

आयकर अपीलिय अधिकरण, मुंबई "डी" खंडपीठ में
Income-tax Appellate Tribunal - "D" Bench Mumbai
सर्वश्री राजेन्द्र, लेखा सदस्य एवं सी. एन. प्रसाद, न्यायिक सदस्य
Before S/Sh. Rajendra, Accountant Member and C. N. Prasad, Judicial Member
आयकर अपील सं./I.T.A./7251/Mum/2016, निर्धारण वर्ष /Assessment Year: 2011-12

ACIT Circle-27(1) Room No.415, 4 th Floor Tower No.6, Vashi Station Complex, Mumbai 400 703.	Vs.	Smt. Deepali Atul Ganatra 104, Kaveri Neelkanth Valley 7, Rajawadi Road, Ghatkopar (E) Mumbai 400 077. PAN : AAFPG 3094 F
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

राजस्व की ओर से / **Revenue by:** Shri Ram Tiwari-Sr.AR-CIT

अपीलार्थी की ओर से / **Assessee by:** Shri Aditya Ajgaonkar -AR

सुनवाई की तारीख / **Date of Hearing:** 13/06/2018

घोषणा की तारीख / **Date of Pronouncement:** 04/07/2018

लेखा सदस्य, राजेन्द्र के अनुसार/ Per Rajendra A.M.-

Challenging the order dated, 23/09/2016 of CIT(A)-25, Mumbai, the Assessing Officer(AO) has filed the present appeal. Assessee, an Individual, engaged in the business of trading in cotton bales and generation of power, filed return of income on 28/09/2011, declaring income at Rs.7.85 crores. The assessment was completed, u/s.143(3) of the Act, vide order dated 19/03/2013, determining her income at Rs.9.18 crores.

2. Solitary ground of appeal is about allowing additional depreciation for wind mills u/s. 32(1)(ii) of the Act. During the assessment proceedings, the AO found that the assessee had claimed deduction on additional depreciation of Rs. 1.30 crores @10% on the wind mill which was installed and commissioned during the assessment year under consideration. He held that the assessee was not eligible for additional depreciation as per the provisions of section 32(1)(iia), as the windmill was installed and commissioned before AY.2013-14. He issued a notice to the assessee in that regard. After considering the explanation of the assessee the AO held that she was not engaged in the business of generation of power, that she was not eligible to claim additional depreciation for assessment year under consideration, that the amended provisions of section 32(1)(iia) were prospective, that the additional depreciation was not available for the year under consideration. Rejecting the claim of the assessee, the AO added back an amount of Rs.1.30 crores to the total income of the assessee.

3. Aggrieved by the order of the AO the assessee preferred an appeal before the First Appellate Authority (FAA) and made detailed submissions. After considering the available

material,he referred to the case of Atul S. Ganatra (ITA/4899/Mum/2014, AY 10-11, dtd.26/08/2016) wherein identical issue was decided in favour of the assessee.He referred to the following cases:-

- i) Atlas Export Enterprise (373ITR414);
- ii) Ankit Metal & Power Ltd.(372ITR660);
- iii) Hi Tech Arai Ltd. (321ITR477);
- iv) Texmo Precision Casting (321ITR481) and
- v) Cera Sanitaryware Ltd. (42ITR(Trib.)334)

and allowed the additional depreciation claimed by the assessee on the wind mills.

4.During the course of hearing before us,the Departmental Representative (DR) stated that matter could be decided on merits. The Authorised Representative (AR) stated that in the case of Giriraj Enterprises,(186TTJ146) the Tribunal had held that generation of electricity by wind mills amounted to production of an article or thing, that claim made by the assessee for additional depreciation on purchase of wind mills u/s.32(1)(iia) was to be allowed. He also referred to case of Atul S. Ganatra(supra), husband of the assessee.

5.We have heard the rival submissions and perused the available material. We find that in the case of Atul S. Ganatra the Tribunal has decided the issue as under :-

“2.1 Next issue is with regard to additional depreciation of Rs.2,19,29,891/- on two windmills acquired and installed by assessee during the year, which was confirmed by CIT(A). As stated above, assessee is engaged in the business of generation of power. During the year two windmills were acquired and installed. Assessee claimed additional depreciation of Rs.2,19,29,891/- u/s.32(1)(iia). Assessing Officer disallowed same by relying of the decision of Tamilnadu Chlorates [2006] 98 ITD 1 (Chennai) (Trib.). CIT(A) upheld the disallowance by relying upon the explanatory notes (memorandum) to amendments as inserted by Finance Act, 2012. The stand of assessee has been that ITAT Chennai Bench in Tamilnadu Chlorates (supra) has been relied upon by Assessing Officer was not relevant to current scenario as dealt with the provisions of Section 80HHC of the Act and not with the provisions of Section 32(1)(iia) of the Act. Ld. Authorized Representative submitted that ITAT, Delhi Bench in case of N.T.P.C. vs. DCIT [2012] 54 SOT 177 (URO) (Delhi) (Trib.), considered this decision while dealing with the activity of generation of electricity with respect of additional depreciation u/s.32(1)(iia) and ruled in favour of assessee. Hon’ble Madras High Court in case of CIT vs. VTM Ltd. [2009] 319 ITR 336 (Mad.) (HC) examined the same issue and dismissed the revenue appeal seeking to disallow additional depreciation u/s.32(1)(iia) of the Act with respect of setting up a windmill by a manufacturer of textile goods. Thus, following the ratio of VMT Ltd.(supra) issue has been decided in favour of assessee with regard to addition depreciation u/s.32(1)(iia) of the Act. Hon’ble Supreme Court in case of CST vs. M.P. Electricity Board (AIR 1970 SC 732), held that the electricity generated by an assessee is an article or goods. The explanation to amendments (memorandum) as inserted by Finance Act, 2012 as relied upon by CIT(A) cannot be said to overrule and earlier decision of Hon’ble High Court. An amendment that has prospective application cannot be said to retrospectively take away the rights of an assessee qua it’s explanatory notes. Where there is no ambiguity in the Section, there is no warrant for resort to external aids of interpretation namely the notes on clauses and the memorandum

explaining its provisions. In the light of decision of VTM Ltd.(supra) with regard to claim of additional depreciation u/s.32(1)(iia) for setting up a windmill, wherein material being sole decision by Hon'ble High Court on the matter, we hold that additional depreciation should be allowed."

Respectfully following the above order of the Tribunal and the order of Giriraj Enterprises (supra),we decide the effective Ground of appeal against the AO.

As a result, appeal filed by the AO stands dismissed.
फलतः निर्धारिती अधिकारी द्वारा दाखिल की गई अपील नामंजूर की जाती है.

Order pronounced in the open court on 4th July, 2018.
आदेश की घोषणा खुले न्यायालय में दिनांक 4 जुलाई, 2018 को की गई।

Sd/-

(सी. एन. प्रसाद / C.N.Prasad)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक/Dated : 04 .07.2018.

Jv.Sr.PS.

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

- 1.Appellant /अपीलार्थी
2. Respondent /प्रत्यर्थी
- 3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त
- 5.DR "D " Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ,आ.अ.न्याया.मुंबई
- 6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**

उप/सहायक पंजीकार **Dy./Asst. Registrar**

आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai.