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

श्री संजय अरोड़ा, लेखा सदस्य एवं श्री जी. जॉर्ज माथन, न्यायिक सदस्य के समक्ष
BEFORE SHRI SANJAY ARORA, ACCOUNTANT MEMBER
AND SHRI GEORGE MATHAN, JUDICIAL MEMBER

आयकर अपील सं./ITA Nos.1504 & 1676/Mds/2015
निर्धारण वर्ष / Assessment Year : 2011-12

Dy. Commissioner of Income Tax, Corporate Circle-6(2), Aayakar Bhavan, New Block, 7th Floor, M.G.Road, Chennai – 600 034.	Vs.	Sri Power Generation (India) Pvt. Ltd., Old No.41, New No.54, 2nd Floor, Devaraj Street, Strahans Road, Paattalam, Chennai – 600 012. [PAN: AALCS 8744F]
(**अपीलार्थी /Appellant**)		(**प्रत्यर्थी/Respondent**)

अपीलार्थी की ओर से / Appellant by	:	Ms. Vajayaprabha, Jt. CIT
प्रत्यर्थी की ओर से/Respondent by	:	Shri J.D.Srikanth Varma, Advocate
सुनवाई की तारीख/ Date of hearing	:	29.08.2017
घोषणा की तारीख /Date of Pronouncement	:	06.09.2017

आदेश /O R D E R

Per Sanjay Arora, AM:

This is a set of two Appeals by the Revenue directed against the Order dated 30.03.2015 by the Commissioner of Income Tax (Appeals)-15, Chennai ('CIT(A)' for short), partly allowing the assessee's appeal contesting its assessment under section 143(3) of Income Tax Act, 1961 (the 'Act' hereinafter) for Assessment Year (AY) 2011-12 dated 31.01.2014, as well as the subsequent order dated 29.05.2015 modifying the original order by the ld. CIT(A) u/s. 154 of the Act. The two appeals raising common issues were posted

and, accordingly, heard together, and are therefore being adjudicated per a common order.

2. The appeals raise two issues. The first issue is in respect of the correct amount of depreciation exigible under the Act. The assessee, a company manufacturing solar power equipment, filed its return of income for the year on 15.09.2011, claiming depreciation at ₹. 2,26,20,833/-, of which, on account of insufficiency of profits and gains, ₹. 2,15,29,924/– was claimed for carry forward as unabsorbed depreciation to the subsequent year/s. This was in addition to the claim of unabsorbed losses and unabsorbed depreciation brought forward from earlier years. During the course of the assessment proceedings, commenced by the issue of notice u/s. 143(2) on 21.08.2012, the assessee filed a revised return claiming depreciation at ₹. 1,25,34,533/–, including ₹. 1,06,05,262/– on power generating units. The balance ₹.19,29,271/– was on other assets. The revision in depreciation, it was explained, was on account of application of incorrect rates of depreciation on solar plants as well as the building in which they are housed, which is to be per Straight Line Method (SLM) as against the Written Down Value (WDV) method (for other assets), in the original return. The Assessing Officer (AO), accepting the assessee's revised return, disallowed the excess depreciation claimed per the original return, i.e., ₹.1,20,15,571/- (22620833 – 10605262), holding as under:

> '2.1 The assessee had returned a loss of a Rs.(2,15,29,924) in the original return of income by claiming depreciation of Rs.2,26,20,833/-. Vide letter dated 20.08.2013, the AR produced the revised return of the assessee company filed on 16.08.2013 in which it had shown a loss of only Rs.(1,1 4,43,624). The AR brought vide the letter mentioned above stated that the assessee had revised the return as it was not eligible for the depreciation claim of Rs.2,26,20,833/-. The AR mentioned in the letter that the assessee was eligible for depreciation on solar power plant for only 7.69% by straight line method and depreciation on building used for solar power plant for only 3.02% by straight line method. In the revised return, the current year depreciation claimed was only Rs.1,06,05,262/-. The assessee is eligible for depreciation only as per the Appendix lA of

> the Income Tax Rules. Rule 5(1A) allows depreciation in certain cases only on straight line method. The difference or depreciation between the original and revised return amounting to Rs. 1,20,15,571/- is being added back to the total loss as per the original return of income.'

The disallowance was worked at ₹. 120.16 lacs. As apparent, the AO, in computing the total income, regarded the income originally returned as a starting point. In the assessee's view, this disallowance ought to have been restricted to ₹.1,00,86,300/- (i.e., 22620833 – 12534533), so that there was an excess disallowance by ₹. 19,29, 271/– (i.e., 12015571 - 10086300). In appeal, the ld. CIT(A), while upholding the AO's action in principle, held as under:

> '5.2 The first ground filed is with respect to the disallowance of difference of depreciation between the original and revised return for an amount Rs.l,20,15,571/-. In the revised return of income, the appellant claimed depreciation of Rs.19,29,271/- in respect of the assets other than the power generation equipments. The appellant also claimed depreciation of Rs.l,06,05,262/- on straight line method for power generating units. The total depreciation claim in the revised return was Rs.l,25,34,533/- as against the claim of Rs.2,26,20,833/- in the original return. *No details are provided in respect of the claim of depreciation of Rs.19,29,271/- . As the appellant is only engaged in the power generation, it is not known why the appellant claimed depreciation of Rs.19,29,271/-.* However, the assessing officer is not correct in disallowing an amount of Rs.1,20,15,571/-. Therefore, the assessing officer is directed to restrict the disallowance to Rs.19,29,271/- and the grounds of appeal filed on this issue is partly allowed.'
>
> [emphasis, supplied]

2.2 The assessee, invoking section 154, claimed before the first appellate authority that instead of restricting the disallowance of depreciation to ₹. 19,29,271/-, the ld. CIT(A) ought to have allowed relief to this extent, being the depreciation on assets other than power generating equipments, for which details had been examined by the AO. The first appellate authority, if in doubt, could have called for the relevant details. The ld. CIT(A), after noting the relevant facts at para 2 of his order in the rectification proceedings, held as under toward the end of the said para:

> '2. ….. This issue was discussed with the AR of the appellant in the course of rectification proceedings to the appellate order dated 30.03.2015 wherein the AR of the appellant agreed for the relief Rs.19,29,171/- instead of direction to restrict the disallowance to Rs. 19,29,271/- in the para 5.2 of the appellate order dated 30.03.2015. This mistake arises from the appellate record itself and same is rectified. The final sentence of the para 5.2 of the appellate order should be read as under:
>
> 'Therefore, the AO is directed to give a relief of Rs.19,29,171/- (Rs.1,20,15,571 - Rs.1,00,86,400) only and grounds of appeal filed on this issue is partly allowed' in place of the sentence read in the appellate order dated 30.03.2015 as under:
>
> 'Therefore, AO is directed to restrict the disallowance to Rs.19,29,271/- and the grounds of appeal filed on this issue are partly allowed.''

2.3 Aggrieved, the Revenue is in appeal against both the original as well as the rectification order by the ld. CIT(A).

3. We have heard the parties, and perused the material on record, as well as the written submissions filed by the ld. Authorized Representative (AR).

The issue clearly involves the assessee's claim for depreciation (at ₹. 19.29 lacs) on assets other than power generating units, claimed to be vehicles, computers, office equipment and furniture. It is not clear if depreciation in respect of these assets was claimed per the original return; it being claimed in a single, consolidated sum of ₹. 226.21 lacs. Even if not, as appears to be the case, the assessee is well entitled to make a claim per the revised return, which it does. Whether, therefore, the AO ought to have also disallowed this claim for depreciation of ₹. 19.29 lacs, or restricted the disallowance only to that claimed on power generation plant, admittedly in excess, the correct amount being ₹. 106.05 lacs, was the only issue before the ld. CIT(A) in the appellate proceedings. He, however, after correctly recording the issue before him, rendering his finding, directed the AO to restrict the disallowance to ₹. 19,29, 271/-, i.e., the amount claimed, in his view, without any basis. Further, as

apparent, he presumed the AO to have proceeded, in computing the total income, from the income as returned per the revised return, while the AO had in fact adopted that per the original return. The ld. CIT(A) realizes his mistake, even as admitted by him in his order dated 29.05.2015 in the following words (at para 2 of his order):

> 'Since the AO started the computation of disallowance in the assessment order from the original return of loss Rs.2,15,29,924/-, the entire issue of restriction of the disallowance to Rs.19,29,271/- in the appellate order dated 30.03.2015 would change.'

He, therefore, ought to have, in consequence, confirmed the assessment order per the order under s. 250(6) r/w s.154, by deleting the last two sentences of para 5.2 of his order, i.e., beginning with the words 'However, the Assessing Officer is not….' and ending with the words 'partly allowed', replacing them with words 'disallowance as made by the AO is confirmed.' However, he, again commits a mistake and, contrary to his finding in the original order, allows assessee relief for the impugned sum of ₹.19.29 lacs. This would also be apparent upon reading the revised para 5.2, i.e., substituting the last sentence as directed per the rectification order dated 29/5/2015:

> '5.2 The first ground filed is with respect to the disallowance of difference of depreciation between the original and revised return for an amount Rs.l,20,15,571/-. In the revised return of income, the appellant claimed depreciation of Rs.19,29,271/- in respect of the assets other than the power generation equipments. The appellant also claimed depreciation of Rs.l,06,05,262/- on straight line method for power generating units. The total depreciation claim in the revised return was Rs.l,25,34,533/- as against the claim of Rs.2,26,20,833/- in the original return. *No details are provided in respect of the claim of depreciation of Rs.19,29,271/-. As the appellant is only engaged in the power generation, it is not known why the appellant claimed depreciation of Rs.19,29,271/-.* However, the assessing officer is not correct in disallowing an amount of Rs.1,20,15,571/-. *Therefore, the AO is directed to give a relief of Rs.19,29,171/- (Rs.1,20,15,571 - Rs.1,00,86,400) only and grounds of appeal filed on this issue is partly allowed.*'
>
> [emphasis, supplied]

This contrary position cannot be allowed to subsist. In fact, the ld. CIT(A), in the rectification proceedings, could not have disturbed his finding as to there being no basis for the claim of depreciation for ₹. 19,29,271/- on assets other than power generating equipment, issued in the absence of any details. Even if the said basis was indicated to him in the rectification proceedings, and which does not appear to be the case and neither is so stated by him, the question is if the same were before the AO, and which would warrant a verification by the ld. CIT(A). And, in this case they were before the AO, the only manner for the assessee to cause an alteration in the said finding was to file an appeal against his original order dated 30.03.2015. The ld. CIT(A), however, unmindful of the same, proceeds to disturb his finding. This is also surprising as he realizes his 'mistake' in the rectification order. His revised direction therefore cannot be sustained.

Coming to the merits of the case, the assessee before the ld. CIT(A) in the rectification proceedings claimed that all the bills (for assets on which depreciation of ₹. 19,29,271/- stands preferred) had been verified by the AO and, further, that he was also satisfied about the user of the said assets (refer para 1/pg. 2 of impugned order dated 29.05.2015). There is no discussion by the AO on this in his order. That being the case, if at all, it is this order that ought to have been subject to rectification by the assessee, while we find no such claim by it even in the appellate proceedings in the first instance. We are not, we may clarify, for a moment doubting the assessee's said claims, but only that the same being made in the rectification proceedings, would not by itself cause to alter the categorical finding (by the ld. CIT(A)) of no details *qua* depreciation having been submitted by the assessee, i.e., in respect of its impugned claim, and which implies no details being furnished at any stage, including before the AO. Under the circumstances, having regard to the conspectus of the case, we only consider it proper that the matter is restored back to the file of the ld. CIT(A) for a decision on merits. The ld. CIT(A), in the set aside proceedings, in verification

of the assessee's said claim, verify the same, also seeking the AO's comments/verification, and adjudicate afresh *qua* the assessee's claim for ₹. 19,29,271/-. The assessee shall, meanwhile, be allowed depreciation on solar generation assets, as per the revised return, i.e., at ₹. 1,06,05,262/-.

We decide accordingly.

4. The second issue arising in the instant appeals is *qua* the disallowance u/s. 14A. The assessee having a sizeable investment in shares/units, both as at the beginning and the close of the relevant year, as well as substantial movement therein, entailing expenditure, both on interest and indirect, administrative expenditure, was show caused for disallowance u/s. 14A in the assessment proceedings; it having not made any *suo motu* disallowance. The assessee's explanation of having not earned any divided income was found not satisfactory inasmuch as the expenditure would, nevertheless, be incurred, so that a disallowance in its respect would in any case ensue. The assessee had incurred interest expenditure on term loan, while, at the same time, there was no nexus of the investment with the surplus funds, as well as there was a proximate relationship of the other expenditure, viz. professional charges, communication expenses, salaries, etc., with investments made. Disallowance was accordingly made applying r. 8D, at ₹. 61,13,860/-, including ₹. 4,99,943/- *qua* administrative expenditure. In appeal, the provision (s.14A) was found to be applicable, with the assessee having in fact earned a tax-exempt dividend income of ₹. 5,50,638/. However, the assessee had, against interest expenditure of ₹. 5,23,57,286/-, apportioned to investment, earned interest income at ₹. 5,52,63,653/-. The ld. CIT(A), accordingly, directed disallowance of indirect, interest expenditure only with reference to the excess expenditure of ₹. 29,06,367/- (i.e., 55263653 - 52357286), holding as under:

> '5.3.5 However, while making disallowance, the assessing officer did not take into consideration the interest income received of Rs.5,52,63,653/- in the calculation of the disallowable amount in the

> Rule 80D(ii) of the IT Rules. The net interest expenditure is only required to be taken up for the purpose of computation. Hence the assessing officer is directed to consider the net interest expenditure of Rs.29,06,367/- (Rs.5,52,63,653 - Rs.5,23,57,286) for the purpose of computation of disallowance under Rule 80(ii) of the IT Rules. No modification is required in respect of calculation of disallowable amount under Rule 8D(ii) of the IT Rules. With the above directions, the assessing officer is directed to recomputed the disallowable expenditure u/s. 14A of the IT Act, 1961.'

The assessee moved a rectification, stating that ₹. 29.06 lacs was the excess of income over expenditure, i.e., the net income, so that no net expenditure had been incurred for it to be disallowed u/s. 14A. The ld. CIT(A) directed likewise, so the disallowance u/s. 14A stands now restricted to that on the indirect, administrative expenditure of ₹. 4.99 lacs. Aggrieved, the Revenue is in appeal against both the orders.

5. We have heard the parties, and perused the material on record. The disallowance u/s. 14A, which is therefore disputed, is *qua* interest expenditure, incurred at ₹.56,13,917/- (refer para 3.4 of the assessment order). The same is in respect of interest expenditure on term loan, incurred at Rs. 523.57 lakhs. What would therefore have to be seen is if the term loan/s, or any part thereof, is applied for shares/units. This is as normally a term loan would stand to be applied for the purpose for which it has been allowed. Even if therefore there is no one-to-one correspondence, as claimed by the AO, inasmuch as the same gets mixed up in the common pool of funds, if the asset to the required extent is created, the borrowed funds would have to be regarded as deployed toward the same. That is, if a term loan is granted for a specified asset/asset class, as is normally the case, stipulating a margin (say, at 25%), an asset creation of Rs. 133/- would justify the absorption of the term loan of Rs. 100/-, even if a one-to-one correspondence is not, as stated, forthcoming. That apart, we observe that out of the total interest expenditure of Rs. 523.57 lakhs, Rs.518.16 lakhs has been set off, both in the original and the revised return, against interest income

of Rs. 552.64 lakhs, returning the net income of Rs. 34.47 lakhs as income from other sources. The same has not been disturbed by the AO in any manner, so that, apparently, the interest-bearing funds – to that extent, have been applied toward interest-bearing loans, earning interest. The two rates of interest are not known, and would well be different, but the very fact that the entire interest expenditure is set off against that earned implies absorption of the entire bank loan funds toward interest bearing loans. That leaves us with an interest expenditure of Rs. 5,40,711 (i.e., 52357286 - 51816575). There being no specific explanation *qua* this interest expenditure, the same shall be appropriated under rule 8D(2)(ii) for estimating the disallowance u/s. 14A. Needless to add, the total assets shall, in estimating the disallowance, reduced by the interest-bearing loans (both as at the beginning and the end of the year) inasmuch as funding of assets to that extent is established. We decide accordingly.

6. In the result, the Revenue's appeals are partly allowed for statistical purposes.

Order pronounced on September 06, 2017 at Chennai.

Sd/-	Sd/-
(जॉर्ज माथन)	(संजय अरोड़ा)
(George Mathan)	(Sanjay Arora)
न्यायिक सदस्य/Judicial Member	लेखा सदस्य/Accountant Member

चेन्नई/Chennai,
दिनांक/Dated, September 06, 2017.
EDN

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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