

**आयकर अपीलीय अधिकरण, सुरत न्यायपीठ, सुरत**  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**SURAT BENCH, SURAT**

**श्री सी.एम.गर्ग, न्यायिक सदस्य तथा श्री ओ.पी.मीना, लेखा सदस्य के समक्ष**  
**BEFORE SHRI C.M.GARG, JUDICIAL MEMBER**  
**AND SHRI O.P.MEENA, ACCOUNTANT MEMBER**

आ.अ.सं./I.T.A No.143/Ahd/2016	निर्धारण वर्ष/A.Y.:2006-07
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<b>M/s. Kadodara Power Pvt. Ltd.</b> <b>Plot No. 30-33&amp; 60-63, Block</b> <b>No.179/2, Kadodara Char</b> <b>Rasta, Palsana, Surat 394327</b> <b>PAN: AACCK5249E</b>	<b>Vs.</b>	<b>Assistant Commissioner of</b> <b>Income Tax, Circle-1, Surat</b>
अपीलार्थी Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से /Assessee by	Shri Rasesh Shah, CA
राजस्व की ओर से /Revenue by	Shri S.R. Meena, Sr. D.R.

सुनवाई की तारीख/ Date of hearing:	08.08.2018
उद्घोषणा की तारीख/Pronouncement on	06.09.2018

**आदेश /O R D E R**

**PER O. P. MEENA, ACCOUTANT MEMBER:**

1. This appeal by the Assessee is directed against the order of learned Commissioner of Income tax (Appeals)-1, Surat (the CIT(A)) dated 25.11.2015 pertaining to Assessment Year 2006-07.
2. Ground No.1&3 : are not pressed before us, hence, these are treated as dismissed.

**3.** Ground No. 2 states that the Id. CIT (A) has erred in confirming disallowance of Rs.1,11,25,307 on account of additional depreciation claimed under section 32 (1) (iia) of the Act.

**4.** The assessee has claimed additional depreciation of Rs. 1,11,25,307 on power plant and electric installations. The AO was of the view that plants and machinery are covered under section 32(1)(i) of the Act on which normal depreciation is allowable, hence, additional depreciation is not allowable. The additional depreciation @20% is allowable under section 32 (1) (iia) in respect of plants and machinery acquired and installed after 31.03.2005 and used in manufacturing or production of articles or things. It was contended that that the assessee company was formed as Joint Venture Company (JVC) by four members companies for setting up a Captive Power Plant (CPP). The assessee is a Special Purpose Vehicle for putting up a group Captive Power Plant by 4 Process Houses in the vicinity of the assessee`s power generation unit. The assessee didn`t sell a single unit to any person other than its members. The assessee is not in generation and distribution of power like other Independent Power Suppliers (IPS). However, the

AO was not satisfied with the submissions of the assessee and disallowed the additional depreciation of Rs. 1,11,25,307.

5. Being aggrieved, the assessee filed an appeal before the Id. CIT (A). The CIT (A) observed that the claim of the assessee that it was a Captive Power Plant is devoid of any merit because even if it is believed the company was jointly formed by 4 companies , then also each of such companies and present company have separate legal entity, separate books of accounts and this power plant was not part of block of assets or division of 4 companies. Hence, by no stretch on imagination this power plant could be termed as Captive Power Plant. Thus, on facts of this case, the assessee company is eligible to claim depreciation under section 32(1)(i) and not under section 32(1)(ii) of under section 32 (1) (iia) of the Act. The CIT (A) further observed that provision of section 32 (1)(iia) have been amended by Finance Act, 2012, with effect from A.Y. 2013-14 by incorporating “the assessee engaged in the business of generation or generation and distribution of power” which clearly showed that such benefit was not available before A.Y. 2013-14. In other words, before A.Y. 2013-14 assessee who is engaged in the business of generation of power or generation & distribution of power were not eligible for additional depreciation.

It was further observed that provision of section 32 (1)(iia) talks about that the assessee engaged in the business of manufacturing and production of an article or thing obviously power generation is not manufacturing and production of an article or thing. Moreover, when specific provision has been made in section 32(1)(i) then there is no need to adopt indirect legislation i.e. Rule 5 (1A) of Income-Tax Rules, 1962. The CIT (A) also observed that the option as per WDV method or Straight Line Method given to the assessee does not mean that the assessee automatically becomes eligible for additional depreciation.

**6.** Being, aggrieved the assessee filed this appeal before the Tribunal. The Ld. AR for the assessee submitted the assessee is a Special Purpose Vehicle and is engaged in power generation of units for its Captive Power Plant. The very purpose of setting up the power generation plant is to give un -interrupted power supply to its member units vis-à-vis State Electricity Board. The assessee has claimed depreciation on WDV method. The ld. A.R. relying on the decision in the case of N.T. P. C Ltd. v. DCIT [2012] 22 taxmann.com 247 (Delhi) submitted that the process of generation of electricity is akin to manufacturing and production of an article or thing and the assessee is engaged in activity of generation of

electricity would be entitled to additional depreciation under section 32 (1) (iia) of the Act. Therefore, it was urged before us that the CIT (A) was not justified in confirming the action of the AO.

**7.** Per contra, the learned Departmental Representative (the ld. D.R.) relied on the order of lower authorities.

**8.** We have heard the rival submissions and perused the relevant material on record. On perusal of the findings of lower authorities, it seems that the AO was of the view that the assessee case is covered u/s 32(1)(i) of the Act which provides for depreciation to an undertaking engaged in generation or generation & distribution of power at such percentage of the actual cost as prescribed and hereafter referring to the amendment which has been brought in by the Finance Act,2012 wherein the provisions of section 32 (1)(iia) has been amended to provide for additional depreciation to an assessee engaged in business of generation or generation & distribution of powers, the assessee's claim was denied holding that the said amendment is 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.

9. 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 @ 20% on the asset used in Captive Power Plant. We now refer to the provisions of section 32(1)(iia) of the Act which reads as under: “(iia) In the case of any new machinery or plant (other than ships and aircraft) which has been acquired and installed after the 31st Day of March, 2005 by an assessee engaged in the business of manufacture or production of any article or thing or in the business of generation or generation and distribution of power, a further sum equal to twenty per cent of

the actual cost of such machinery or plant shall be allowed as deduction under clause (ii).”

**10.** 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 31st day of March, 2005. It further provides that the additional depreciation in new machinery or plant shall be allowed in the hands of the assessee who is engaged in the business of manufacture or production of any article or thing or in the business of generation or generation & distribution of power. In the instant case, it is not in dispute that new machinery or plant has been acquired and installed after the 31st March 2005. It is also not in dispute that the assessee has claimed depreciation u/s 32(1)(ii) of the Act. Once the AO has accepted the assessee’s claim u/s 32(1)(ii) of the Act, we do not see a reason why the

assessee should be denied the claim of additional depreciation on the same assets u/s 32(1)(iia) of the Act.

**11.** We may note 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.

**12.** 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. 2013-14whereby 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 assessees 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). 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. 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 plants and machinery installed in the Captive Power Plant. Hence, the Ground No. 2 of appeal of the assessee is allowed.

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

**14.** Order pronounced in the open court on 06-09-2018.

Sd/-

(सी.एम.गर्ग /C.M. GARG)

न्यायिकसदस्यतथा/JUDICIAL MEMBER लेखासदस्यकेसमक्ष /ACCOUNTANT MEMBER

सुरत Dated: 6<sup>th</sup> September, 2018 / OPM

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

1.अपीलार्थी/ The Appellant; 2. प्रत्यर्थी/ The Respondent; 3. आयकरआयुक्त (अपील) The CIT(A)4.आयकरआयुक्त / Pr. CIT 5.विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण/D.R. (ITAT) 6. गार्डफाईल / Guard file ITAT.

By order

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Assistant Registrar, Surat