

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "B", MUMBAI

BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER
AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

ITA No. 6363/Mum/2018
Assessment Year : 2013-14

The DCIT-4(1)(2), MUMBAI	Vs.	M/s.Batot Hydro Power Ltd., 26, Gobind Mahal, 86-B, Netaji Subhash Road, Marine Drive, MUMBAI [PAN : AACCB4560B]
(Appellant)		(Respondent)

Appellant by : Ms.Kavita P.Kaushik, DR
Respondent by : Shri Anuj Kisnadwala, AR

Date of Hearing : 16-09-2019	Date of Pronouncement : 15-10-2019
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ORDER

PER RAJESH KUMAR, A.M:

This appeal filed by the Revenue is directed against the order of the Commissioner of Income Tax(Appeals)-9, Mumbai, dated 20-08-2018.

2. In this appeal, the Revenue has raised the following Grounds:

"1. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in directing the AO to allow additional 50% depreciation on plant and machinery for second half of financial year, when assets were clearly damaged and as they were not put to use, they were unusable.

2. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in directing the AO to grant 100% depreciation on Plant & Machinery, which was commissioned on 16.06.2012 and became non-operational after 18.08.2012 due to natural calamity and hence the plant was not used for minimum 180 days in the said assessment year.

3. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in directing the AO to grant 100% depreciation, even though AO had considered and allowed depreciation @50% although plant and machinery were operational only for 2 months”.

3. The first ground by the revenue is against the order of CIT(A), directing the AO to allow additional depreciation @50% on Plant and Machinery, which was disallowed by the AO on the ground that the assets were completely damaged and could not be put to use for the purpose of business.

3.1. The facts in brief are that assessee is engaged in the business of generation of electric power through Renewable Energy Sources like Hydro Power. During the assessment year under consideration, assessee-company started operations/commissioned its hydroelectric power generation unit at Batot, Himachal Pradesh. The assessee-company started operations on 16-06-2012 and it could operate up to upto 18-08-2012 i.e., for about two months when the plant was closed due to heavy floods in the State of Himachal Pradesh and the plant was damaged badly. According to the AO, assessee claimed depreciation at normal rate, whereas the AO was of the opinion that since the asset was put to use only for two months and thereafter, the machinery was damaged and was not used at all in the business of assessee. Accordingly, the AO restricted the depreciation to 50% of normal depreciation thereby making an addition of Rs.1,37,40,083/- by rejecting the contentions of assessee that

the usage of machinery was not possible due to the reason beyond the control of the assessee as the same was damaged in the heavy floods in the State of Himachal Pradesh.

4. In the appellate proceedings, Ld.CIT(A) allowed the appeal of assessee by observing and holding as under:

“3.2 I have perused the facts of the case and appellant's submissions carefully. In this case, the assessee company commissioned its hydroelectric power generation unit at Batot, Himachal Pradesh, and started operations on 16.06.2012. It worked upto 18.08.2012 i.e. only for about 2 months, and then the plant was closed/ shutdown due to heavy floods in Himachal Pradesh. Since the plant was used for less than 180 days in the previous year, the AO requested the assessee to justify the claim of depreciation for full year. The assessee claimed that the word use of assets embraces both active and passive use, and that even if the assets are kept as ready to use and not actually used, the assessee is still eligible for depreciation. The assessee relied upon various case laws in its favour, On the other hand, the AO relied upon some other case laws, including the decision of Hon'ble Bombay HC in the case of Dineshkumar Gulabchand Agrawal [2004] 141 Taxman 62 (Bom.). Finally, the AO restricted the claim of depreciation to 50%, as actually used for less than 180 days.

3.2.1.....

3.2.2.....

3.2.3.....

3.2.4.....

*3.2.5 I note that the AO has principally relied upon the decision of Hon'ble Bombay High Court in the case of DineshkumarGulabchand Agarwal (supra). In the said case, the word "used" in the main provision of section 32(1) has been discussed, which according to jurisdictional High Court denotes actually and not merely ready for use. I note that in present case of appellant, the dispute is not with regard to allow-ability of depreciation per se covered under main provision of section 32(1), but it is under second proviso to section 32(1), i.e. whether the depreciation is allowable at full rate or at half rate. In the said Second Proviso to section 32(1), the word "put to use" might not necessarily have same meaning as the word "used" referred in main provision of section 32(1). I note that none of aforesaid case laws, except the judgment of **Hon'ble Madras High Court in the case of Siv Industries Ltd. (supra)** directly deal with the case covering Second Proviso to section 32(1) as in present case, hence the same are distinguishable on facts of each case. In the said case of Siv Industries Ltd. (supra), it was held that the expression 'put to use for 180 days' cannot be interpreted to mean as 'exploited for 180 days' **but** it would, comprehend those cases also where machinery has been kept ready by owner for its use in business and failure to use it actively in business has not been, on*

account of its incapacity for being used for that purpose or its non-availability. In present case, the appellant started operations on plant on 16.06.2012, but it had to be closed due to heavy flood which was beyond its control. Hence, from appellant's side, the plant was put to use for more than 180 days during the year, though could not be exploited as such due to natural calamity, and hence, the appellant could not be denied the benefit of full depreciation".

5. Ld.AR vehemently submitted before us that the assessee has put to use hydro plant with the commissioning of the power plant on 16-06-2012 and continued to use the same till 18-08-2012. The ld AR contended that due to heavy floods, the plant got damaged and could not used thereafter. Ld.AR submitted that assessee has put to use the asset during the year but only after 18-08-2012, the same was not used due to the reasons beyond the control of assessee. Ld.AR also submitted that once the plant is put to use by the assessee which became non-functional due to any defect, then, it cannot be said that the asset is not put to use for the purpose of business. In this connection, Ld.AR relied on the decision of the Hon'ble Karnataka High Court in the case of CIT Vs. Chamundeshwari Sugar Limited (2009) [309 ITR 326] (Karn). Ld.AR also relied on the decision of CIT Vs. Vindhyachal Distilleries Pvt. Ltd., October, 27, 2004. In this case, Ld.AR submitted that bio-gas plant was put to use in May, 1992 and due to leakage during the year in the trial run, regular production was started in the month of October, 1992. The Tribunal reversed the order of CIT(A) and allowed the depreciation for the full year, which was upheld by the Hon'ble High Court by holding that assessee is entitled for claiming depreciation in respect of the entire year as the asset was put to use in May, 1992. Ld.AR also relied upon the decision of Shiv Industries Ltd., Vs. DCIT (2008) [306 ITR

114] (Mad), which was relied upon by the Ld.CIT(A) in deciding the appeal in favour of assessee in which it has been held that the first machinery was put to use in 28th September, 1992 and the block was used for more than 18 days. Thereafter, assessee was entitled to full depreciation. Relying on the ratio laid in the above decisions, the Ld.AR argued that the assessee was put to use the hydro power plant in the month of June. Therefore, he argued that the word 'put to use' cannot be restricted to the actual use of the machinery, as has been held by the various Hon'ble High Courts hereinabove.

6. Ld.DR, on the other hand, relied heavily on the orders of authorities below, submitted that the same may be affirmed as the assessee only put to use them for 180 days and not for the entire period, falling after commissioning of the plant. Therefore, he prayed that the order of Ld.CIT(A) may kindly be affirmed.

7. After hearing both the parties and perusing the material on record, we observe that the un-disputed facts in this case are that the assessee has claimed depreciation for the full year in respect of the power plant, which was put to use on 16-06-2012 which became non-functional on 18-08-2012, when the natural flood occurred in the State of Himachal Pradesh damaging the power plant. Consequently the power plant could not be used thereafter. The plea of the assessee is that once the asset is put to use and kept for use, the word 'put to use' cannot be interpreted in a very restricted manner to deny depreciation to the assessee as the asset could not be

used due to the reasons beyond the control of assessee. We find merit in the contentions of the Ld.AR of the assessee that once the asset is put to use during the year and thereafter due to any problem beyond the control of the assessee could not be used, then the depreciation cannot be restricted to 50% of the normal depreciation as the asset was put to use for less than 180 days. In this regard, Ld.CIT(A) passed a well reasoned and speaking order and correctly interpreted the Section 32 of the Act and 2nd proviso thereto. In this case, the asset has been put to use with the commissioning of the power plant and therefore, in our considered view, the assessee has used the plant for the purpose of business though due to the reasons beyond the control of the assessee, it cannot be used after the flood occurred. In our considered view it can not be interpreted to mean that asset was not used for the purpose of business or used for less than 180 days. The decisions referred to above by the various Hon'ble High Courts make the legal position amply clear that once the asset is put to use and any temporarily out of use of the said asset due to the reasons beyond the control of assessee, depreciation cannot be denied to the assessee would not deprive the assessee from claiming the full deprecation on the said asset. Accordingly, we uphold the order of Ld.CIT(A) and dismiss the Ground raised by Revenue.

7. Since the Ground Nos.2 & 3 raised by Revenue is interconnected and are in support of the ground no. 1, need no separate adjudication.

8. In the result, the appeal of Revenue is dismissed.

Order pronounced in the open court on 15th October, 2019

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/Mumbai; दिनांक/Dated : 15-10-2019

TNMM

Sd/-

(RAJESH KUMAR)

लेखा सदस्य/ACCOUNTANT MEMBER

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A), Mumbai
4. आयकर आयुक्त / CIT, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक

पंजीकार (Dy./Asst. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai