

IN THE INCOME TAX APPELLATE TRIBUNAL  
PUNE BENCH "B", PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT  
AND SHRI VIKAS AWASTHY, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.1723/PUN/14,  
ITA No.11/PUN/2015 & ITA No.1608/PUN/2015  
निर्धारण वर्ष / Assessment Years : 2010-11, 2011-12 & 2008-09

Ayoki Fabricon Private Limited,  
Office No.137 & 139,  
Akshay Complex,  
Dhole Patil Road,  
Pune – 411 001

**Vs.** DCIT, Circle-1(1),  
Pune

**PAN : AABCA5780F**

**(Appellant)**

**(Respondent)**

Appellant by  
Respondent by

Shri Nikhil Pathak  
Shri Pankaj Garg

Date of hearing

19-11-2018

Date of pronouncement

20-11-2018

आदेश / ORDER

PER R.S.SYAL, VP :

These three appeals by the assessee relate to the assessment years 2010-11, 2011-12 & 2008-09. Since a common issue is raised in all these appeals, we are, therefore, proceeding to dispose them off by this consolidated order for the sake of convenience.

**ITA No.1723/PUN/2014 – A.Y.2010-11 :**

2. The only issue raised in this appeal is the denial of the claim of additional depreciation amounting to Rs.1,03,30,137/- u/s. 32(1)(iia) of the Income-tax Act, 1961 (hereinafter also called as 'the Act').

3. Briefly stated, the facts of the case are that the assessee is engaged in the business of erection and fabrication of sugar factories, cement plants etc. During the course of assessment proceedings, it was noticed that the assessee claimed additional depreciation of Rs.1,03,30,137/- in addition to regular depreciation amounting to Rs.3,32,30,692/-. The Assessing Officer (AO) observed that the additional depreciation u/s. 32(1)(iia) can be allowed only if an assessee is engaged in the business of manufacture and production of any article or thing. Since the assessee is engaged in the business of fabrication and erection of sugar factories, cement plants etc., the AO held that the additional depreciation was not admissible. The Ld. CIT(A) upheld the AO's order on this point after relying mainly on the judgment of Hon'ble Supreme Court in the case of *CIT Vs. N.C. Budharaja & Co.*

(1999) 204 ITR 412 (SC) in which it has been held that the construction of dam etc., does not constitute ‘manufacture or production of an article’ for the purposes of section 80HH(2)(i) of the Act. The assessee is aggrieved by the denial of additional depreciation.

4. We have heard both the sides and perused the relevant material on record. The only controversy which is involved in this appeal is against the denial of additional depreciation u/s. 32(1)(iia) of the Act, the relevant part of which, at the material time, 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*, 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):

Provided that no deduction shall be allowed in respect of-

- (A) .....
- (B) to (D).....”

5. A bare perusal of the provision transpires that additional depreciation on new machinery or plant installed after 31-03-2005 is allowable u/s. 32(1)(iia) of the Act to an assessee who is engaged in the business of ‘manufacture or

production of any article or thing'. The proviso to this provision carves out four situations/items in which the benefit of additional depreciation is not admissible. None of such exceptions is applicable in the instant case. The AO has held the assessee to be ineligible for additional depreciation simply on the ground that it is not engaged in the business of manufacture or production of an article or thing. No other aspect is found to be wanting. The assessee is admittedly engaged in the business of erection and fabrication of sugar factories, cement plants etc. The crucial question which, ergo, arises under these circumstances is as to whether erection and fabrication of sugar factories and cement plants etc. can be construed as 'manufacture or production of an article or thing'. The Hon'ble Supreme Court in the case of *N.C. Budharaja (supra)* dealt with similar expression of 'manufacture or production of an article' albeit used u/s.80HH of the Act. In that case, the assessee, a firm of contractors was engaged in the business of construction of a dam in Orissa. Deduction was claimed u/s.80HH which was denied by the AO on the ground that construction of a dam could not be equated with 'manufacture or production of an article'. When the matter

finally travelled before the Hon'ble Supreme Court, their Lordships negatived the assessee's claim of deduction by noting that the word 'articles' occurring in s. 80HH(2)(i) is not defined in the Act or the Rules and thus it must be understood in its normal connotation. Throwing light on the scope and ambit of the term 'article', their Lordships held that : 'It is equally difficult to say that the process of constructing a dam is a process of manufacture or a process of production. It is true that a dam is composed of several articles; it is composed of stones, concrete, cement, steel and other manufactured articles like gates, sluices, etc. But to say that the end product, the dam, is an article is to be unfaithful to the normal connotation of the word. A dam is constructed; it is not manufactured or produced.' The Hon'ble Court further went on to explain that : 'The expressions 'manufacture' and 'produce' are normally associated with movables—articles and goods, big and small—but they are never employed to denote the construction activity of the nature involved in the construction of a dam or for that matter a bridge, a road or building.' It was thus held that : 'It is not possible to accede to the contention that the activity of construction of a dam can be

characterised as manufacture or producing of article or articles, as the case may be.....’.

6. The Id. AR candidly admitted, and rightly so, that the connotation of the expression ‘manufacture or production of an article or thing’, given in the judgment in the context of section 80HH, applies equally in the context of section 32(1)(iia) as well. In the light of the judgment of the Hon’ble Supreme Court, it is crystal clear that sugar factories or cement plants etc. are constructed and not manufactured. Further, the meaning of the term “article” in the provision cannot comprehend erection of factories etc. This term, when coupled with the expression ‘manufacture or production’, refers to bringing into existence some movable articles, which position is plainly absent in the instant case. When confronted, the Id. AR was fair enough to concede that the judgment of Hon’ble Supreme Court bars the assessee from claiming deduction u/s.32(1)(iia) of the Act in respect of its business of erection and fabrication of sugar factories and cement plants etc.

7. He, however, gave a different twist to the case by arguing that even though the assessee cannot be considered as involved in ‘manufacture or production of an article or thing’ by erecting and fabricating factories and cement plants etc., but it manufactures certain items which are used in the erection and fabrication of sugar factories and cement plants etc. It was, therefore, argued that the assessee should be made eligible for additional depreciation in respect of the items of plant and machinery, that are used in the manufacture of such items used in the erection and fabrication of sugar factories and cement plants etc.

8. We are unable to countenance the argument put forth on behalf of the assessee. Firstly, the Id. AR could not figure out any material to indicate that the assessee was actually engaged in the business of manufacturing certain items which were used in the erection and fabrication of sugar factories etc. It is not disputed that the assessee is constructing factories etc. at the site of its client. On a specific query, it was admitted that no excise duty was paid by the assessee during the year. This shows that there is no evidence of the alleged manufacturing of any articles or things by the assessee. The second reason is

that, in order to be eligible for additional depreciation, the assessee must be engaged in the `business of` manufacture or production of an article or thing. The words “engaged in the business of” clearly demonstrate that the business of the assessee should be that of ‘manufacture or production of article or thing’. If the business of the assessee is construction and fabrication of factories and cement plants etc., then the assessee cannot be treated as engaged in the business of ‘manufacture or production of article or thing’, even though in the process of construction and fabrication, it manufactures certain articles which are used in the erection of certain factories. The Hon’ble Supreme Court in *Budharaja (supra)* also dealt with such a situation in its judgment, when it noted that : `It may be that the petitioner is himself manufacturing some of the articles like gates, windows and doors which go into the construction of a dam but that makes little difference to the principle. The petitioner is not claiming the deduction provided by s. 80HH on the value of the said manufactured articles but on the total value of the dam as such. In such a situation, it is immaterial whether the manufactured articles which go into the construction of a dam are manufactured by

him or purchased by him from another person'. Since the assessee could not satisfy even the preliminary condition of placing any material on record to clearly evidence that it was, in fact, engaged in the business of manufacture of certain articles which were used in the construction of factories etc. and the further fact that the assessee is engaged in the business of construction of factories etc. and not in the manufacture of articles, the fresh claim raised by the Id. AR deserves the fate of rejection. We order accordingly.

9. The reliance of the Id. AR on the judgment of Hon'ble Madras High Court in the case of *CIT Vs. AICAM Engineering Pvt. Ltd. (2011) 336 ITR 294 (Mad.)* is misplaced. In that case, the assessee used to produce raw materials, manufacture and supply and erection of various public undertakings, several industrial equipments comprising boilers and piping systems etc. It was under those circumstances that the benefit of section 32A of the Act was allowed by treating that assessee as an 'industrial undertaking'. This judgment has no application to the facts of the instant case in as much as there is no evidence of the extant assessee being involved in the purchase of raw materials and manufacture and supply of

certain industrial equipments etc. Since in that case, the assessee was engaged in doing actual manufacturing activity, entitlement to benefit of section 32A was allowed. It goes without saying that if a person, instead of manufacturing for himself, manufactures the eligible articles for some outsider on job work basis, the benefit available for own manufacturing cannot be denied to the manufacturing on job work basis. We are confronted with a situation in which the assessee is neither involved in any job work nor in purchase of raw materials and manufacture and supply of any equipments etc. for its own. On the contrary, we find that the reliance of the ld. CIT(A) on the judgment of Hon'ble Madras High Court in the case of *CIT Vs. Dowel Erectors (2000) 243 ITR 832 (Mad.)* is direct and on the point. In that case, the assessee was engaged in the business of erection which was done at the site and involved assembling of various parts and fabrication to the extent required for being attached to complete boiler. The boilers erected were not meant to be moved. The assessee in that case claimed investment allowance on machinery used by it for erecting the boilers which claim was jettisoned by the Hon'ble Madras High Court following the judgment of Hon'ble

Supreme Court in the case of *N.C. Budharaja (supra)*, by holding that construction of boiler could not be equated with ‘manufacture or production of an article or thing’. The facts of the case under consideration are also *mutatis mutandis* similar in as much as the assessee is also engaged in the business of erection of plants at site. The cement plants etc, manufactured by the assessee cannot be moved. Under these circumstances, we are of the considered opinion that the Id. CIT(A) was justified in repelling the assessee’s contention for the claim of additional depreciation u/s. 32(1)(iia) of the Act.

10. In the result, appeal of the assessee is dismissed.

**ITA No.11/PUN/2015 – A.Y.2011-12 :**

11. The first ground of the assessee’s appeal is against the denial of additional depreciation of Rs.1,68,21,515/- u/s.32(1)(iia) of the Act. Both the sides are in agreement that the facts and circumstances of this ground for this year are similar to those of the preceding year. Following the view taken hereinabove, we approve the view of the Id. CIT(A) in rejecting the assessee’s claim. This ground fails.

12. The only other ground about the confirmation of disallowance u/s. 14A of the Act was not pressed by the ld. AR. The same is, therefore, dismissed.

13. In the result, appeal of the assessee is dismissed.

**ITA No.1608/PUN/2015 – A.Y.2008-09 :**

14. Second ground of the assessee's appeal is against initiation of re-assessment proceedings.

15. Succinctly, the facts of the case are that the assessee filed its original return on 30-09-2008 declaring total income of Rs.4.56 crore, which was subsequently revised on 11-01-2009 to total income of Rs.3.30 crore. The assessment was completed u/s. 143(3) of the Act on 29-12-2010. On examination of the depreciation schedule, the AO noticed that additional depreciation of Rs.1,04,80,668/- was claimed u/s. 32(1)(ia). He opined that such a claim was not admissible. Invoking the provisions of section 147, the AO issued notice u/s. 148 of the Act on 26-03-2014. In the consequential assessment completed on 20-02-2015, the AO disallowed the claim of additional depreciation to the tune of

Rs.1.04 crore and odd. The assessee is aggrieved by the initiation of re-assessment proceedings.

16. We have heard both the sides and perused the relevant material on record. Admittedly, the assessment in this case was originally completed u/s. 143(3) of the Act, in which the claim of the assessee for additional depreciation was allowed. The AO initiated re-assessment proceedings only for the purpose of withdrawing such a claim of additional depreciation by means of notice u/s. 148 on 26-03-2014, which is after the period of four years from the end of the relevant assessment year.

17. First proviso to section 147, which is relevant for our purpose, reads as under :

“Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year.”

18. A careful circumspection of the above proviso deciphers that where an assessment has been completed u/s. 143(3) of the Act, then no re-assessment can be done after the expiry of four years from the end of the relevant assessment year unless any income chargeable to tax has escaped assessment by reason of failure on the part of the assessee, *inter alia*, to disclose fully and truly all material facts necessary for the assessment.

19. Adverting to the facts of the instant case, it is found that not only the original assessment in this case was completed u/s. 143(3) and a notice u/s.148 was issued beyond a period of four years from the end of the relevant assessment year, there was no failure on the part of the assessee to disclose fully and truly all material facts concerning the additional depreciation. Such a claim was allowed by the AO in the original assessment. In the notice for reassessment, the AO has not referred to any material which indicates that there was any failure on the part of the assessee to disclose fully and truly all material facts *qua* the claim of additional depreciation. As such, it is a clear case of invalid initiation of reassessment proceedings, which has no legal legs to stand on. Our view is

fortified by the judgment of Hon'ble Bombay High Court in the case of *ICICI Bank Ltd. Vs. K.J. Rao, DCIT (2004) 268 ITR 203 (Bom.)*. Similar view has been taken by the Hon'ble Delhi High Court in the case of *NTPC Ltd. Vs. DCIT (2014) 360 ITR 380 (Delhi)*. In view of the foregoing discussion, we hold that the initiation of reassessment is bad in law. *Ex consequenti*, all the proceedings flowing out of such an invalid initiation, including the passing of the assessment order, are hereby set aside. This ground is allowed.

20. In view of our decision in quashing the re-assessment, the claim of the assessee for additional depreciation, being the subject matter of ground no. 1, gets automatically allowed the same was so accepted in the original assessment completed u/s.143(3) of the Act.

21. In the result, appeal of assessee is allowed.

Order pronounced in the Open Court on 20<sup>th</sup> November, 2018.

Sd/-  
(VIKAS AWASTHY)  
JUDICIAL MEMBER

Sd/-  
(R.S.SYAL)  
VICE PRESIDENT

पुणे Pune; दिनांक Dated : 20<sup>th</sup> November, 2018

सतीश

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

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) /  
The CIT (Appeals)-1, Pune
4. आयकर आयुक्त / The CIT-1, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय  
अधिकरण, पुणे "बी" / DR 'B', ITAT, Pune;
6. गार्ड फाईल / Guard file.

**आदेशानुसार/ BY ORDER,**

**// True Copy //**

Senior Private Secretary  
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	19-11-18	Sr.PS
2.	Draft placed before author	20-11-18	
3.	Draft proposed & placed before the second member		
4.	Draft discussed/approved by Second Member.		
5.	Approved Draft comes to the Sr.PS/PS		
6.	Kept for pronouncement on		
7.	File sent to the Bench Clerk		
8.	Date on which file goes to the AR		
9.	Date on which file goes to the Head Clerk.		
10.	Date of dispatch of Order.		

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