आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर

**IN THE INCOME TAX APPELLATE TRIBUNAL, INDORE BENCH, INDORE**

चन्द्रमोहन गर्ग, न्यायिक सदस्य तथा श्री ओ.पी.मीना, लेखा सदस्य के समक्ष

**BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER AND SHRI O.P.MEENA, ACCOUNTANT MEMBER**

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| आ.अ.सं./ **I.T.A. No. 620/Ind/2013** | |
| निर्धारण वर्ष /**Assessment Year: 2007-08** | |

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| **M/s. Sanwaria Agroils Ltd. E-1/1 Arera Colony Bhopal** | **v.** | **ACIT 1(1) Bhopal** |
| अपीलार्थी /**Appellant** | | प्रत्यर्थी /**Respondent** |
| स्था.लेखा/**PAN: AACSS 1449 N** | | |

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| अपीलार्थी की ओर से/**Appellant by** | **Shri Anil Kumar Khabya, CA** |
| प्रत्यर्थी की ओर से/**Respondent by** | **Shri Mohd. Javed, Sr. D.R.** |

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| सुनवाई की तारीख/**Date of hearing** | **09-05-2017** |
| उद्घोषणा की तारीख/**Date of pronouncement** | **16-05-2017** |

आदेश/**O R D E R**

**PER O.P. MEENA, ACCOUNTANT MEMBER.**

This appeal filed by the assessee is directed against the order of Learned Commissioner of Income-tax (Appeals)-I, Bhopal [in short "the CIT(A)"] dated 19-09-2013 pertaining to Assessment Year 2007-08, which in turn has arisen from the order dated passed by the ACIT 1(1) Bhopal (in short "the AO" ) under section 147 read with section 143 (3) of Income Tax Act,1961 ( in short 'the Act'). The assessee has taken following grounds of appeal:-

*1.That the learned CIT (A) erred in holding that the proceedings initiated under section 148 and the order of reassessment passed by the AO were not bad in law.*

*2.That the order of assessment has been reopened merely on the basis of change of opinion which was not permitted under section 147. The CIT (A) out to have declared reassessment proceedings without jurisdiction and bad in law.*

*3. That the Ld. CIT (A) erred in maintaining disallowance of claim of additional depreciation under section 32 (1) (iia) of the Act of Rs.1, 20, 20, 000/-.*

*4.That the Ld. CIT (A) erred in maintaining Levy of interest under section 234B without VAT invoice special provisions of section 234B applicable in the facts of the case.*

**2. Ground No. 1 and 2 of appeal relates challenging the initiation of reassessment proceedings under section 147 of the Act, which were upheld by the learned CIT (A).**

**3.** Succinctly, facts as culled out from the orders of lower authorities are that the assessee is a limited company and engaged in the business of processing, extraction, and refining of soya seeds and soya refined oil and also in generation of power. The assessee has filed original return of income on 04-11-2007 declaring total income at Rs. 8, 58, 82, 560/-. This was revised on 16-03-2009 by declaring total income of Rs.8, 35, 82,

306/-. The original assessment under section 143 (3) was completed vide order dated 30-10-2009 determining total income at Rs. 8, 76, 15, 740/-. Subsequently the case was reopened under section 147 by issuing notice under section 148 on 29-09-2011, after recording reason by the AO. The assessee has requested for supply the copy of reasons recorded, and the AO provided the same on 24-11-2011.

**4.** Aggrieved by the order of the AO, the assessee had filed an appeal before the CIT (A). It was claimed that the reasons for reopening was supplied on 16-02-2012, the perusal of the same shows that the same were recorded on 23-11-2011. Therefore, it was contended that the reasons were recorded after issue of notice under section 148 for the assessment, and, therefore, the reassessment proceedings initiated were without any jurisdiction and the same is liable to be annulled. However, ongoing through the reasons, the Ld. CIT (A) noted that in the copy of reasons supplied to the appellant, in the footer of each page the following were so mentioned “Reply-HM note -23.11.2011-ACIT-1 (1)”. On the perusal of the copy of reasons recorded, the CIT (A) observed that no date is mention in the beginning of the reasons recorded or below the signature of the AO. The AO had supplied the

reason on 24-11-2011 and to the appellant and it appears that while supplying a copy of the reasons recorded, the AO had taken a printout of the reasons already recorded from his computer on 23.11. 2011. But, it does not indicate or confirm that the reasons were actually recorded on 23-11-2011. Whereas on perusal of the original assessment records, it is found from the copy the original reasons recorded for issuing notice under section 148 that there is no such remark in the footer of the pages of original reasons recorded. The notice under section 148 was issued on 29-09-2011 and reasons were also recorded before the issue of the said notice, as mentioned in the note sheet entry dated 29-09-2011. Accordingly, the submissions of the appellant were rejected on this ground and appeal was dismissed.

**5.** Being, aggrieved the assessee filed this appeal before the Tribunal. The learned Counsel for the assessee, relying on the decision in the case of CIT v. Fujistu Optel Ltd. [2013] 359 ITR 67 (MP), submitted that assessment has been reopened on the ground that additional depreciation and expenses in relation to exempt income were already on record, therefore, the reopening on same set of facts amounts to change of opinion, and the

reopening is bad in law. Further, the reopening has been made on the basis of audit report, and there is no application of mind of the AO, therefore, the reopening of assessment is not in accordance with law and deserve to be quashed.

**6.** On the other hand, the Ld. Sr. D.R., relying on the order of the CIT(A) submitted that the assessment has been reopened on the basis of material noticed during the course of assessment proceeding for the assessment year 2008-09, wherein the opening WDV on "windmill" after claim of additional depreciation was furnished by the assessee was noticed, which showed that the assessee has claimed additional depreciation on windmill installed for captive power generation, which is not permissible in law and therefore, the assessment reopened by the AO, after recording reasons for doing so. The copy of the same was also made available to the assessee during asp proceeding wherein the assessee has not taken any objection on this ground.

**7.** We have heard the rival submissions of both the parties and have perused the material available on record. We find that the assessment year involve under consideration is A.Y. 2007-08. The four assessment years from the end of assessment year

expires on 31-03-2012. The notice under section 148 was issued in this case on 29-09-2011 i.e. before expiry of 4 years from the end of relevant assessment year. As per the mandate of section 147 if the AO 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 reassessment proceedings. Accordingly, we find that the AO has satisfied the required conditions laid down in the statute for the issuance of notice under section 148 and there is no infirmity in his order on this count. Notice under section 148 within four years can be issued even if there is no failure on the part of assessee to disclose all material truly and fully necessary for assessment. Thus, the issue of notice under section 148 is as per law. This view is also supported by decision of Hon`ble Bombay High Court in the case of Grind well Norton Ltd. v Jagdish Prasad Jangid ACIT and Others 267 ITR 673(Bom) wherein it was observed by the Hon'ble High Court as under:

*" If one reads explanation 2 to section 147 of the IT Act including the proviso therefore then it is clear that where the Department re-opens assessment within a period of 4 years, it can do so on the ground of income having escaped assessment. Even if there is no failure on the part of assessee to disclose fully and truly all material facts. However in the cases of reopening after 4 Years, the A.O. must have reason to believe that the income had escaped assessment by reason of failure on the part of the assessee is disclose fully and truly all material facts, explanation 2 cannot be read without reading the proviso to sec. 147. In this case mere information regarding claim u/s. 80I and 80IA had been provide to A.O. while completing the original assessment and there was no failure on the part of assessee to disclose fully and truly material facts the re-opening beyond 4 years was not valid.."*

**8.** The power to make assessment or reassessment within four years of the end of the relevant assessment year would be attracted even in cases where there has been a complete disclosure of all relevant facts upon which a correct assessment might have been based in the first instance, and whether it is an error of fact or law that has been discovered or found out justifying the belief required to initiate the proceedings. The words "escaped assessment", where the return is filed, cover the

case of discovery of a mistake in the assessment caused by either an erroneous construction of the transaction or due to its non-consideration, or caused by a mistake of law applicable to such transfer or transaction even where there has been a complete disclosure of all relevant facts upon which a correct assessment could have been based. In cases where the Assessing Officer had over-looked something at the first assessment, there can be no question of any change of opinion, when the income which was chargeable to tax is actually taxed as it ought to have been under the law, but was not, due to an error committed at the first assessment.

**9.** The word "reason" in the phrase "reason to believe" would mean cause or justification. If the Assessing Officer has a cause or justification to think or suppose that income had escaped assessment, he can be said to have a reason to believe that such income had escaped assessment. The words "reason to believe" cannot mean that the Assessing Officer should have finally ascertained the facts by legal evidence. Unless the ground or the material on which his belief is based, is found to be so irrational as not to be worthy of being called a reason by any honest man, his conclusion that it constitutes a sufficient reason, cannot be

overridden. If the Assessing Officer honestly comes to a conclusion that a mistake has been made, it matters nothing so far as his jurisdiction to initiate the proceedings under section 147 is concerned, that he may have come to an erroneous conclusion whether on law or on facts. The court will not in exercise of its extraordinary jurisdiction under the Constitution, examine the sufficiency of the reason which led the Assessing Officer to believe that the income had escaped assessment as held in the case of Shri Praful Chunilal Patel v. M. J. Makwana [1999] 236 ITR 832(Guj).

**10.** We further fortify our view by placing reliance on the decision of Hon`ble Bombay High Court in the case of Dr. Amin`s Pathology Laboratory v. P.N. Prasad , JCIT [2001] 252 ITR 673 (Bom)/ [2001] 172 CGTR 696 (Bom) it was observed in para that Hon`ble High Court observed as follows:

> *"However, in the present case, the period of four years has since elapsed. Therefore, the proviso to section 147 comes into the picture. Under the said proviso, no action can be taken after four years unless any income chargeable to tax has escaped assessment by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. Therefore, it was contended on behalf of the assessee that, in the present case, there is no allegation of failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment.*

*In the present matter, as stated above, the assessee has been following the mercantile system of accounting for all items of expenditure and income except for all collections which are under cash basis. A reading of the assessment order clearly shows that the Assessing Officer failed to notice an important item, viz., an amount of Rs. 6,70,758 which represented unpaid purchases. The assessee-firm had claimed expenses in respect of all purchases. However, an amount of Rs. 6,70,758 represented unpaid purchases. It is for this reason that the Assessing Officer has come to the conclusion for issuance of notice under section 148 that the assessee-firm had suppressed an income to the extent of Rs. 6,70,758. Under Explanation 1 to the proviso, mere production of account books from which material evidence could have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the proviso. Therefore, mere production of the balance-sheet, profit and loss account or account books will not necessarily amount to disclosure within the meaning of the proviso. In the present case, the facts show that the Assessing Officer overlooked the aforestated item. That, he noticed it subsequently. That, at the time of passing the original order of assessment, he could not be said to have opined on the above item. Therefore, there was no change of opinion. Therefore, in the present case, the impugned notice is sustained.*

**11.** Adverting to the facts of instance case, we find that the assessee, in the instant case, there is no evidence on record; to suggest that the assessee has furnished full particulars with regard to nature of the claim of additional depreciation on wind electric generator as could be seen from the reasons recorded that the assessee has neither furnished depreciation chart as

per Income Tax Act nor along with computation of total income nor it was available on record. It was only when the assessee had shown opening WDV of wind electric generator for Rs. 6,01,00,000 i.e. (12,20,20,000- 60,10,00,000) (as claimed in A.Y. 2007-08) in depreciation chart for the assessment year 2008-09, which is available in case record of assessment year 2008-09. The AO, after due diligence, came to know that the assessee has claimed additional depreciation of Rs. 8,95,89,175/- which inter-alia included additional depreciation of Rs. 1,20,20,000/- on Wind electricity generator and same was allowed. Even in scrutiny proceedings completed for the assessment year 2007-08 it is not the case of the assessee that this specific issue was considered and all the facts concerning the claim of additional depreciation are available on record. Further the assessee has earned dividend income of Rs. 1.24 crore which is claimed exempt income under section 10(34) but no disallowance under section 14A of the Act, were made even though the assessee has debited interest expenditure of Rs. 3.61 crores. Thus, there was prima-facie reason for reopening of assessment. Therefore, the Assessing Officer was justified in reopening the assessment by issuing notice under section 148 of the Act. We therefore, reject

ground of the assessee with regard to validity of reopening of assessment. As there was prima-facie case of reason to believe that income chargeable to tax has escaped assessment.

**12.** Further reliance is placed in the case of Raymond Woolen Mills Ltd. vs. ITO [1999] 236 ITR 34 (SC); wherein it was observed that:

> " *in determining whether commencement of proceedings u/s 147(a) was valid, what was to be seen was only the prima facie material; the sufficiency or correctness of the material was not a thing to be considered at that stage. Reopening of the assessment of the preceding year on the basis of information obtained in the subsequent year's proceedings regarding undervaluation of inventories resulting in under-statement of profits was held valid under section 147(a).*

**13.** In the case of Kalaynji Mabji & Cop. V. CIT 9(1097) 102 ITR 287 (SC) it was held that reassessment can be initiated even if information may be obtained from record of original assessment.

**14.** The learned counsel for the assessee, submitted that assessment was reopened on the basis of audit objection, which is not permissible in law. In this regard we rely in the case of P. V. S. Beedies Pvt. Ltd. [1999] 237 ITR 13, the Apex Court held

> *"that the audit party can point out a fact, which has been overlooked by the Income-tax Officer in the assessment.*

*Though there cannot be any interpretation of law by the audit party, it is entitled to point out a factual error or omission in the assessment and reopening of a case on the basis of factual error or omission pointed out by the audit party is permissible under law. As the Tribunal has rightly noticed, this was not a case of the Assessing Officer merely acting at the behest of the audit party or on its report. It has independently examined the materials collected by the audit party in its report and has come to an independent conclusion that there was escapement of income. The answer to the question is, therefore, in the affirmative, in favour of the Revenue and against the assessee.*

**15.** Ongoing through the assessment order, and reasons recorded by the AO, we find to the AO had applied his independent mind on the basis of material available on record for A.Y. 2008-08 and also for assessment year under consideration and find that the information pointed out by the audit was on factual error. Therefore, the AO has formed his opinion about reason to believe that income chargeable to tax had escaped assessment.

**16.** In the light of above facts, the reopening of assessment is perfectly in accordance with law hence same is upheld. This ground of appeal of the assessee is therefore dismissed.

**17. Ground no. 3 relates to maintaining the disallowance of claim of additional depreciation of Rs. 1,20,20,000/- under section 32 (1) (iia) of the Act on Wind Electric Generator.**

**18.** Facts apropos of this ground are that the AO noted that the assessee has shown addition to asset of Wind Electric Generator for Rs. 1, 20, 20, 000/-during the year under consideration, which commissioned and put to use during the year under consideration. Since the assets were used for a period less than 180 days during the year, the assessee claimed depreciation on these assets of Rs. 6, 01, 00, 000/-in A.Y. under consideration as follows : Normal depreciation Rs. 1, 20, 20, 000 @40% -Rs. 4,80,80,000 +Additional depreciation Rs. 1,20,20,000 @10% - 1,20,20,000 = Total depreciation= Rs. 6,01,00,000

**19.** Thus, the assessee had also claimed additional depreciation of Rs. 1, 20, 20, 000/- under section 32 (1) (iia) on Wind Electric Generations. According to the AO, the wind Electric generators were used for generation of power and these were not new machinery or plant for manufacturing or producing of any article or thing, as power is not an article or thing as envisaged in section 32 (1) (iia) of the Act. Therefore, it was held by the AO that the assessee was not entitled for

additional depreciation under section 32 (1) (iia) on the acquisition of wind Electric generators. The AO also referred to the decision of Honourable ITAT Chennai in the case of Tamil Nadu Chlorates v. JCIT 98 TTJ 1 (Chennai), wherein it was held that power could not be held to be article or thing and thus, the taxpayer was not eligible to claim an additional depreciation on purchase of new machinery used for generation of power.

**20.** Being, aggrieved, the assessee filed an appeal before the Ld. CIT (A). It was submitted that the assessee was engaged in the business of manufacturing of edible oil and D.O.C. Section 32 (1)(iia) allows a benefit of additional depreciation of 20% on new plant and machinery installed by the assessee to manufacture or produce of any article or thing. It was submitted that the Electric energy is "good" and, thus, an article or thing. The electricity is sold and duties are collected on production of electricity energy . In the VAT Act, the electrical energy is placed in Schedule-I as "Exempted goods". Therefore, there is no dispute that electrical energy is good and capable of being transferred and sold. The Ld. CIT (A) noted that the assessee had two separate major business segments

i.e. solvent extraction and refining and power generation. The assessee has acquired Wind Electric Generator for its new business of power generation. Now the issue involved is whether an assessee engaged in the business of generation of power was entitled for deduction of additional depreciation of 20% of the actual cost of any new machinery or plant acquired after 31st day of March 2005. The CIT(A) referred the relevant provision inserted in the Finance Act 2012 "*or in the business of generation for generation and distribution of power*" in section 32 (1)(iia) with effect from 01-04-2013. Therefore, the Ld. CIT (A) held that the amended provision are applicable for A.Y. 2013-14 and subsequent assessment years. Thus, it makes clear that an assessee who was engaged in the business of generation or generation and distribution of power was not entitled for deduction of additional depreciation on the acquisition of new plant or machinery as per section 32 (1)(iia) before A.Y. 2013-14. The Ld. CIT (A) also referred to the relevant portion of the Explanatory Memorandum relating to additional depreciation under section 32 (1) (iia) which is reproduced as under :

*Extending benefit of initial depreciation to the power sector*

*Section 32 (1)(iia) provides for allowance of initial depreciation (in addition to normal depreciation) at the rate of 20% of the actual cost on new machinery or plant (other than ships and aircraft) to the assessee engaged in the business of manufactured or production of any article or thing in the year of acquisition and instalment. Under the existing provisions, the benefit of the initial depreciation is not available on the new machinery or plant installed by the assessee engaged in the business of generation or generation and distribution of power.*

**21.** In order to increase in new investment by the assessee's engaged in the business of generation or generation and distribution of power, it is proposed to amend this section to provide that an assessee engaged in the business of generation or generation and distribution of power shall also be allowed initial depreciation at the rate of 20% of actual cost of new machinery or plant (other than ships and aircraft) acquired and installed in a previous year. This amendment would take effect from 1st April 2013 and will, accordingly, apply in relation to the assessment year 2013-14 and subsequent assessment years.

**22.** From the above it is evidently clear that the initial depreciation under section 32 (1) (iia) in respect of new machinery and plant for generation or generation and

distribution of power is allowable at the rate of 20% of actual cost from assessment year 2013-14 only. Now, in the instant case, the year involved is assessment year 2007-08 and, thus, the appellant was not eligible for claiming initial depreciation under section 32 (1) (iia) of the Act on the wind Electric Generator in the year under consideration. Accordingly the disallowance of initial depreciation under section 32 (1) (iia) of Rs.1, 20, 20, 000/-is made by the AO was confirmed.

**23.** Being, aggrieved the assessee filed this appeal before the Tribunal. The learned counsel for the assessee submitted that electricity is produced and, commercially tradeable and therefore it was 'article or thing' within the meaning of section 32 (1) (iia) of the Act. The learned counsel referred the VAT Act and submitted that in the said Act, the electricity is considered as good for the levy of VAT. The learned Counsel for the assessee also cited a decision in the case of Commissioner of Sales tax, Madhya Pradesh v. Madhya Pradesh Electricity Board Jabalpur 1970 AIR 732, 1969 SCR (2) 939 wherein supply Electric energy was treated as good and electricity board was treated as a dealer for the purpose of sales tax. The learned Counsel for the assessee also placed reliance in the case of ACIT v. Delta

Enterprise [ I.T.A. No. 944/Mum/2012] (A.Y. 07-08) dated 09-10-2015] , wherein relying on the decision of Southern Petrochemical and 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 A.P. v. National Thermal Power Corporation Ltd. [2002] 5 SCC 203, M. P. Cement Manufactures Association v. State of Madhya Pradesh [2004] 2 SCC 249 referred to in Tata Consultancy Services v. 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 electricity energy would be transmitted, transferred, delivered, stored and possessed etc. in the same way as any other movable property. It was held that that the electricity is “”goods”” within the meaning of Sales Tax Act. Therefore, in view of the decision 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%. While doing so , it was also relied in the case of ACIT v. Mallow

International in I.T.A. No. 152/MDS/2014 dtd. 19-12-2014 for the assessment year 2006-07. Wherein relying on the decision of The Hon`ble Madras High Court in the case of CIT v. Hi Tech Arai (supra) has held

> *that where the assessee has setup a wind mill in addition to some other existing business , and is engaged in the generation of electricity , the assessee is entitled to additional depreciation on the same.*
>
> 6. *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 coordinated bench of the Tribunal. We do not find any infirmity in the impugned order.*

**24.** The learned counsel for the assessee, relied in the case of CIT v. TVM Ltd. 319 ITR 336 (Mad) wherein it was held that the additional depreciation allowed on wind mill generator to an assessee who is already engaged in the business of manufacture and production of an article or thing.

**25.** On the other hand, the learned Sr. D.R. relying on the decision of Clover Developer P Ltd. v. ACIT [I.T.A. No. 6422/M/2011-A.Y. 0708 dtd. 01-05-2013] of Mumbai tribunal submitted the provision of section 32 (1)(iia) of the Act have been interpreted by Chennai Bench of Tribunal to hold that

> *the assessee who is already engaged in the business of production or manufacture of an article or a thing or good in the past alone to claim of additional depreciation , Admittedly, there is no other contrary decision in existence*

*on the issue. Further, admittedly the assessee is not engaged in the business of manufacture or production of an article or thing prior to the manufacture of the electricity using the impugned "windmill". Considering the above settled nature of the issue, we are of the opinion, assessee is not entitled to the claim additional depreciation.*

**26.** The learned Sr. D.R. further referring to newly inserted provisions of section 2 (29BA) of the Act relating to the definition of "manufacture"" submitted that the claim of the assessee is untenable, as word manufacture required a change in no leaving physical object or article or a thing. And in the instant case qua the electricity generated , no new and distinct object or article or a thing has been brought in existence by using "windmill". Therefore, generation of electricity by use of "windmill" does not amount to manufacturing activity by the assessee. The use of electricity by "windmill" is therefore, allowed only after amendment in Finance Act, 2012, with effect from 01-04-2013.

**27.** We have heard the rival submissions of both the parties and have perused the material available on record. On perusal of the above, it seems that the AO was of the view that the assessee case is covered u/s 32(1)(i) of the Act which provides for depreciation to an undertaking engaged in generation or generation & distribution of power at such percentage of the actual cost as prescribed and hereafter referring to the amendment which has been brought in by the Finance Act,2012

wherein the provisions of section 32 (1)(iia) has been amended to provide for additional depreciation to an assessee engaged in business of generation or generation & distribution of powers, the assessee's claim was denied holding the said amendment prospective in nature. However, the assessee's case is that by using "windmill" the assessee is producing an article or a thing as define under section 32 (1) (iia) of the Act hence, it is entitled to additional depreciation.

**28.** On review of provisions of section 32 read with the rules, it is clear that an undertaking engaged in generation or generation & distribution of power has, an option to claim the depreciation either under section 32 (1)(iia) of the Act. The AO has not disputed the said claim of the assessee in respect of claim of depreciation u/s 32(1)(ii) of the Act .We now refer to the provisions of section 32(1)(ii)(a) of the Act which reads 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, 2005 by an assessee engaged in the business of manufacture or production of any article or thing or in the business of generation or generation and distribution of power, a further sum equal to twenty per cent of the actual cost of such machinery or plant shall be allowed as deduction under clause (ii)."*

**29.** A reading of the above provisions makes it clear that the additional depreciation @20% of the actual cost of machinery &

plant shall be allowed as deduction under clause (ii). In other words, over and above the depreciation claimed and allowed u/s 32(1)(ii) of the Act, the assessee shall be eligible for an additional depreciation of 20% of the actual cost of such machinery and plant. It further provides that a machinery of plant should be a new machinery or plant (other than ships and aircraft) which has been acquired and installed after the 31st day of March, 2005. It further provides that the additional depreciation in new machinery or plant shall be allowed in the hands of the assessee who is engaged in the business of manufacture or production of any article or thing or in the business of generation or generation & distribution of power. In the instant case, it is not in dispute that new machinery or plant has been acquired and installed after the 31st March 2005. It is also not in dispute that the assessee has claimed depreciation u/s 32(1)(ii) of the Act. Once the AO has accepted the assessee's claim u/s 32(1)(ii) of the Act, we do not see a reason why the assessee should be denied the claim of additional depreciation on the same assets u/s 32(1)(iia) of the Act.

**30.** In the case of JCIT vs. Mineral Enterprises Ltd. (2013) 144 ITD 680 (Bang.)(Trib.):

> *The assessee was engaged in manufacture of article or thing. By exercising the option provided under second proviso to rule 5(1A), it claimed additional depreciation on wind mill. The AO disallowed the claim of additional depreciation on wind mill on the ground that provisions of the Act allowed depreciation only in case of any new machinery or plant (other than ships and aircraft) and not*

*for wind mill, which was engaged in power generation. It was held that in view of the decision of Madras High Court rendered in case of CIT Vs. VTM Ltd. [2009] 319 ITR 336, assessee was entitled to additional depreciation on the wind mill.*

**31.** The learned Counsel for the assessee, has placed reliance in the case of CIT Vs. VTM Ltd. (2009) 319 ITR 336 (Mad.)(HC): In this case, assessee is a company engaged in the business of manufacture of textile goods. It set up a windmill for generation of power and claimed additional depreciation u/s 32(1)(iia). AO held that setting up of a windmill has absolutely no connection with the manufacturing of textile goods and thus assessee is not entitled to claim additional depreciation u/s 32(1)(iia). It was held that to claim additional depreciation u/s 32(1)(iia), what is required to be satisfied is that 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. Therefore, the contention that setting up of a windmill has nothing to do with the power industry, namely, manufacture of textile goods is totally not germane to the specific provision contained in s.32(1)(iia) of the Act. Accordingly, additional depreciation on windmill as allowed by CIT(A)/ITAT was upheld. This view was also followed in case of CIT Vs. Hi Tech Arai Ltd.

321 ITR 477 (Mad.)(HC) and CIT Vs. Texmo Precision Castings 321 ITR 481 (Mad.)(HC).

**32.** We find that the expression 'article or thing' used in section 32(1) (iia) is not defined in the IT Act, 1961. The Supreme Court in case of State of Andhra Pradesh vs. NTPC Ltd. 5 SSC 203 held that electricity is 'goods' and therefore production/generation of electricity is production of article or thing. Further, Delhi Tribunal in case of NTPC Ltd. Vs. DCIT (2012) 54 SOT 177 wherein assessee's claim of additional depreciation was disallowed on the ground that power/electricity generated by assessee could not be equated with an article or thing which was being manufactured in an industrial undertaking, held that if there can be sale and purchase of electric energy like any moveable object, then electric energy is covered by the definition of goods and thus admissibility of additional depreciation could not be denied to assessee merely on the ground that electricity is not an article or thing. In view of the said decisions, P&M acquired and installed by assessee for generation of electricity is akin to manufacture or production of an article or thing and consequently assessee is entitled for additional depreciation u/s 32(1)(iia) on same.

**33.** We find to the AO, while framing assessment u/s. 143(3)/147 held that assessee's submission is not acceptable in view of amended provision of sec. 32(1)(iia) whereby assessee's engaged in the business of generation or generation and distribution of power is allowed additional depreciation with effect from A.Y. 13-14, meaning thereby, that they were not

allowed additional depreciation during the year under consideration i.e. A.Y. 08-09. The said amendment has been incorrectly interpreted by AO. The coordinated bench of Chennai Tribunal in case of ACIT Vs. M. Satish Kumar (2012) 19 ITR (Trib.) 646, case pertaining to A.Y. 08-09, has given a finding on such amendment and has held

> *that generation of electricity is a manufacturing activity entitling assessee to claim additional depreciation u/s 32(1)(iia). In this case, assessee was engaged in the business of sale of imported second hand machinery and generation of electricity through windmills. He installed two windmills. The 1st windmill was installed in Year 2005 and second in Sept. 2007 i.e. A.Y. 08-09. Assessee claimed 100% depreciation in respect of 2nd windmill installed as per provisions of sec. 32(1) and Item xiii of New Appendix 1 read with Rule 5. The AO rejected the claim of assessee for grant of additional depreciation on windmill installed during A.Y. 08-09 by observing that assessee is not involved in manufacturing of any goods. Before Tribunal, revenue submitted that assessee is a commission agent and not a manufacturer. For availing benefit of additional depreciation, it is essential that assessee should be engaged in manufacturing activity. Therefore, assessee is not entitled to additional depreciation u/s 32(1)(iia). Assessee submitted that it had no claimed additional depreciation on 1st windmill since he was not involved in any manufacturing or production activity at that time. Now, he is claiming additional depreciation on 2nd windmill as he is already engaged in the business of production/generation of electricity. It was held vide Para 9 and 10 of the order as under:- "A perusal of judgment clearly shows that generation of electricity is akin to manufacturing of a new product. In the instant case, electricity which may not be seen with the eyes, however, its effect can be seen and felt.*

*The electricity can be transmitted, transferred, delivered, stored, possessed etc.*

**34.** The Hon'ble Supreme Court in the case of CST Vs. Madhya Pradesh Electricity Board (supra) has held that electricity falls within the definition of goods under the provisions of Sale of Goods Act, 1930. The Delhi Bench of the Tribunal in the case of NTPC Ltd. (supra) after a detailed examination of several judgments, Acts, Constitution of India, has concluded that the process of generation of electricity is akin to manufacture of an article or thing. In view of the above, we are of the section 32(1)(iia). Although the said amendment is with effect from 1.4.2013 considered opinion that generation of electricity is a manufacturing activity. The assessee is involved in the manufacturing activity and fulfills the conditions as laid down under section 32(1)(iia). The Government vide Finance Act, 2012 has amended the provisions of section 32(1)(iia) to include the business of generation or generation and distribution of power, eligible for benefit under but it gives impetus to the view that generation of electricity is a manufacturing process and qualifies for the benefits under section 32(1)(iia)."

**35.** Further, the coordinated bench of Kolkata Tribunal in case of Damodar Valley Corporation (2016) 160 ITD 78, case pertaining to A.Y. 11-12 held that

*On perusal of section 32(1)(iia) of the Act as it stood upto A.Y. 2012-13, it is evident that the additional depreciation is permissible to all assessees who are engaged in the business of manufacture or production of any article or thing. In the circumstances, the assessee who is desirous of claiming the additional depreciation need only to prove that*

*during the relevant year he was engaged in the business of manufacture or production of any article or thing. Now the question to be decided is as to whether the assessee engaged in generation and distribution of electricity could be said to be engaged in the business of manufacture or production of any article or thing so as to be eligible for claiming additional depreciation u/s 32(1)(iia) of the Act. It is well settled that for the purpose of manufacture, an element of transformation is a prerequisite.*

*A particular item should undergo changes in its colour and character and become a separate and new marketable commodity after the manufacturing process. In the instant case, the assessee had set up hydel power and thermal power plant, wherein the water and coal gets converted into electricity through the manufacturing process. Hence it is undisputed that transformation from mere coal to electricity and from mere water to electricity happens pursuant to the manufacturing process and the electricity so produced or generated becomes a separate marketable commodity. The Various apex court decisions relied upon by the assessee in the context of levy of sales tax on the sale of electricity had also decided that the generation of electricity amounts to production of article or thing. Hence, it could be safely concluded that the assessee is entitled for claiming additional depreciation u/s 32(1)(iia) of the Act even prior to the amendment brought in by Finance Act 2012. 15.*

**36.** Further Reliance is placed in the case of Principal CIT Vs. Kanishk Steel Industries (2016) 96 CCH 0292 (Mad.) (HC):

*In this case, the assessee was stated to have set up two wind mills in addition to the already existing four wind mills and thereby having increased its power generation capacity by above 50%. It was held that it is true that the assessee is a company engaged in the business of manufacture of oil seeds, moulded rubber parts, reed value assemblies apart from generation of power. After the installation of the*

*additional wind mills, both prior to as well as after the installation of the additional wind mills, the assessee was using wind energy for generating power for its capitative consumption apart from selling the surplus power generated to the Tamil Nadu Electricity Board. As far as application of Section 32(1)(iia) of the Act, 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 up to 31.03.2002 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 power industry, namely, manufacture of oil seeds etc. is totally not germane to the specific provision contained in section 32(1)(iia) of the Act.*

**37.** In the case of CIT Vs. Diamines & Chemicals Ltd. (2014) 109 DTR 62 (Guj.) (HC): The assessee already in the business of manufacture of chemicals, is eligible for additional depreciation u/s 32(1)(iia) in respect of windmill electricity generating machinery acquired by it.

**38.** The submissions of the Ld. D.R. that manufacture of electricity does not transform in physical form in view of definition contained in section 2 (29BA) of the Act nor it amount to manufacture of an article or a thing. In the instant case, the assessee had set up “windmill” the by using “windmill” the wind gets converted into electricity through the manufacturing process. Hence, it is undisputed that transformation from wind

to electricity through a process in to electricity happens pursuant to the manufacturing process and the electricity so produced or generated becomes a separate marketable commodity. A particular item should undergo changes in its colour and character and become a separate and new marketable commodity after the manufacturing process. The electricity though could not be seen by eyes, however, its effect can be seen and felt. The electricity can be transmitted, transferred, delivered, stored, possessed etc. The Apex Court in the case of Commissioner of Sales tax, Madhya Pradesh v. Madhya Pradesh Electricity Board Jabalpur 1970 AIR 732, 1969 SCR (2) 939 held the supply Electric energy as good and electricity board was treated as a dealer for the purpose of sales tax. Therefore, the argument of Revenue does not hold good. The Various Apex Court decisions relied upon by the assessee in the context of levy of sales tax on the sale of electricity had also decided that the generation of electricity amounts to production of article or thing. Hence, it could be safely concluded that the assessee is entitled for claiming additional depreciation u/s. 32(1) (iia) of the Act even prior to the amendment brought in by Finance Act 2012.

**39.** The learned Sr. D.R. has relied in the case of Clover Developer P Ltd. v. ACIT [I.T.A. No. 6422/M/2011-A.Y. 0708 dtd. 01-05-2013],which is in favour of the Revenue. However, the assessee has relied on various decisions as referred to above of Mumbai, Delhi and Chennai Tribunals as well as Hon`ble Madras High Court and other coordinated benches, which are favour of the assessee. When two views are possible then view,

which is favourable, be adopted. In this regard, we find that it has been held in plethora of judgements that in case where two possible on the same issue and there being no judgement on the said issue from the Jurisdictional Hon`ble High Court or the Hon`ble Apex Court, the view that is favourable to the assessee has to be adopted. In other words, the Hon`ble non-Jurisdictional High Court`s judgement in favour of the assessee, is to be preferred over the non-Jurisdictional High Court`s judgement not favourable to the assessee. In this connection, we rely on the following judgements:

> i) *CIT v. Kulu Valley Transport Co. Pvt. Ltd. [1970] 77 ITR 518 (SC) held that even if two views are possible the view which is favourable to the assessee must be accepted while construing the provisions of a taxing statute.*
>
> *ii) CIT v. Vegetables Products Ltd. [1973] 88 ITR 192 (SC) held On the other hand, if two reasonable constructions of taxing provision are possible, that construction which favours the assessee must be adopted. This is well-accepted rule of construction recognized by this court in several of its decisions.*
>
> *iii) CIT v. Madho Pd. Jatia [1976] 105 ITR 179 (SC) held where ambiguous interpretation of statute – admitting two views- views which is favourable to subject should be adopted.*
>
> *iv) Petron Engineering Construction Pvt. Ltd. v. CBDT [1989] 175 ITR 523 (SC) held that principle that when two interpretations are possible to be made, the interpretation, which is favourable to the assessee, should be adopted is well settled and there is no doubt about that.*
>
> *v) CIT (TDS) v. Reliance Engineering Associates Pvt. Ltd. [2012] 80 CCH 113 (Guj) held that it is well-settled law that where two interpretations are possible, the one*

*which is favourable to the assessee should be adopted. Appeal dismissed.*

**40.** In view of above, we find that it is settled law where two interpretations are possible, the one, which is favourable to the assessee should be adopted. Applying the ratio of above decisions to the facts of the case, it can safely said that that when two views are possible on the same subject, the view favouring the assessee should be adopted. We find that it is now a settled proposition as held by the Hon'ble Supreme Court and the various Co-ordinate Benches of the Tribunal that the process of generation of electricity is akin to manufacture of an article or thing, the assessee in the instant case satisfy the requirement that it is engaged in the business of manufacture or production of an article or thing. Now coming to the amendment which has been brought-in by the Finance Act 2012 w. e. f. A.Y. 2013-14 whereby the assessee engaged in the business of generation or generation & distribution of power have specifically been included and held eligible for claim of additional depreciation. In our view, the said amendment cannot be held to disentitle the assessee to claim of the additional depreciation. Various Coordinate Benches have held that even prior to the amendment brought in by the Finance Act 2012, that the assessee`s engaged in generation or generation and distribution of electricity were held eligible for additional depreciation. In this regard, a reference can be drawn to the decision of NTPC Ltd. [2012] 54 SOt 177 (Delhi) (supra), ACIT v. M. Satish Kumar [2012] 19 ITR (Trib) 646 (Chennai) (supra) and Damodar Valley Corporation [2016] 160 ITD 78 (Kol) (supra). In

our view, the said amendment cannot be read to negate the settled legal position that generation of electricity is akin to manufacture or production of an article or thing. As held by Coordinate Bench in M Satish Kumar (supra), the said amendment by the Finance Act 2012 gives an impetus to the view that generation of electricity is a manufacturing process. In light of above, the assessee is held entitled to the additional claim of depreciation on the power plant and the windmill installed during the year. Hence, the ground of the assessee is allowed.

**41. Ground no. 4 relates to charge of interest u/s. 234B (3) of the Act**.

**42.** The learned Counsel relying in the case of wherein it was held that VIjay Kumar Saboo (HUF) Ors v. ACIT 340 ITR 382 (Karn) submitted that interest u/s. 234B (3) is available in case of reassessment only from the date of original assessment and not from the first day of assessment year.

**43.** We have heard. We find that the charging of interest under section 234B(3) is mandatory as held in the case of Anjum M. H. Ghaswala 252 ITR 1 (SC), Therefore, it is upheld. However, the interest would be chargeable as per law laid down by Hon`ble Karnataka High Court (supra). However, as we allowed the main ground of appeal on favour of the assessee it becomes academic in nature and consequential in nature and not required adjudication. However, we held the assessee is entitled to consequential relief if any as arise out on giving effect to this

order in a case with law. This ground of appeal is disposed-of accordingly.

**44.** In the result, the appeal of the assessee is partly allowed.

**45.** The order pronounced in the open Court on 16.5.2017

| Sd/- | Sd/- |
|---|---|
| **( C.M. GARG)** | **( O. P. MEENA)** |
| **JUDICIAL MEMBER** | **ACCOUNTANT MEMBER** |

दिनांक /**Dated : 16TH May, 2017**

**OPM**