit in which new plant and machinery is put up and is itself independent of the whole unit, capable of production of goods then it would be classified as a new established industrial undertaking. Thus the new industrial undertaking is to be considered different from the

existing business of the assessee, if it satisfies the conditions. In assessee's case even though they are in the manufacturing of similar automobile components, each of the unit was located different places, are independent of its existence and is not dependent on other business units in its manufacturing activity. Accordingly, each unit can be considered as an independent industrial undertaking as far as the unit is concerned.

11. Another reason for treating the unit as separate industrial undertaking was the fact that Addl. Depreciation was claimed on only one unit. Assessee has increased the capacity in the unit at MIDC Waluj, Aurangabad, the fact of which is not in dispute and additional depreciation was not claimed on any other units except for this unit in which there is an increase in capacity. Had the assessee claimed additional depreciation on the entire assets of all industrial units then comparison of increased capacity with reference to the earlier capacity, as made out by the A.O., would be justified. But assessee has claimed only additional depreciation of the unit at Waluj, Ahmedabad. As already stated this unit was independently established in 1990. Therefore Assessing Officer's action in comparing increased capacity with reference to the whole of the business when assessee claimed additional depreciation on only one unit is not correct.

12. Even if one were to consider that the capacity of the entire business has to be considered, this is not practicable if assessee is manufacturing different products. Consider an example of a company which is manufacturing tooth paste, tooth brush, soap, cosmetics, etc. The entire business may have different units and different factories manufacturing different products at different places. If that company installs additional machinery with reference to production of tooth brushes and claims additional depreciation it is not possible to compare the increased capacity with reference to other products as different parameters exists. One can only compare similar products in a given situation. Thus examination of a condition for granting additional depreciation to an existing unit provided it increased installed capacity by not less than 10% can only be with reference to the products manufactured in that particular undertaking. As rightly submitted by the assessee this unit at MIDC Waluj, Aurangabad is

manufacturing Needle Rollers Bushes & Cages, Ball and Roller Bearings and Automobile Components, which has been increased by 11.33%, 38.09% and 70% respectively and it has claimed additional depreciation on these machineries in that unit only. It so happened that assessee is manufacturing similar products at different places but that does not mean that comparison has to be made with production in different units when assessee has claimed additional depreciation only with reference to one unit in which it has increased the capacity. Considering the scheme of the Act and the intention in granting additional depreciation by way of a benefit, AO's action cannot be justified in considering the increased capacity with reference to whole of the business as such when in fact assessee has claimed additional depreciation with reference to only one unit.

13. Assessee relied on the decision of the Hon'ble Madras High Court in the case of CIT vs. VTM Ltd. 229 CTR 70 where additional depreciation was claimed on new industrial unit. That assessee was in the textile manufacturing business and was engaged in manufacturing of textile goods. It has installed new windmill and claimed additional depreciation. The Hon'ble Madras High Court considered the claim of the assessee and held as under: -

> *"When the Tribunal by the impugned order has applied s. 32(1)(iia) to the facts involved in the case of the assessee and has found that the assessee is entitled for the additional depreciation claimed under the said provision, it cannot be held that simply because Co-ordinate Bench of the Tribunal had earlier taken a different view, the Tribunal on this occasion also ought to have followed the same. When it is found that the Tribunal has applied the law correctly in the impugned order, there is no gain saying that there was an earlier order by the Co-ordinate Bench and therefore, for that reason, this time also the Tribunal should have blindly followed its own earlier decision even if such earlier decision did not reflect the correct position of law.*
>
> *It is true that the assessee is a company engaged in the business of manufacture of textile goods. As far as application of s. 32(1)(iia) is concerned, what is required to be satisfied in order to claim the additional depreciation is that the setting up of a new machinery or plant should have been acquired and installed after 31st March, 2002 by an assessee, who was already engaged in the business of manufacture or production of any article or thing. The said provision*

does not state that the setting up of the new machinery or plant, which was acquired and installed upto 31st March, 2002 should have any operational connectivity to the article or thing that was already being manufactured by the assessee. Therefore, the contention that the setting up of a wind mill has nothing to do with the industry, namely, manufacture of oil seeds etc. is totally not germane to the specific provision contained in s. 32(1)(iia). It cannot also be said that setting up of a windmill will not fall within the expression setting up of a new machinery or plant. There is no error in the conclusion of the Tribunal."

As far as application of section 32(1)(iia) is concerned, what is required to be satisfied in order to claim the additional depreciation is that the setting up of a new machinery or plant should have been acquired and installed after 31st March 2002 by an assessee, who was already engaged in the business of manufacture or production of any article or thing. The said provision does not state that the setting up of a new machinery or plant, which was acquired and installed upto 31st March 2002 should have any operational connectivity to the article or thing that was already being manufactured by the assessee.

14. It is a well settled principle of statutory interpretation that the words or expressions used by the Legislature should be given the normal meaning. Clause (iia) to sec. 32(1) as applicable to the A.Y. 2005-06 was inserted by Finance (No.2) Act, 2002 w.e.f. 1.04.2003 and the same was amended by the Finance (No.2) Act, 2004 w.e.f. 1.04.2005. For giving the benefit of additional depreciation, the Legislature has made the classification keeping the line of demarcation as 'new undertaking', which begins to manufacture or produce article or thing on or after 1.04.2002 or any existing industrial undertaking before the above date achieves substantial expansion by way of increase in the installed capacity not less than 10%. The expression "industrial undertaking" is specifically used to create an identity from the entire business of the assessee. The assessee's business may comprise a different industrial undertaking but the industrial undertaking which fulfils the condition, as contemplated in the proviso, is eligible for additional depreciation. It is to pertinent to note here that all the clauses to sec. 31(1) have been differently worded to achieve a particular object i.e. clause (i), clause (ii), clause (iia) and clause (iii) to sec. 32(1), hence, in our humble

opinion, the interpretation canvassed by the Ld. Counsel is correct. An expansion in the installed capacity is to be considered undertaking-wise. We make it clear that there is no other dispute in respect of interpretation of term "industrial undertaking".

15. Considering the above principles to the given set of facts, we are of the opinion that assessee's increase in capacity cannot be examined with reference to operational activity of the units which are already been set up earlier by the assessee. The intention of the Legislature is only to examine the increase in capacity by an undertaking in which the additional machinery was installed on which additional depreciation was claimed. Since the MIDC Waluj, Aurangabad unit being an independent unit and has increased capacity of more than 10% said undertaking satisfied the conditions of section 32(1)(iia). Therefore we direct the A.O. to allow the additional depreciation as claimed on the MIDC Waluj, Aurangabad unit. Grounds raised by assessee are allowed.

16. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 20th September 2011.

Sd/-	Sd/-
(R.S. Padvekar)	**(B. Ramakotaiah)**
Judicial Member	**Accountant Member**

Mumbai, Dated: 20th September 2011

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) – V, Mumbai*
4. *The CIT– II, Mumbai City*
5. *The DR, "J" Bench, ITAT, Mumbai*

By Order

//True Copy//

Assistant Registrar
ITAT, Mumbai Benches, Mumbai

n.p.