

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI "D" BENCH, MUMBAI

BEFORE SHRI SHAILENDRA KUMAR YADAV, JUDICIAL
MEMBER,
AND SHRI ASHWANI TANEJA, ACCOUNTANT MEMBER.

ITA. No. 944/Mum/2012
(Assessment Year:2007-08)

ACIT 12(1),
Mumbai

Appellant

Vs.

M/s. Delta Enterprises,
1st Floor, Tamarind Lane,
Crescent Chambers, Fort,
Mumbai - 400023

Respondent

PAN: AAAFD5147R

अपीलार्थी की ओर से /By Appellant : Shri Chandra Vijay, D.R.

प्रत्यर्थी की ओर से/By Respondent : Ms. I. A. Singh, A.R.

सुनवाई की तारीख/Date of Hearing : 24.09.2015

घोषणा की तारीख/Date of
Pronouncement : 09.10.2015

ORDER

PER ASHWANI TANEJA, A.M:

This appeal has been filed by the Revenue against the order of learned Commissioner of Income-Tax (Appeals)-21, Mumbai, dated 03.11.2011 for A.Y. 2007-08 passed against the assessment order u/s.143(3) dated 24.12.2009.

2. Following grounds are raised by the Revenue in the appeal memo:

- (i) *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not appreciating the facts of the case with respect to section 80I which was introduced by the Finance (No.2) Act, 1991 w.e.f. 1.4.1991. In this section legislature included generation of power or transmission or distribution of power also. If generation of power could be placed in the ambit of the term "article" there was no necessity of specifying separately the same in the section. Further, power generation falls within the meaning of the word "article" is nothing but the overstraining of the language beyond its normal and ordinary meaning. The expression "manufacture" and "Produce" are normally associated with movable articles or goods, big and small but they are never employed to denote the activity of the generation of power. As per Oxford Dictionary the word "article" is defined as a "commodity", a piece of goods or property. Power generation does not fit within the definition of the word article.*
- (ii) *The ld. CIT(A) relied on the citation submitted by the assessee which was the decision rendered in the content of the language of particular statute as such this meaning cannot be extended to the facts of the present case. The Hon'ble Supreme Court judgment in the case of M/s. Southern Petrochemical Industries Co. Ltd. Vs. Electricity Inspector P.E.I.O. 2007 (3) CTC 273 (SC) specifically deals with the Sales Tax Law. As per the Supreme Court order the electricity has been considered as "goods" and not specifically as "article" or "things".*

Further in the case of Commissioner of Sales Tax vs. M.P. Electricity Board, it was held that electricity cannot be classified as "goods" for the purpose of sale of goods Act.

3. The Revenue has also filed one additional ground of appeal, as under:

“1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing the depreciation to assessee particularly in view of the fact that the generation of power has been added in section 32(1)(iia) only after 1/4/2013. Therefore, even if for the sake of argument it is accepted that assessee is engaged in the business of generation of power even then assessee is not entitled for additional depreciation prior to 1/4/2013.”

4. It is noted by us that the additional ground raised by the Revenue is purely legal ground and does not require any investigation of fresh facts. Ld. Counsel for the assessee also expressed no objection with regard to admission of this ground. Keeping in view the aforesaid facts and circumstances of the case and relying upon the judgment of Hon’ble Supreme Court in case of National Thermal Power Co. Ltd. vs CIT 229 ITR 383 (SC), we admit the additional ground filed by the Revenue.

5. During course of hearing, Learned Departmental Representative stated that with regard to both of the grounds raised by the Revenue with the appeal memo, he would simply rely upon order of the AO, whereas, the additional ground is to be contested seriously by the Revenue. We now proceed to adjudicate all the grounds, including the additional ground, as admitted above.

6. In the additional ground, the Revenue has contested the action of Ld CIT(A) in allowing the depreciation to the assessee. In view of the fact that, generation of power has been added in Section 32(1)(iia) only after 01.04.2013. Therefore, even if for the sake of argument, it is accepted that assessee is engaged in the business of generation of power, even then, the assessee is not entitled for additional depreciation prior to 01.04.2013.

7. During course of hearing, Learned Departmental Representative has argued that assessee is not eligible to get the benefit of additional depreciation in the impugned assessment year, because it falls prior to 01.04.2013. He has supported the order of Assessing Officer and requested to uphold the action of Assessing Officer in denying the claim of depreciation of Rs.1,54,80,000/-, being additional depreciation on the wind mill. On the other hand, learned Authorized Representative has vehemently supported the order of ld. CIT(A). In addition to that she has placed reliance upon the order of Assessing Officer in assessee's own case for A.Y. 2006-07 wherein Assessing Officer after making detailed discussion in the assessment order, has allowed the claim of additional depreciation made by the assessee. Copy of assessment order has been placed before us. Further, in support of her claim, she has placed reliance on the judgment of Hon'ble Chennai Bench in case of ACIT vs. M. Satishkumar [2013] 33 taxmann.com 396 (Chennai – Trib.).

8. We have considered the submissions made by both the sides and gone through the orders of lower authorities as well as

material placed before us for our consideration. The brief facts are that assessee was having a wind mill division. The claim of depreciation made by the assessee in the return of income included depreciation of wind mill @ 80% and additional depreciation @ 20% as per Section 32(1)(iia) of the Income Tax Act, 1961. The assessee's claim of additional depreciation was disallowed by the Assessing Officer on the ground that additional depreciation was allowable in the case of any new machinery or plant installed after 31st day of March, 2005, by the assessee in the business of manufacturing or production of any article or thing. As per A.O., the production of electricity by use of wind energy, could by no stretch of imagination be regarded as any "article or thing" within the meaning of the said section. The A.O. did not accept assessee's contention that electricity is produced and commercially tradable and therefore, it was "article or thing" within the meaning of section 32(1)(iia). He held that only material things can qualify for being "article or thing", it should be tangible. Electromagnetic field could not be said to be "article or thing" and that it should be capable of storage and the electricity could not be stored. He held that the wind mill could not be said to be indirectly used in manufacturing activity. Thus the windmill was not producing an "article or thing", either directly or indirectly. He, therefore, disallowed assessee's claim of additional depreciation amounting to Rs. 1,54,80,000/ - claimed u/s 32(1)(iia) of the Act.

8.1. During appellate proceedings before the Ld CIT(A), the assessee explained that it had generated electricity by harnessing wind energy and earned income from sale of the electricity so generated, in the states of Maharashtra and Rajasthan. The electricity generated was measured and traded in units known as 'kilowatts'. The electricity is an actively traded good, and there was even an exchange specifically for this purpose. As regards the contention of A.O. that electricity was not an "article or thing" the assessee relied upon following decisions, to show that this contention was erroneous:

- CIT vs Geo Tech Foundations & Constructions 241 ITR 90 (Ker)
- Airfreight Ltd. vs. State of Karnataka (1999) 6 SCC 561
- Aspinwall and Co. Ltd. vs. CIT 251 ITR 323
- Gangadhar Narasingdas Agarwal vs. Union of India (1967) 1 MLJ 197
- Southern Petrochemical Industries Co. Ltd. vs. Electricity Inspector and E.T.I.O. 2007 (3) CTC 273 (SC)
- Commissioner of Sales Tax vs. Madhya Pradesh Electricity Board (1969) 1 SCC 200
- State of A.P. vs. National Thermal Power Corporation Ltd, (2002) 5 SCC 203

By relying on above decisions, the assessee claimed that it was engaged in manufacturing of electricity and the electricity so generated was "article or thing" within the meaning of section 32(1)(iia). The assessee argued that it was entitled to claim additional depreciation and the said claim had been accepted by the tax department in the earlier years, and there being no

change in facts during the year under consideration vis-a-vis earlier years, the aforesaid finding could not be disturbed by the A.O. On this issue, the assessee relied on the decision of Radhasoami Satsang vs. CIT 193 ITR 321 and other decision as mentioned in written submissions. Learned CIT(A) considered the facts of the case as well as correct position of law, while deciding this issue. We find that his findings are correct as per law and facts, and therefore we concur with the same. In our considered view also, the electricity generated by the appellant is an "article or thing" which can be traded, which can be measured and which can be stored and also it can be exchanged. In the case of Southern Petrochemical Industries Co. Ltd., the Supreme Court held that the electricity has to be considered as (goods) for the purpose of application of Sales Tax Laws. In the case of State of A.P. vs National Thermal Power Corporation Ltd. (2002) 5 SCC 203, M. P. Cement Manufacturers Association vs. State of Madhya Pradesh (2004) 2 SCC 249 referred to in Tata Consultancy Services vs. State of A.P. (2004) 271 ITR 401, it was held that the electricity was capable of abstraction, consumption and use which, if done dishonestly was punishable u/s 39 of the Indian Electricity Act, 1910. It was held that electric energy could be transmitted, transferred, delivered, stored and possessed, etc., in the same way as any other movable property. It was held that electricity was thus "goods" within the meaning of Sales Tax Act. Therefore, in view of the decisions relied upon by the Ld Counsel, it can be said that the electricity generated by the assessee amounts to production of an "article or thing" within the meaning of section 32(1)(iia) of the Act and therefore, the

assessee would be entitled for additional depreciation @ 20%.

8.2. It is further seen by us that Assessing Officer himself has allowed this claim to the assessee in the assessment order passed by him for immediately preceding assessment year i.e. A.Y. 2006-07 in the order dated 29.12.2011 u/s 143(3) r.w.s. 147 of the Income Tax Act, 1961. The relevant para of said assessment order is reproduced for the sake of ready reference as under:

“3. The electricity generated by the assessee is an "article or thing" which can be traded, manufactured, stored and exchanged, relying upon the order in the case of Southern Petrochemical Industries Co. Ltd., the Supreme Court held that the electricity has to be considered as (goods) for the purpose of application of Sales Tax Laws. It was further held in the case of State of A.P. Vs. National Thermal Power Corporation Ltd. (2002) 5 SCC 203, M.P. Cement Manufacturers Association vs. State of Madhya Pradesh (2004) 2 SSC 249 referred to in Tata Consultancy Services Vs. State of A.P. (2004) 271 ITR 401, that the electricity was capable of abstraction, consumption and use which, if done dishonestly was punishable u/s. 39 of the Indian Electricity Act, 1910. It was held that electric energy could be transmitted, transferred, delivered, stored and possessed, etc. in the same way as any other movable property. It was held that electricity was thus "goods" within the meaning of Sales Tax Act.

4. From the above judgement of the Hon'ble Supreme Court, electricity is an 'article or thing' for the purpose of sales tax. The same definition if applied to Income Tax makes the assessee eligible for its claim of depreciation u/s. 32(1)(iia).

5. The submissions and arguments of the assessee were duly considered and were found to be substantial to qualify production of electricity as manufacture or production of articles or things and hence is eligible for additional depreciation u/s.32(1)(iia).”

8.3. Further, it is observed by us that this issue has been decided in favour of assessee in many judgments passed by the Tribunal also, as were relied upon by the ld. Counsel, during course of hearing. We can take support from the judgments of ACIT vs. M. Satishkumar (supra), wherein similar claim has been allowed by the Bench after considering the amendment made by Finance Act, 2012, which has been referred to in grounds of appeal filed by the Revenue. Similar view has been taken in another case by Hon'ble ITAT, Chennai Bench in case of ACIT vs. M/s. Mallow International in ITA No.152/MDS/2014 dated 19.12.2014 for A.Y. 2006-07. The relevant portion of the judgment is reproduced below:

“6. The Hon'ble Madras High Court in the case of CIT vs. Hi Tech Arai Ltd. (Supra) has held that where the assessee has set up windmill in addition to some other existing business, and is engaged in the generation of electricity, the assessee is entitled to claim additional depreciation on the same.

7. We find that the issue in appeal is squarely covered in favour of the assessee by the aforesaid decisions of the Hon'ble Madras High Court and the co-ordinate Bench of the Tribunal. We do not find any infirmity in the impugned order.”

8.4. Therefore, keeping in view the aforesaid facts and circumstances of the case and clear position of law, we find that the claim made by assessee on account of additional depreciation is allowable, no interference is called for in the order of CIT(A), and therefore same is upheld. The AO is directed to allow additional depreciation u/s 32(1)(ia) of the Act. All of the

grounds raised by Revenue are dismissed.

9. As a result, the appeal filed by the Revenue is dismissed.

Pronounced in the open Court on this the 09th day of October, 2015.

Sd/-
(SHAILENDRA KUMAR YADAV)
JUDICIAL MEMBER

Sd/-
(ASHWANI TANEJA)
ACCOUNTANT MEMBER

Mumbai: Dated 09/10/2015

True Copy

S.K.SINHA

आदेश की प्रतिलिपि अग्रहित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार,
आयकर अपीलीय अधिकरण, मुंबई ।