

आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH : CHENNAI

श्री अब्राहम पी. जॉर्ज, लेखा सदस्य एवं श्रीजी. पवन कुमार, न्यायिक सदस्यकेसमक्ष

**BEFORE SHRI ABRAHAM P. GEORGE, ACCOUNTANT MEMBER
AND SHRI G. PAVAN KUMAR, JUDICIAL MEMBER**

आयकर अपील सं./I.T.A. No. 108/Mds/2017

निर्धारण वर्ष /Assessment year : 2011-2012

The Assistant Commissioner
of Income Tax,
Central Circle 1,
Madurai

Vs. M/s. Bhima Jewellery,
NMC, 37/5-2,
Avai Shanmugam Salai,
Meenakshipuram,
Nagercoil 629 001.

[PAN AAFFB 4737J]

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The Assistant Commissioner
of Income Tax,
Central Circle 1,
Madurai

Vs. M/s. Bhima Jewellery,
No.137, West Masi Street,
Madurai 625 001.

[PAN AAIFB 1068K]

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by : Mrs. Ilavarasi, Addl. CIT.
प्रत्यर्थी की ओर से /Respondent by : Shri. R. Krishnan, C.A.

सुनवाई की तारीख/Date of Hearing : 04-05-2017

घोषणा की तारीख /Date of Pronouncement : 31-05-2017

आदेश / ORDER**PER ABRAHAM P. GEORGE, ACCOUNTANT MEMBER:**

These are appeals filed by the Revenue directed against orders dated 07.10.2016 of Id. Commissioner of Income Tax (Appeals)-3 and Id. Commissioner of Income Tax (Appeals)-2, Madurai respectively for the impugned assessment year.

2. Grounds taken by the Revenue in both these appeals are similar. Grounds 1 & 8 are general in nature needing no adjudication.

3. Vide its ground No.2 & 6, Revenue grievance is that Id. Commissioner of Income Tax (Appeals) directed Id. Assessing Officer to allow depreciation on Windmills at full rate of 80% despite the windmills having been used for business purpose only after 30th September, 2010.

4. Facts apropos are that assessee engaged in jewellery business had filed its returns for the impugned assessment year disclosing income of ₹10,07,43,384/- and ₹11,54,42,940/- respectively. During the course of assessment proceedings, it was noted by the Id. Assessing Officer that assessee had claimed depreciation on windmills. Claim of depreciation in respect of first assessee was on a windmill cost of ₹7,10,00,000/-, and in respect of

second assessee was on a windmill cost of ₹6,92,00,000/-. These windmills were acquired by the assessee from M/s. Suzlon Energy Limited. Assessee had claimed depreciation @80% being the rate of depreciation applicable to windmills vide item number (8) (xiii) of Serial number III of New Appendix I to Income Tax Rules. Id. Assessing Officer was of the opinion that windmills bearing No. KER 448 & 449 installed by first assessee and bearing No. KER 429 & 440 installed by second assessee, though connected to Kerala State Electricity Board (KSEB) grid before 30.09.2010, commercial production had started only on 23.10.2010. For coming to this conclusion Id. Assessing Officer relied on the response given by KSEB to a commission issued to it u/s. 131(1) (d) of the Act. As per Id. Assessing Officer, KSEB had confirmed that though windmills were inter-connected to the KSEB grid on 17.07.2010, the commercial operation started only on 23.10.2010. Further, as per Id. Assessing Officer initial meter reading of the windmills were taken only on 23.10.2010 by the KSEB. He held that windmills could be considered as installed and put to use only on the date of starting commercial operation which fell after 30.09.2010. According to him, the windmills were used for a period less than 180 days and by virtue of second proviso to Sec. 32(1) of the Act, depreciation that could be allowed was only 50% of the normal rates. He thus restricted the

claim of depreciation to 50% of the applicable rate of 80% and made disallowances.

5. Aggrieved the assessee moved in appeal before Id. Commissioner of Income Tax (Appeals). Id. Commissioner of Income Tax (Appeals) held that windmills were connected to electricity grid on 17.07.2010 and power purchase agreements with KSEB were signed on 30.09.2010. According to him, windmills were thus ready for use and had already started generating electricity prior to 30.09.2010. He thus, held that assessee had put the windmills to use for a period more than 180 days and hence eligible for full depreciation.

6. Now before us, Id. Departmental Representative strongly assailing the order of the Id. Commissioner of Income Tax (Appeals) submitted that date of start of commercial production alone could be considered as the date on which the machinery were put to use. According to her, Id. Commissioner of Income Tax (Appeals) fell in error in holding that assessee was eligible for full claim of depreciation.

7. Per contra, Id. Authorised Representative supporting the order of the Id. Commissioner of Income Tax (Appeals) submitted that Sec. 32 of the Income Tax Act, 1961 (in short 'the Act') did not use

the word commercial production anywhere. According to him, only requirement was that machinery should be put to use.

8. We have considered the rival contentions and perused the orders of the authorities below. There is no dispute that the windmills were connected to the grid on 17.07.2010. This is mentioned by the Id. Assessing Officer in the assessment order itself. However, as per Id. Assessing Officer commercial production had started only on 23.10.2010. What we find is that during the intervening period between 17.07.2010 to 23.10.2010, there was production of electricity. It may be true that KSEB had taken initial meter reading on 23.10.2010. However, the initial energy meter reading reflected both import and export of electricity of windmills. In our minds, there is no doubt that electricity was generated by the windmills on its connection to the grid which admittedly happened on 17.07.2010. What is required u/s. 32 of the Act is that an asset should be put to use for claiming depreciation. There is no requirement that asset should be put to use for commercial production. Even otherwise in the case of electricity, whether generated during trial period or generated after trial run, the product remained very same. In the circumstances, we are of the opinion that the Id. Commissioner of Income Tax (Appeals) was justified in taking a view that the windmills were put to use for a period more than 180 days during the relevant previous year and

allowing the full claim of depreciation. We do not find any reason to interfere with the orders of the Id. Commissioner of Income Tax (Appeals). Ground 2 & 6 of the Revenue stand dismissed.

9. Vide its ground 3, 4, 5 & 7, Revenue is aggrieved that electrical installation for the windmill and cost of civil works for windmill were considered as part of the cost of the windmill and allowed depreciation at the rates prescribed for windmill.

10. Ld. Departmental Representative submitted that assessee had considered expenses incurred for transformer /electrical work of the windmills and cost of civil works incurred for installing the windmills, as part of windmill for claiming depreciation . As per Id. Departmental Representative, there were separate depreciation rates for electrical installation work and civil works, in the New appendix I, prescribing the depreciation rates. As per Id. Departmental Representative for electrical installation work rate of depreciation was only 15% and for civil works the rate of depreciation was only 10%. Contention of the Id. Departmental Representative was that assessee could not claim enhanced depreciation available to windmills by showing such items as part of the windmills. Reliance was placed on the decision of Pune Bench of the Tribunal in the case of *Poonawala Finvest & Agro (P) Ltd vs. ACIT (2008) 12 DTR 211*. As per Id.

Departmental Representative, Id. Commissioner of Income Tax (Appeals) fell in error in holding that electrical items and civil works were part of the windmills. Reliance was also placed on the judgment of Jurisdictional High Court in the case of *CIT vs. Popular Borewell Service and Others*, 194 ITR 12.

11. Per contra, Id. Authorised Representative submitted that Id. Commissioner of Income Tax (Appeals) had relied on the decision of Co-ordinate Bench in the case of *M/s. Asian Handlooms vs. DCIT (ITA No.2291/Mds/2008, dated 20.11.2009)* and correctly held that civil works and electrical installation of the windmills were eligible for depreciation at the rate provided for windmills.

12. We have considered the rival contentions and perused the orders of the authorities below. Id. Assessing Officer while holding that civil works and electrical installation of the windmills could not be given depreciation rate specified for the windmills in new appendix I, had relied on the Pune Bench in the case of *Poonawala Finvest & Agro (P) Ltd (supra)*. However, Id. Commissioner of Income Tax (Appeals) had chosen to follow the decision of Co-ordinate Bench in the case of *M/s. Asian Handlooms (supra)* wherein it was held as under:-

"We have heard the rival contentions and perused the order. There can be no dispute that a wind mill is an apparatus that harnesses wind power, for a variety of uses like pumping water, driving of saw mill. grinding

cone and/or driving electrical turbines. A typical wind mill, as installed by the assessee, which is of Suzlon Corporation. would consist of a specialized foundation, on which the wind blades are attached through a post. The Blades connected in the top is a revolving apparatus to which different numbers of arms are attached. When it is used for producing electricity, these are called wind turbines and serves as a significant source of electrical energy. Being a nonconventional source of energy with renewable inputs and which is nature friendly world over, windmills have been given special status. importance and encouragement. There is no doubt that for a windmill to be sustainable it has to be erected in a place where sustainable wind flow is available with a land suitable to a foundation on which, a structure strong enough to withstand a powerful thrust of air at any point of time. Specialized foundation and specialized area specifically ear-marked to facilitate a flow of wind without hindrance, and specialized electrical fittings and high tension lines are all basic requirements for a wind mill plant. None of these requirements including the premises can be seen detached from what is called a 'wind mill' since a wind mill to work these are essential. All these are necessary inputs going into ultimate cost of such wind mill. The foundation structure or the specially demarcated appurtenant thereto cannot be considered as equivalent to a hotel or a cinema building which is adjunct to carrying on a hotel business or theatre business. On the other hand these can be deemed only a part of a windmill for harnessing wind energy. In coming to this conclusion we are fortified by decision of Hon'ble Karnataka High Court in the case of CIT v Kamataka Power Corporation (247 ITR 268) where it was held that whether the building can be treated as a plant or not. it was a question of fact and when it is found as a fact that the building has been so planned and constructed as to serve the assessee's special technical requirement, it would qualify to be treated as a plant. In our opinion, the expenses relating to the land and foundation specially incurred with a view to serve the technical requirements would also become a part of the plant in a case that of a wind mill Similarly, in the case of CIT v. Herdilia Chemicals (216 ITR 742), Hon'ble jurisdictional High Court held that huge land measuring 360 acres taken on lease for the purpose of

erection of plant and machinery where the entire factory was to be constructed in this land and expenses incurred for the foundation meant for fixing the machinery and for the purpose of leveling the land, formed a part of the cost of the plant. If we look at Appendix I to the Income-tax Rules, prescribing the rates of depreciation, it can be seen that Legislature has given higher depreciation rate of 80% on anti-pollution devices, energy saving and renewable energy devices. Apparently, these higher rate have been given not solely for off-setting the impairment in value of such assets on account of use but also to encourage such entrepreneurial ventures which results in energy savings or utilization of renewable energy sources, or prevention of pollution. If a very limited meaning is given to these terms used in Appendix I of the I. T Rules, it would defeat the very purpose for which such enhanced depreciation was provided for. Therefore, in our opinion, assessee's claim for depreciation should not be restricted in the manner made by the Assessing Officer. Therefore, disallowance of Rs.1,17,00,000/- 13 lakhs, Rs.23,51,576/- and Rs.5,73,824/- on account of depreciation claim stands cancelled. Ground Nos. 5 to 19 of the assessee stands allowed."

Even if we consider that Pune Bench had taken a different view with regard to depreciation rates applicable for civil works and electrical installation of windmills, we cannot find fault with Id. Commissioner of Income Tax (Appeals) following the decision of a Co-ordinate Bench which went in favor of the assessee. That apart, the judgment of jurisdictional High Court in the case of *Popular Borewell Service and Others (supra)* relied on by the Id. Departmental Representative was in relation to drilling rigs, air compressors and jack hammers which are not akin to civil works and electrical installation necessary for a

windmill. When specified civil structures and specified electrical installation work are necessary for installation of a windmill, in our opinion such items cannot be considered as independent pieces of machinery or plant or building. In these circumstances, we are of the opinion that Id. Commissioner of Income Tax (Appeals) was justified in allowing the claim of the assessee. Grounds 3, 4, 5 & 7 of the Revenue stand dismissed.

13. In the result, the appeals of the Revenue stand dismissed.

Order pronounced on Wednesday, the 31st day of May, 2017, at Chennai.

Sd/-

(जी. पवन कुमार)

(G. PAVAN KUMAR)

न्यायिक सदस्य/JUDICIAL MEMBER

Sd/-

(अब्राहम पी. जॉर्ज)

(ABRAHAM P. GEORGE)

लेखा सदस्य/ACCOUNTANT MEMBER

चेन्नई/Chennai

दिनांक/Dated:31st May, 2017.

KV

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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