

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर  
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री कुल भारत, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष  
BEFORE: SHRI KUL BHARAT, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 82/JP/14  
निर्धारण वर्ष / Assessment Year : 2008-09

The ACIT, Circle-1, Kota	बनाम Vs.	M/s Mangalam Cement Ltd. Aditya Nagar, Morak Ramganj Mandi, Kota
स्थायी लेखा सं./जीआईआर सं./PAN No. AABCM 6602Q		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

आयकर अपील सं./ITA No. 681/JP/14  
निर्धारण वर्ष / Assessment Year : 2009-10

The ACIT, Circle-1, Kota	बनाम Vs.	M/s Mangalam Cement Ltd. Aditya Nagar, Morak Ramganj Mandi, Kota
स्थायी लेखा सं./जीआईआर सं./PAN No. AABCM 6602Q		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारितकी ओर से / Assessee by : Shri P.C. Parwal (CA)  
राजस्व की ओर से / Revenue by : Shri H.V. Gurjar (CIT)

सुनवाई की तारीख / Date of Hearing : 05.01.2017  
घोषणा की तारीख / Date of Pronouncement: 30/01/2017.

आदेश / ORDER

PER SHRI VIKRAM SINGH YADAV, A.M.

These are two appeals filed by the Revenue against the order of Id CIT(A), Kota dated 29.11.2013 and 22.07.2014 relevant for assessment years 2008-09 & 2009-10 respectively. Both the appeals having identical facts, the

same were heard together and are being disposed off by this consolidated order. The grounds of appeal taken by the Revenue are as under:

**ITA No. 82/JP/14 – AY 2008-09**

- (i) *On the facts and in the circumstances of the case, the Id. CIT(A) has erred in annulling the assessment order by holding that reopening of the assessment u/s 147 of the Act in this case was merely change of opinion, and therefore, bad in law.*
- (ii) *On the facts and in the circumstances of the case, the Id. CIT(A) has erred in deleting the disallowance of Rs.18,16,98,068/- on account of additional depreciation on the assets of power generating units.*
- (ii) *On the facts and in the circumstances of the case, the Id. CIT(A) has erred in deleting the disallowance of Rs.1,41,57,121/- made by the AO u/s 43B.*

**ITA No. 681/JP/14 – AY 2009-10**

- (i) *On the facts and in the circumstances of the case, the Id. CIT(A) has erred in annulling the assessment order by holding that reopening of the assessment u/s 147 of the Act in this case was merely change of opinion, and therefore, bad in law.*
- (ii) *On the facts and in the circumstances of the case, the Id. CIT(A) has erred in deleting the disallowance of Rs. 13,20,232/- made by the AO on account of withdrawal of additional depreciation claimed by the assessee in respect of machinery installed in its power generating units.*
- (iii) *On the facts and in the circumstances of the case the Id. CIT(A) has erred in deleting the disallowance of Rs.61,71,580/- made by the AO on a/c of deduction claimed by the assessee u/s 43B by admitting additional evidence in violation of Rule 46A.*

2. Firstly, we will take up appeal for AY 2008-09. In respect of ground no. 1, briefly the facts of the case are that the assessment u/s 143(3) of the Act was completed on 31.12.2010 by making certain additions/disallowances to the returned income filed by the assessee company. Thereafter, a notice u/s 148 dt. 17.08.2012 was issued to the assessee for the following two reasons:

- (a) Assessee has claimed and was allowed additional depreciation of Rs. 18,16,98,068/- u/s 32(1)(iia) on assets of power generating unit whereas the same is allowable only on P&M which falls under sec.32(1)(ii) whereas the assets of power generating unit are covered under sec. 32(1)(i).
- (b) Assessee claimed and was allowed deduction of Rs.1,41,57,121/- being deposits made under protest against demand of service tax and land tax booked in other advances and not debited to P&L a/c, hence, the same is not allowable. Even deduction u/s 43B is not justified on such payment as under this section amount of expenditure is first booked in expenditure and if not paid, be added back to income and thereafter deduction is given on payment basis.
3. In response to the said notice, the assessee vide letter dt. 21.09.2012 objected to the issuance of notice u/s 148 by interalia submitting as under:-
- (a) As per 2<sup>nd</sup> proviso to Rule 5(1A), an undertaking engaged in generation or generation and distribution of power, may instead of claiming depreciation on its assets under clause (i) of sec. 32(1) i.e. SLM basis has an option to claim depreciation under clause (ii) of the said section i.e. WDV basis. Accordingly, assessee has exercised the option of claiming depreciation under clause (ii) of section 32(1) and thus has rightly claimed and been allowed additional depreciation u/s 32(1)(iia).
- (b) The payment of land tax and service tax was made in the year under consideration against the demand and therefore same is otherwise allowable u/s 43B.

4. The AO thereafter in the order passed u/s 147 disallowed the claim of additional depreciation by holding that in view of amended provision of sec. 32(1)(iia), assessee's engaged in the business of generation or generation and distribution of power is allowed additional depreciation w.e.f. A.Y. 13-14, meaning thereby, that they were not allowed additional depreciation during the year under consideration i.e. A.Y. 08-09. In respect of claim of assessee u/s 43B, he held that explanation of the assessee is not acceptable and therefore disallowed the claim of the assessee.

5. On appeal, the Ld. CIT(A) held that the reopening of assessment u/s 148 was bad in law and the order is ab-initio void in as much as the issue of depreciation and claim of deduction u/s 43B were considered by the then AO and therefore the reopening of assessment by the AO was merely a change of opinion. Hence, against the said order of Ld CIT(A), the Revenue is in appeal before us.

6. The Id AR, at the outset, submitted that both the issues regarding the claim of additional depreciation on power plant and windmill, and the claim of deduction u/s 43B was examined in the course of assessment proceedings u/s 143(3) as under:-

(a) AO vide query letter dt. 25.10.2010 in Point No. 3 and 9 required assessee to furnish assets register and file copy of accounts of all assets added or sold during the year so as to consider the assessee's claim of depreciation on these assets. In response to same, assessee vide reply dt. 09.11.2010 in Point No. 3 and 9 submitted that due to voluminous and

detailed nature of transaction, FAR register will be submitted later on. However, AO vide letter dt. 03.12.2010 held that the details filed is in a routine manner and not as per queries raised vide letter dt. 25.10.2010 and thus required assessee to file the details in the performa of the said letter. He further in Point No. 10, 11 and 12 of the said letter, specifically required assessee to furnish complete details of power plant at Morak and windmill at Jaisalmer. In response to same, assessee vide Point No. 9 of Annexure 26 furnished documents/supportings/information of transaction of assets having value of more than Rs. 1 lacs. It further vide reply dt. 14.12.2010 in Point No. 10, 11 and 12 explained about the power plant and the windmill. It further explained that depreciation claimed is allowable u/s 32. After examining the same, along with the depreciation chart, additional depreciation was allowed by the AO.

(b) AO vide query letter dt. 25.10.2010 in Point No. 7 required assessee to furnish proof of all payment covered u/s 43B as mentioned in Item No. 21 of the tax audit report. In response to same, assessee vide reply dt. 9.11.2010 in Point No. 7 furnished proof of all payments covered u/s 43B. However, AO vide letter dt. 03.12.2010 held that the details filed is in a routine manner and not as per queries raised vide letter dt. 25.10.2010 and thus required assessee to file the details in the performa of the said letter. He further in Point No. 8 of the said letter by referring to the fact that as per computation, assessee has claimed deduction of Rs. 54,30,165/- for land tax of F.Y. 07-08 deposited on 07.02.2008, required assessee to explain that why an amount of Rs. 54,30,165/- of land tax deposited on 01.11.2008 as per details filed be not disallowed u/s 43B. In response to the said letter, assessee vide Point No. 7 of Annexure 26 submitted that it has

already submitted detailed enclosures of payment allowable u/s 43B as per Point No. 7 of submission dt. 09.11.2010. Assessee further vide letter dt. 14.12.2010 in Point No. 8 submitted that due to oversight challan dt. 29.10.2007 for Rs. 54,30,165/- towards land tax was not filed earlier and in place of that challan of similar amount of Rs. 54,30,165/- dt. 01.11.2008 was filed and thus enclosed challan dt. 29.10.2007 for Rs. 54,30,165/- in support of its claim of deduction u/s 43B. After considering the above submission of assessee along with evidence, AO while framing assessment u/s 143(3) allowed the claim of deduction u/s 43B.

7. The Id AR submitted that from the above, it can be noted that when the AO in the original assessment proceedings has examined the issues of additional depreciation and deduction u/s 43B, on those very issues notice u/s 148 taken by him is only on account of change of opinion. On such change of opinion, re-assessment proceedings initiated by him, even within a period of 4 years, is illegal and bad in law. For this reliance is placed on following cases:-

(a) CIT Vs. Hindustan Zinc Ltd. (2016) 241 Taxman 392 (Raj.) (HC):

AO initiated reassessment proceedings on the ground that assessee had made incorrect claim of additional depreciation on captive power plant. On appeal, it was held that it is noticed that assessee had made true and full disclosure of all relevant facts relating to the claim of additional depreciation and also in respect of claim for grant of deduction u/s 80-IA. Further, a separate audit report in the prescribed form 10CCB in support of claim for deduction u/s 80-IA/80-IB was also duly submitted. The assessee had also submitted reply pursuant to all the queries made by the AO during assessment proceedings u/s

143(3) of the Act. Thus, the contention sought to be raised by the Revenue about non-disclosure on the basis of failure on the part of the assessee in mentioning bifurcated amount of additional depreciation allowable in the depreciation chart is absolutely baseless. All that has been said by the AO is that after scrutiny assessment, it was observed that assessee has made incorrect claim of additional depreciation on captive power plant whereas the claim for additional depreciation on captive power plant was allowed by the AO while framing the assessment u/s 143(3) after conscious consideration of the material on record. The formation of belief by the AO regarding escapement of income was based on re-appreciation of the material already available on record at the time of scrutiny assessment which amounts to mere change of opinion. In the garb of purported exercise of the power to reassess, the AO cannot be permitted to review his own order or the order passed by his predecessor. Thus, the finding arrived at by the ITAT that the reassessment proceedings initiated by the AO by mere change of opinion is patently illegal, cannot be faulted with. Therefore, the ITAT having arrived at the categorical finding that reopening of the completed assessment without any fresh material, merely on the basis of change of opinion of the AO, is without jurisdiction & erroneous, the appeal preferred by the revenue had rightly been dismissed as having become infructuous.

(b) Ashwamegh Co.Op. House Soc. Ltd., Vibhag 2 Vs. DCIT (2013) 214 Taxman  
42 (Guj.)(HC)(Magz.):

Assessee filed its return declaring certain capital gain arising from sale of land. AO completed assessment u/s 143(3) accepting the computation of capital gain. Subsequently, AO issued notice u/s 148 seeking to reopen the assessment

on the ground that business of assessee was land development and sale and purchase of plots and, hence, the land/plots were nothing but stock-in-trade and the profit/income arrived by the assessee should be treated as business income. It was held that since AO had passed the assessment order after taking into consideration all the relevant facts, reassessment proceedings could not be initiated merely on the basis of change of opinion even within a period of four years from the end of relevant assessment year. Therefore, impugned reassessment proceedings were to be quashed.

(c) CIT vs. Usha International Ltd.(2012) 77 DTR 396 (Del.)(HC)(FB):

Expression 'change of opinion' postulates formation of opinion and then a change thereof. In the context of s.147, it implies that the AO have formed an opinion at the first instance and later proposes or wants to take a different view. Question of change of opinion arises when an AO initially forms an opinion and decides not to make an addition accepting the assessee's position or stand. Reassessment proceedings in the said cases would be hit by the principle of "change of opinion". In case an issue or query is raised by the AO and answered by the assessee in the original assessment proceedings, and the AO does not make any addition, it has to be accepted that the issue has been examined but the AO did not find any ground or reason to make any addition, and thus, the reassessment would be invalid. Once there has been a full and true disclosure of all material and primary facts at the time of original assessment u/s 143(3), and the assessment is reopened in respect of a matter covered by the disclosure, it is a case of change of opinion and the assessment proceedings cannot be validly reopened even within four years.

(c) ACIT Vs. Rolta India Ltd. (2011) 57 DTR 370 (Mum) (TM):

Assessee capitalized the cost of software in the books of accounts & claimed the same as revenue expenditure in the computation of income furnished with the return. AO raised a specific query regarding allowability of the said software expenses as revenue expenditure and specifically asked the assessee to justify the claim for deduction thereof. Assessee wrote a letter to the AO giving the justification and stating the relevant facts. AO was satisfied with the assessee's reply that the expenses were allowable as revenue expenditure though he did not make any specific reference on this issue in the assessment order passed u/s 143(3). However, AO reopened the assessment on the basis of audit party note on the said issue. It was held that in the absence of any tangible material which could persuade the AO to form a belief that income chargeable to tax had escaped assessment by reason of the allowance of the expenses, he could not issue a notice u/s 148 even within the period of four years from the end of the relevant assessment year. Mere fact that the said issue was not specifically adverted to in the assessment order did not ipso facto give jurisdiction to the AO to reopen the assessment. Therefore, the initiation of reassessment proceedings was void ab initio.

8. The Id AR further submitted that the AO while framing assessment u/s 143(3)/147, disallowed the assessee's claim of additional depreciation u/s 32(1)(iia) not for the reason for which notice u/s 148 was issued but for an entirely different reason as stated in the facts above. Thus, order u/s 143(3)/147 to this extent is illegal & bad in law. Reliance in this connection is placed in case of ITO Vs. Bidbhanjan Investment & Trading Co. (P) Ltd. (2012)

16 ITR (Trib.) 220 (Mum.). In this case, assessee purchased a property in 1986. In order to maintain the property it had to incur certain expenditure in the form of security charges, water charges, municipal taxes etc. Since the company had no business activity other than holding the property, whatever expenditure was incurred for maintaining the said property was added to the cost of the property from year to year so as to depict true and correct picture of the company. In the process of widening of the road, the Bombay Municipal Corporation took over the front side of the property and thus assessee was left with the balance plot. Assessee sold the development rights of the said property in 1999 but retained the right of balance FSI with it. The right on FSI, which was retained, was valued and was reflected in the balance sheet. On sale of development rights of property, assessee declared capital gain and return was processed u/s 143(1). However, AO reopened the assessment, for the reason that assessee had paid municipal taxes which "appears to be for the change of usage". On local enquiries it is "understood" that the property in question was a factory building and now it stands developed as shops and marriage hall consisting of 110 units, known as "Oshiwara Plaza" and assessee had developed the property consisting of 110 units and sold the same during the period. In response to the show-cause notice, assessee furnished a detailed reply and upon going through the reply, AO noticed that the initial assumptions which were the basis for reopening of the assessment were wrong but, he proceeded to recompute the total income on the ground that the assessee is not entitled to the benefit of indexed cost of acquisition of the property, by treating the sale proceeds as capital gains. In the opinion of the AO, income on sale of property was assessable to tax under the head "Profits and gains of business and profession". Since assessee capitalized various expenses over the years and enhanced the cost of the property, AO assumed that the assessee's

intention was to treat this property as a commercial asset, to be developed subsequently, and hence it cannot be treated as an investment in property.

It was held that reopening of assessment is bad in law in as much as AO has ultimately not completed the assessment on the strength of the reasons recorded for reopening the assessment but on altogether different grounds. Hon'ble Supreme Court in 130 ITR 1 held that though Court cannot investigate into the adequacy or sufficiency of the reasons, the Court can certainly examine whether the reasons are relevant and have a bearing on the matters in regard to which he is required to entertain such a belief, before a notice is sought to be issued u/s 148 of the Act. In other words, if there is no rational and intelligible nexus between the reasons and the belief, an appellate authority is competent to hold that the reassessment proceedings are invalid and liable to be quashed. In the present case, AO appears to have reopened the assessment on mere assumptions and surmises and he never cared to verify the factual position. Assessment was not made on the strength of the reasons mentioned in the note which clearly supports the stand of assessee that assessment was sought to be reopened merely to harass the assessee. AO had reopened the assessment on arbitrary and flimsy grounds and since no addition was made on the strength of such reasons, Ld. CIT(A) was justified in quashing the reassessment proceedings.

9. The Id AR further submitted that in respect of disallowance u/s 43B, the AO has not stated anything as to why the explanation of assessee is not acceptable. The assessee has given various case laws vide letter dt. 21.09.2012 where it was held that statutory liability is allowable on payment basis even if expenditure is not booked in books of accounts. Therefore, making the

disallowance without giving any reason for the same in the assessment order shows that the reasons recorded by the AO on this issue is on flimsy ground and therefore the reopening on this issue is illegal and bad in law.

In view of above, the order passed by the AO u/s 143(3)/147 is illegal and bad in law and therefore the Ld. CIT(A) has rightly held that reopening of assessment u/s 148 is bad in law and the order is held to be ab-initio void.

10. The Id DR is heard who has vehemently argued the matter and supported the reopening of assessment proceedings. He submitted that the both the issue of claim of additional depreciation as well as claim under section 43B was not examined by the AO in the original assessment proceedings and hence, there is no question of change of opinion.

11. We have heard the rival contentions and pursued the material available on record. The Revenue has challenged the order of the Id. CIT(A) wherein he has held that the claim of additional depreciation and claim of deduction u/s 43B were considered by the Assessing Officer while completing the original assessment u/s 143(3) of the Act. The Id. CIT(A) held reopening of the assessment by the AO as merely change of opinion which is bad in law and the order passed u/s 147 read with section 143(3) was held to be void ab-initio. During the course of hearing, the Id. AR has also submitted that both the issues regarding the claim of additional depreciation on power plant and windmill, and the claim of deduction u/s 43B were examined in the course of original assessment proceedings u/s 143(3) of the Act. It was further submitted that when the AO in the original assessment proceeding has examined both the issues, the issuance of notice u/s 148 on those very issues

is only on account of change of opinion and on such change of opinion, reassessment proceedings initiated by him even within a period of four years is illegal and bad in law.

12. In this case the assessment year involved is A.Y. 2008-09 where the assessment under section 143(3) was originally completed on 31.12.2010 and notice has been issued u/s 148 on 17.08.2012. Therefore, the proviso to section 147 is not relevant and therefore not been considered by us. The limited issue under consideration is whether the issue of claim of additional depreciation has been examined by the Assessing Officer in the course of original assessment proceedings or not. The expression "change of opinion" postulates formation of an opinion and then a change thereof. In the context of section 147, it implies that the AO has formed an opinion at the first instance in the original assessment proceedings and later proposes or wishes to take a different view on a particular matter. It would therefore be relevant to examine whether the issue of claim of additional depreciation as well as claim of deduction u/s 43B was examined in the course of original assessment proceedings or not.

12.1 In this regard, we refer to notice u/s 142(1) dated 25.10.2010 issued by the AO wherein, in the point No.3 and 9, the AO has raised the following queries:

“(3) You have claimed depreciation of Rs. 17,70,25,733/- as per profit and loss account of the return. On referring to the schedule (Annexure –E), it is seen that there are additions of the assets of Rs. 14663.22 lacs in the assessment year. Please file the copies of accounts in respect of these assets with copies of purchase bills and the details of payments made. The cost of transportation of the capital assets, the erection & installation expenses and other incidental expenses for putting these

assets in use may be separately worked out. If the same are charged to revenue expenditure, identify the amounts and head of accounts under which they are debited.

- (9) Produce the assets registers required to be maintained as per the Company Laws and file the copies of accounts of all the assets added or sold during the year under consideration with copies of bills and the dates on which they were first put to use so as to consider your claims for depreciation of these assets.”

12.2 Thereafter, on 03.12.2010, the Assessing Officer has asked the following further details alongwith necessary supporting evidences:

- “(10) As per note of computation, production in Mangalam Power Plant, Morak and Mangalam Wind Power Plant, Jaisalmer has started in October and September, 2007 respectively but no production and sales details have been shown in the books of accounts. Please furnish month wise details of production and sales alongwith documentary evidence of production commenced. Please also file complete details of income and expenditure details of above plants separately.
- (11) As per depreciation chart filed, investment of Rs. 79.44 crores and Rs. 33.62 crores has been shown in the case of Mangalam Power Plant, Morak but no WDV as on 01.04.2007 and addition made during the year has been mentioned separately. Please furnish block wise details alongwith purchase of bills and source of investment in the above plant.
- (12) As per deprecation chart, depreciation of 80% has been claimed in the case of Mangalam Wind Power Plant, Jaisalmer but no details of production and sales have been shown in the year under consideration. Since no receipts have been shown from the above plant you are required to show cause why the depreciation claimed may not be disallowed . Please file complete details of production and consumption thereof and file copy of agreement if any with RSEB for power supply.”

12.3 The assessee vide its letter dated 14.12.2010 has submitted as under:

“(10) We are enclosing herewith following documents of the Mangalam Power plant, SITUATED AT Morak and Mangalam Wind Mills situated at Jaisalmer:

- (i) Balance sheet and Profit and Loss account of above units (Ref. Ann 34(a))
- (ii) Computation of income of above units (Ref. Ann 34(b))
- (iii) Details of monthwise production of unit generated in above units (Ref. Ann 34(c))
- (iv) Copy of commissioning certificate of above units (Ref. Ann 34(d))

The receipts of Rs.2393.54lacs (2345.85 lacs from power plant and Rs. 47.09 lacs from windmills) from power generation have been deducted from power and fuel (Refer Schedule 15 of the Balance sheet of Mangalam cement Ltd).

(11) We wish to submit that both 17.5 MW captive power plant valued Rs. 7944.94 lacs and wind mills valued Rs. 3362.00 lacs were commissioned during the year therefore, opening balance of block accounts is NIL. The amount incurred till 31.03.2007 was shown as “capital work in progress” amounting to Rs.6460.27 lacs of Mangalam Power Plant. Refer Balance sheet of Mangalam Power Plant. This amount can be verified from the last year figure in the Balance sheet.

We submit hereunder:

- (i) Details of block wise assets of the Mangalam Power Plant and Mangalam Wind mills already submitted on 19.11.2010 in detail.
- (ii) We are enclosing herewith copies of invoices/bills of material and services provided by the parties related to Mangalam Wind Mills and Mangalam Power Plant.
- (iii) We hereby informed that having along term loan from SBI Kolkata of Rs. 5250 Lacs for Mangalam Power Plant (copy of agreement already submitted at Ann. 20 vide our submission dated 9.11.2010 and balance out of internal accruals. We have used internal accruals of Rs. 3362 lacs for installing “Manglam Wind Mills”.

(12) We are enclosing herewith following:

- (i) Copies of agreements with JVVNL and Suzlon Energy Ltd. relating to Banking and wheeling agreements for Mangalam Wing Mills
- (ii) Details of production and consumption have already been mentioned in point No.10 above.

As per the details mentioned above, your goodself will find that a receipt of Rs. 2345.85 lacs from Power Plant and Rs.47.69 lacs from wind mills is disclosed as per P&L account of the respective units. Since units generated were consumed by the cement plants for captive purpose, hence the receipt has been netted off from the power and fuel expenses of Mangalam Cement Ltd. Please refer Schedule 15 of Balance sheet. Hence depreciation claimed is allowable u/s 32 of the Income Tax Act, 1961.”

12.4 For claim of depreciation, the assessee has to satisfy the requirements of section 32(1)(i) and section 32(1)(ii) of the Act wherein the assessee has to satisfy the test of ownership over the assets and the usage of the assets for the purpose of the business. Further depending on the nature of the assets – tangible/intangible assets and the period of usage, the rate of depreciation has been prescribed which can be claimed by the assessee. In the context of additional depreciation, the provisions are contained in section 32(1)(ii)(a) which provides that where a new machinery or plant (other than ships and aircraft) which has been acquired and installed after the 31<sup>st</sup> day of March, 2005 by the assessee who is engaged in the business of manufacture or production of any article or thing or in business of generation or generation and distribution of power, a further sum equal to 20% of the actual cost of machinery or plant shall be allowed as deduction under clause (ii). In our view, the conditions prescribed under section 32(1)(ii)(a) for claim of additional depreciation needs to be satisfied in addition to the conditions for claim of depreciation under section 32(1)(ii) of the Act. Further, it would be equally relevant to note that section 32(1)(iia) of the Act provides that a further sum equal to 20% of actual cost of such machinery or plant shall be allowed as deduction under clause (ii). In other words, the machinery or plant which are otherwise eligible to depreciation under section 32(1)(ii) of the Act shall be allowed additional depreciation at the rate of 20% of actual cost. The claim of

additional depreciation at actual cost is therefore closely linked and connected to machinery or plant which are otherwise eligible for depreciation on the written down value thereof as may be prescribed under section 32(1)(ii).

12.5 In the instant case, in the reasons recorded by the AO before issuance of notice u/s 148, it is stated that “the assessee has claimed and was allowed additional depreciation of Rs. 18,16,98,068/- u/s 32(1)(iia) on assets of power generating unit whereas the same is allowable only on P&M which falls under sec.32(1)(ii) whereas the assets of power generating unit are covered under sec. 32(1)(i).” In the instant case, the assessee has claimed depreciation on power plant and windmill @ 80% on written down value basis under section 32(1)(ii) of the Act. The Assessing officer has not challenged such claim of depreciation under section 32(1)(ii) of the Act, however, on the same assets, the claim of additional depreciation under section 32(1)(iia) has now been challenged by issuance of notice u/s 148 of the Act. The basis of formation of belief by the AO that the assets falls under clause (i) and not clause (ii) and hence, claim of additional depreciation on such assets is not allowable, cannot therefore be accepted. More so, when the claim of depreciation on such assets under section 32(1)(ii) has been allowed by the Revenue in original assessment proceedings and also in the instant reassessment proceedings which are under challenge before us. There cannot be a situation where the additional claim of depreciation is disputed stating that the original claim of depreciation has been wrongly claimed but without disturbing (rather accepting) such original claim of depreciation. We are therefore of the considered view that the reasons recorded are self-contradictory and cannot form the basis to initiate reassessment proceedings. On this ground alone, the reopening of assessment u/s 147 cannot be held valid in law and is liable to be quashed.

12.6 Further, on review of the queries raised by the AO, it transpires that the same were related to examination of purchase of the assets during the year, the date on which they were first put to use, the production and sales in respect of the power plant and windmill and whether the production has been commenced during the year or not. These queries were raised by the AO after going through the computation of income and depreciation chart submitted by the assessee company in respect of power plant as well as wind mill wherein the assessee has claimed depreciation @ 80% on written down value as well as additional depreciation @ 20% on actual costs available at APB 30-31. In our view, even though the query letter from AO didn't specifically mention about claim of additional depreciation and talks about depreciation claim, the queries raised by the AO were equally relevant for examining the claim of depreciation as well as additional depreciation and more so, when the same were originating from the same set of depreciation chart furnished by the assessee company. Thereafter, on review of submissions and related documentation filed by the assessee, the AO had allowed the assessee's claim of depreciation under section 32(1)(ii) and additional depreciation under section 32(1)(ia) of the Act during the course of original assessment proceedings under section 143(3) of the Act. Now, examining the said claim of additional depreciation during the reassessment proceedings would therefore be a clear case of change of opinion. On this ground as well, the reassessment proceedings can not be held valid in law.

12.7 As far as the issue of claim of deduction u/s 43B of the Act we agree with the contentions of the Id. AR that the issue has been duly examined by the AO during the course of original assessment proceedings and to this extent there is clearly a change of opinion which has been rightly upheld by the Id. CIT(A).

12.8 In the result, the ground no. 1 of the Revenue is dismissed.

13. Now coming to ground no 2 where, on merits, the Revenue has challenged the action of the Id CIT(A) in deleting the disallowance of Rs. 18,16,98,068/- on account of additional depreciation on the assets of power generating units.

13.1 Briefly the facts of the case are that the assessee is engaged in the business of manufacturing of cement. For uninterrupted supply of power, assessee during the year, acquired and installed new P&M i.e. power plant at Morak and a windmill at Jaisalmer for production of electricity for captive consumption in manufacturing of cement. The electricity produced from power plant at Morak was directly utilized in manufacturing of cement whereas the electricity produced from windmill at Jaisalmer was supplied to Jaipur Vidhyut Vitran Nigam Ltd. who in turn reduce that quantity of electricity from the power bill raised on the assessee. On these P&M, assessee claimed additional depreciation of Rs. 18,16,98,068/- (Rs.14,44,58,058 + Rs.3,72,40,000) u/s 32(1)(iia) of the Act.

13.2 The AO while framing assessment u/s 143(3)/147 held that in view of amended provision of sec. 32(1)(iia), assessee's engaged in the business of generation or generation and distribution of power is allowed additional depreciation w.e.f. A.Y. 2013-14, meaning thereby, that they were not allowed additional depreciation during the year under consideration i.e. A.Y. 08-09. Accordingly, he disallowed the claim of additional depreciation.

13.3 The Ld. CIT(A) after considering the language of section 32(1)(i) held that the power plant of the assessee has to be treated as an undertaking of assessee generating power and therefore the assessee clearly falls in the first category and was eligible for depreciation. Secondly, the assessee's case is also covered by section 32(1)(iia) wherein additional depreciation is allowable if the assessee is engaged in the business of manufacture or production of any article or thing. The assessee was manufacturing cement (which has to be treated as an article or thing) and therefore was eligible for additional depreciation.

14. The Id AR submitted that for claim of additional depreciation u/s 32(1)(iia), what is required is that new P&M has been acquired and installed by an assessee engaged in the business of manufacture or production of any article or thing. There is no dispute as to the fact that assessee is engaged in the business of manufacturing of cement. For uninterrupted supply of power to its cement manufacturing unit, it installed new P&M for production of power. Therefore, the electricity produced by power plant/windmill installed by the assessee are basically for manufacturing of cement i.e. article or thing. Hence, the subsequent amendment made in A.Y. 2013-14 do not effect the claim of additional depreciation on the power plant/windmill installed by the assessee.

14.1 In support, the Id AR places reliance on the following cases:-

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 upto 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

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.

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.

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)

14.2 It was further submitted 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.

14.3 It was further submitted that 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 w.e.f. 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 Hon'ble 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 1<sup>st</sup> windmill was installed in Year 2005 and second in Sept. 2007 i.e. A.Y. 08-09. Assessee claimed 100% depreciation in respect of 2<sup>nd</sup> windmill installed as per provisions of sec. 32(1) and Item xiii of New Appendix 1 r.w.r. 5. 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 1<sup>st</sup> windmill since he was not involved in any manufacturing or production activity at that time. Now, he is claiming additional depreciation on 2<sup>nd</sup> 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. 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*

*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 section 32(1)(iia). Although the said amendment is with effect from 1.4.2013 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).”*

Further, the Hon’ble 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 pre-requisite. 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 before the Id 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)(ia) of the Act even prior to the amendment brought in by Finance Act 2012.

15. The Id DR is heard who has relied on the order of the AO.

16. We have heard the rival contentions and pursued the material available on record. In this regard, it would be relevant to go through the reasons recorded by the AO before issuance of notice u/s 148, the assessee's response thereto and the final findings of the AO.

16.1 Firstly, in the reason recorded before issue of notice u/s 148, the AO has stated as under:

"In this case, assessment u/s 43(3) of the IT Act was passed on 31.12.2010 at Rs. 84,65,41,700/- as against returned income of Rs.76,09,97,363/- Later on it is revealed that the assessee claimed and was allowed deduction of depreciation Rs. 70.53 crore, which include Rs. 18,16,98,068/- being the amount of additional depreciation on the assets of power generating units. As the additional depreciation was allowable only on such plan and machinery which came under the clause (ii) of section 32(i) of Income Tax Act, while the assets of power generating units have been covered under the clause (i) of the ibid

section, therefore no amount of additional depreciation was allowance on the assets of Mangalam Power Plant, Morak unit and Mangalam Wind Power plant in Jaisalmer.”

16.2 The assessee however objected to the issuance of the notice and vide its submission dated 21.09.2012 has submitted as under:-

“(1.1) It may be noted that section 32(1) was amended w.e.f. 01.04.98 whereby under clause (i) of this section an undertaking engaged in generation or generation and distribution of Power is allowed depreciation at such percent age of the actual cost as may be prescribed. The prescribed rate is given in Appendix 1A of the rules whereby straight line of depreciation is provided. Clause(ii) of this section provides for the depreciation on the written down Value of the block of assets as per the rates prescribed in new Appendix-1 .

(1.2) As per second proviso to Rule 5(1A) an undertaking specified in clause (i) of section 32 may, instead if claiming deprecation specified in appendix 1A at its option be allowed depreciation as per Appendix-1, if such option is exercised before the due date for furnishing the return of income u/s 139(10) & the option once exercised shall be final & shall apply to all the subsequent A.Ys.

(1.3) From the above provisions, it is clear that the undertaking engaged in generation of generation & distribution of Power has an option to claim the depreciation either u/s 32(1)(i) or 32(1)(ii). We have installed a power plant at Morak & a windmill at Jaisalmer in the year under

consideration & have exercised the option of claiming the depreciation u/s 32(1)(ii). Therefore the additional depreciation has rightly been claimed and allowed to s in the assessment framed u/s 143(3). It may be noted that there is no prescribed form or method for exercising the option & therefore the claim made in the return of income and the audit report filed alongwith the return is sufficient for exercise of the option required under second proviso to rule 5(1A) as held by the ITAT Chennai Bench in the case of K.K.S.K. Leather Processors Pvt. Ltd. vs. ITO 126 ITD 215.

- (1.4) Without prejudice to above, the depreciation u/s 32(1)(i) is allowable to an undertaking engaged in generation or generation & distribution of powers at its option. This alternative basis is available only for those who are covered by the Electricity Act & the Indian Electricity rules 1956. Any other industrial undertaking which establishes a windmill of power plant for its captive consumption and not for generation & distribution of power and not governed by the Electricity Act are not covered u/s 32(1)(i). They have to claim the depreciation u/s 32(1)(ii) & therefore additional depreciation is otherwise allowable to them u/s 32(1)(ii).. In view of above, the reasons recorded by you regarding the incorrect allowance of additional depreciation is legally not tenable & therefore for this reason the notice issue u/s 148 is bad in law.”

16.3 Thereafter, the AO completed the reassessment proceedings whereby the assessee's claim for additional depreciation was disallowed by holding that in view of the amended proviso to section 32(1)(ii), the assessee is allowed

additional depreciation w.e.f. A.Y. 2013-14 and is not eligible for assessment year under consideration.

16.4 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 thereafter 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 as per the second proviso to Rule 5(1)(a) of the IT rules, an undertaking specified in section in 32(1)(i) may instead of claiming depreciation as per Appendix IA (depreciation on actual cost on straight line basis) can exercise its option to claim depreciation as per Appendix-1 (on written down value) and such option has been exercised by the assessee before the due date of furnishing of return of income u/s 139(1) of the Act.

16.5 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 u/s 32(1)(i) or 32(1)(ii) of the Act. There is no dispute that the assessee has claimed depreciation u/s 32 (1)(ii) 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 whereby the assessee has claimed depreciation @ 80% on the assets pertaining to the power plant at Morak and windmill at Jaisalmer in the year under consideration.

16.6 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 31<sup>st</sup> 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).”*

16.7 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 or plant should be a new machinery or plant (other than ships and aircraft) which has been acquired and installed after the 31<sup>st</sup> 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 31<sup>st</sup> 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.

16.8 It is now a settled position 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, the assessee engaged in generation or generation and distribution of electricity were held eligible for additional depreciation. In this regard, reference can be drawn to the decision of NTPC Ltd. (supra), M. Satish Kumar (supra) and Damodar Valley Corpn. (supra). No contrary authority has been brought to our notice. 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 department is dismissed.

17. Now, coming to Ground No. 3 where on merits, the Revenue has challenged the action of Id CIT(A) in deleting the disallowance of Rs.1,41,57,121/- u/s 43B made by the AO.

17.1 Briefly the facts of the case are that the assessee claimed deduction of Rs. 1,41,57,121/- u/s 43B being payment made under protest against demand of service tax and land tax and booked in other advances. The assessee filed detailed explanation on allowability of the claim. However, the AO held that explanation of the assessee is not acceptable and therefore disallowed the claim of the assessee.

17.2 The Ld. CIT(A) deleted the disallowance by holding that AO has simply disallowed the expenses u/s 43B without any finding. As against this, the assessee has given detailed submission stating that these expenses were provided in earlier years and claimed in current year on payment basis.

18. The Id AR, at the outset, submitted the details of payment of Rs.1,41,57,121/- under consideration as under:-

- (a) The demand of service tax of Rs. 13,59,941/- on outward transportation of cement from factory to consumer place was paid on 09.06.2007 as per CESTAT order dt. 16.04.2007.
- (b) Land tax of Rs. 54,30,165/- was paid to Sub Registrar, Chechat & Rs. 19,36,850/- was paid to Sub Registrar, Merta City on 27.10.2007 against demand for the year 06-07 in view of the order of Rajasthan High Court dt. 10.10.2007.

- (c) Land Tax of Rs. 54,30,165/- was paid on 07.02.2008 to Sub Registrar, Chechat as per the order of Rajasthan High Court dt. 01.11.2007.

18.1 It was submitted that all these are statutory liabilities. A statutory liability is allowable in the year in which it arises notwithstanding the fact that it is disputed by the assessee and no entries are made in the books of accounts [CIT Vs. Central Provinces Manganese Ore Co. Ltd. 112 ITR 734 (Bom.)]. Hence, these payment are allowable in the year under consideration.

18.2 It was further submitted that otherwise also because of specific provision of section 43B, such statutory liability are allowable on payment basis even if expenditure is not booked in books of accounts for which reliance is placed on following cases:-

Associated Pigments Ltd. Vs. CIT 234 ITR 589 (Cal.)(HC):

In this case, purchase tax was paid by assessee during the year which related to an earlier accounting year. The same was claimed as deduction u/s 43B which was disallowed by AO. It was held that there is no part of s. 43B or the IT Act itself which requires that when deduction is claimed on the basis of s. 43B, the assessee must satisfy the twin test of both proving actual payment of the due tax or cess in the previous year in question as well as satisfying the Department that due provision had been made in the books in regard to such duty or tax for which payment was made later on. To introduce this double test would be writing words into the section which neither the Tribunal nor the Court is entitled to do. In other parts of the Act, where provision in the books is given a special status, and that is specifically called for but s. 43B is not one such section. The Tribunal was not correct in law in holding that where mercantile

system is followed deduction of tax under s. 43B is impermissible unless the provision was made in the year in which the liability for tax accrued or arose.

CIT Vs. Dharampal Satyapal Sons (P.) Ltd. 50 DTR 287 (Del.) (HC):

Payment of pre-deposit by the assessee on the direction of CESTAT. Though the CESTAT had directed the assessee to make aforesaid payment by way of pre-deposit for stay of the impugned demand and pre-addition for hearing the appeal, indubitably this direction was given keeping in view the total excise duty demand raised by the adjudicating authority under the excise law, therefore, it had direct nexus and co-relation. Fact is that the assessee had made the payment towards excise duty albeit on the direction of the CESTAT as pre-deposit which therefore, would not seem to have the character of excise duty. Ultimate decision in the appeal will have no bearing on the issue. Amount is paid as a part payment against the excise duty demand raised by the excise authorities and since it was a statutory liability on that part, the conditions stipulated in section 43B are duly fulfilled and the assessee was entitled to claim the deduction thereof.

CIT Vs. Hughes Escorts Communications Ltd. 14 DTR 346 (Del.)(HC):

Assessee claimed deduction u/s 43B on the ground that it was required to make special value branch deposit with the custom authorities. The same was disallowed by AO. It was held that liability was required to be discharged by assessee on payment and the assessee had no option but to make payment. Therefore such payment clearly falls within sec. 43B of the Act.

Euro RSCG Advertising (P) Ltd. Vs. ACIT 85 DTR 272 (Mum.) (Trib.):

Assessee paid service tax along with interest as per show cause notice issued by Service Tax Department. AO disallowed the same on the ground that liability has not crystallized during the year as there was no formal written order. It was held that for claim of deduction of sum paid against liability of tax, duty, cess, fee, etc. the year of payment is relevant which is to be taken into account. The year in which assessee incurred liability to pay such tax, duty etc. has no relevance and cannot be linked in the matter of giving benefit of deduction u/s 43B. Therefore, the amount of service tax along with interest paid by assessee is allowable in view of provisions of sec. 43B.

19. The Id DR is heard who has relied on the order of the Assessing officer.

20. We have heard the rival contentions and pursued the material available on record. The demand of service tax of Rs. 13,59,941/- was paid on 09.06.2007 as per CESTAT order dt. 16.04.2007. The Land tax of Rs. 54,30,165/- was paid on 29.10.2007 & land tax of Rs. 19,36,850/- was on 27.10.2007 in view of the order of Hon'ble Rajasthan High Court dt. 10.10.2007. Further, the land tax of Rs. 54,30,165/- was paid on 07.02.2008 as per the order of Hon'ble Rajasthan High Court dt. 01.11.2007. The service tax and land tax are statutory liabilities which are paid during the year as per the orders of the CESTAT and Hon'ble Rajasthan High Court. These are statutory liabilities which pertain to the business carried on by the assessee. The assessee cannot be denied a deduction in respect of these payments merely on account of the fact that these are payments in respect of matters which are contested before the authorities and no expenditure is book in the profit and loss account. The decision of Hon'ble Delhi High Court in case of Dharampal Satyapal Sons (supra) supports the case of the assessee. In light of above, we

upheld the order of the Id CIT(A) in deleting the disallowance of Rs.1,41,57,121/- u/s 43B made by the AO. In the result, the ground taken by Revenue is dismissed.

**ITA No. 681/JP/14 – AY 2009-10**

In this appeal, identical grounds of appeal under identical facts and circumstances of the case have been taken up by the Revenue wherein in ground no. 1, the Revenue has challenged the action of the Id CIT(A) in holding that reassessment proceedings are bad in law as there was merely change in opinion in respect of assessee's claim of additional depreciation on power plant and windmill, and allowance of deduction under section 43B. Further, in ground no. 2 and 3, on merits, the Revenue has challenged the action of Id CIT(A) in deleting the disallowance towards claim of additional depreciation and deduction under section 43B. Our discussions and decision taken in respect of ITA No. 82/JP/14 shall accordingly apply mutatis mutandis to this appeal. The grounds taken by Revenue are accordingly dismissed.

In the result both the appeals filed by the Revenue are dismissed.

Order pronounced in the open court on 30/01/2017.

Sd/-  
(KUL BHARAT)  
न्यायिक सदस्य / Judicial Member

Sd/-  
(VIKRAM SINGH YADAV)  
लेखा सदस्य / Accountant Member

Jaipur  
Dated:- 30/01/2017

Pillai

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- The ACIT, Circle-1, Kota
2. प्रत्यर्थी / The Respondent- M/s Mangalam Cement Ltd.
3. आयकर आयुक्त / CIT-Kota
4. आयकर आयुक्त(अपील) / The CIT(A)-Kota
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No.82 & 681/JP/2014)

आदेशानुसार / By order,

सहायक पंजीकार / Assistant. Registrar.