

आयकर अपीलिय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES 'B' JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 783/JP/2019
निर्धारण वर्ष/Assessment Year :2012-13

M/s Maharaja Shree Umaid Mills Ltd. Khaitan Bhawan, M.I. Road, Jaipur	बनाम Vs.	DCIT, Circle-06, Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AABCM1849B		
अपीलार्थी/ Appellant		प्रत्यर्थी/ Respondent

निर्धारिती की ओर से/ Assessee by : Sh. P. C. Parwal (CA)
राजस्व की ओर से/ Revenue by : Sh. B. K. Gupta (CIT) &
Smt. Runi Pal (JCIT)

सुनवाई की तारीख/ Date of Hearing : 02/12/2019
उदघोषणा की तारीख/ Date of Pronouncement: 27/02/2020

आदेश / ORDER

PER: VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the assessee against the order of Id. CIT(A), Ajmer dated 01.04.2019 wherein the assessee has taken following grounds of appeal:-

- "1. The Id. CIT(A) has erred on facts and in law in upholding the validity of the order passed by AO u/s 147 of IT. Act, 1961.*
- 2. The Id. CIT(A) erred in law and facts by confirming re-assessment proceedings on basis of a mere change of opinion on the same sets of facts as existed and under the knowledge of the Id. AO during the original assessment proceedings.*
- 3. The Id. CIT(A) has erred on facts and in law in confirming the disallowance of additional depreciation of Rs. 5,25,57,261/- on new wind mills installed in wind power generation unit and Rs. 11,60,381/- on new plant & machinery installed in textile division."*

2. Briefly stated, the facts of the case are that the assessee is engaged in the business of manufacturing and sales of textiles (yarn & fabrics) and generation of power. It e-filed its return of income on 28.09.2012 declaring total income of Rs.4,94,32,33,840/-. The assessment was completed u/s 143(3) on 17.03.2015 at total income of Rs.4,95,59,27,360/-. Thereafter, the Assessing officer issued notice u/s 148 dt. 15.11.2016 by recording the following reasons:-

"The assessee e-filed its return of income for AY 2012-13 on 28.09.2012 declaring total income of Rs.494,32,33,840/-, which was assessed u/s 143(3) at the total income of Rs.495,59,27,360/- on 17.03.2015.

On going through the records, it was noticed that assessee had made additions amounting to Rs.52,55,72,612/- under the head wind mills at wind power generation unit in the depreciation chart and claimed additional depreciation of 20% (10% for less than 180 days) thereupon. Total depreciation claimed to the tune of Rs.26,27,86,306/- (i.e. $\frac{1}{2}$ of 80% + $\frac{1}{2}$ of 20%=50%). The assessee was allowed additional depreciation of Rs.5,37,14,642/- on new machinery.

On going through the provisions of clause (ia) of sub-section (1) of section 32, it is found that additional depreciation on new machinery and plant used in the business of generation or generation and distribution of power is allowable w.e.f. 01.04.2013.

However, in this case tax was paid u/s 115JB. Even after considering this disallowance, tax would be payable u/s 115JB. Hence, the income of Rs.5,37,17,642/- has escaped from assessment.

In view of the above facts, I have reasons to believe that income to the tune of Rs.5,37,17,642/- has escaped assessment within the meaning of

provisions of section 147 of the IT Act, 1961 for the Asstt. Year 2012-13. The escapement was on account of failure on the part of the assessee to disclose all material facts”.

3. Against the notice issued u/s 148, the assessee filed objection vide letter dt. 16.08.2017. The AO, however, rejected the same vide letter dated 17.08.2017 and completed the assessment u/s 147 by disallowing the claim of additional depreciation to the extent of Rs.5,37,17,642/-. Being aggrieved, the assessee carried the matter in appeal before the Id CIT(A) who has upheld the validity of reassessment and disallowance of additional depreciation. Against the said findings, the assessee is in appeal before us.

4. In Ground no. 1 & 2, the assessee has challenged the validity of reassessment u/s 147 of the Act. During the course of hearing, the Id. AR submitted that the issue regarding the claim of additional depreciation was examined in the course of assessment proceedings u/s 143(3) as evident from the following:-

(a) The claim of additional depreciation is duly reflected in the depreciation chart filed with tax audit report.

(b) In assessment proceedings, AO examined the assessee's claim of depreciation along with additional depreciation on windmills installed at wind power generation unit and after considering the same allowed the claim of additional depreciation and disallowed part of the claim of depreciation.

5. It was submitted by the Id AR that from the above, it can be noted that AO in the original assessment proceedings has examined the claim of additional depreciation. Reasons recorded by the AO refer to the depreciation chart which

was already filed with the tax audit report. All the material regarding claim of additional depreciation was on record of AO while completing the assessment u/s 143(3). No new or fresh material is brought on record by AO before initiating action u/s 148. Therefore, the observation of AO in the reasons recorded that there is a failure on the part of the assessee to disclose all material fact is incorrect. Thus, reopening the assessment u/s 148 on an issue which is already considered by AO in original assessment proceedings is only on account of change of opinion. On such change of opinion, reassessment proceedings initiated by him, even within a period of 4 years, is illegal and bad in law. For this purpose reliance is placed on following cases:-

- CIT Vs. Hindustan Zinc Ltd. (2016) 241 Taxman 392 (Raj.)
- ACIT Vs. Mangalam Cement Ltd. (2017) 148 DTR 329 (Jaipur)
- ITO Vs. Techspan India (P) Ltd. & Anr. 255 Taxman 152 (SC)
- PCIT Vs. Tupperware India Pvt. Ltd. (2015) 127 DTR 161 (Del.)

6. It was further submitted that the Ld. CIT(A) has confirmed the validity of reopening of reassessment by referring to clause (c) of Explanation 2 to section 147 according to which computation of excessive depreciation allowance is deemed to be a case where income chargeable to tax has escaped assessment. However, in the present case, the additional depreciation allowed by the AO on power generating unit though specifically included in section 32(1)(ia) w.e.f. 01.04.2013 but even before this insertion, it was held allowable in various judgment pronounced by the various High Courts. Therefore, it is not a case covered under clause (c) of Explanation 2 to section 147. In view of above, assessment framed by the AO u/s 147 is illegal and bad in law and the same be quashed.

7. On the contrary, the Id. DR supported the orders of the authorities below. It was submitted that the AO had specific information in his possession that additional depreciation of Rs.5,37,17,642/- not admissible to the assessee was claimed by the assessee as deduction and allowed by the AO. Therefore, the AO had sufficient material with him to form the belief that income pertaining to AY 2012-13 has escaped assessment. It is not a case of change of opinion. In view of clause c of Explanation 2 to section 147, the AO can open the assessment u/s 147 if excessive depreciation allowance under the Act has been claimed by the assessee. It was accordingly that there is no infirmity in the order of the Id CIT(A) where he upheld the validity of reopening the assessment u/s 147 of the Act.

8. We have heard the rival submissions and perused the material available on record. Firstly, it is noted that the notice u/s 148 has been issued on 15.11.2016, i.e, within a period of four years from the end of impugned assessment year 2012-13 and therefore, the additional conditions prescribed in proviso to section 147 to acquire jurisdiction u/s 147 is not relevant and hence, not considered in the present case. Now, coming to the contention advanced by the Id AR wherein he has assailed the action of the Assessing officer in initiating the reassessment proceedings for the reason that where in the original assessment proceedings, the matter relating to claim of additional depreciation on windmills was examined by the Assessing officer, in such circumstances, reassessment proceedings initiated by him on the very same issue amounts to change of opinion and on such change of opinion, reassessment proceedings cannot be sustained as held by catena of decisions of various Courts and Tribunals. We have gone these decisions rendered in the specific facts and circumstances of each case. There is no dispute on the legal proposition that where the matter has already been examined by the Assessing officer in the original proceedings and an opinion has been formed by the

Assessing officer and the claim of the assessee has been allowed, then on the same matter, the Assessing officer cannot initiate the reassessment proceedings disallowing such a claim made by the assessee.

9. For the purposes, it is relevant to examine whether in the instant case, the Assessing officer has examined the claim of additional depreciation in the original assessment proceedings and any findings recorded in the assessment order passed u/s 143(3) of the Act. In APB, Page 4, we find that in response to information sought by the Assessing officer u/s 142(1) dated 5.11.2014, the assessee has filed its submission dated 3.12.2014. At point no.5, the Assessing officer has sought information on "details of Fixed Assets on which additional depreciation of Rs 19,09,306 is claimed and calculation thereof". In response, the assessee company has submitted as under:

"The assessee has the honour to submit that the additional depreciation of Rs. 19,09,306/- is pertaining to the fixed assets in the nature of New Plant & Machinery acquired and installed in the previous year 2010-11 and used for less than 180 days in that year, and therefore, only 50% of the allowable additional depreciation (20%) under section 32(1)(ia) was claimed in that year equivalent to Rs. 19,09,306/-. Therefore, the balance 50% (i.e 10% of the cost of the Plant & Machinery acquired and installed and used for less than 180 days in the previous year 2010-11) of the allowable additional depreciation equal to Rs. 19,09,306/- is claimed in the previous year 2011-12 (Assessment Year 2012-13). Copy of relevant Annexure-C to Form 3CD of the Tax Audit Report for the assessment year 2012-13 and assessment year 2011-12 are enclosed herewith and collectively marked as Annexure-4. It is submitted that the total additions to the Plant & Machinery used for less than 180 days (15% Block) as per Annexure-C to Form 3CD of Tax Audit Report pertaining to the assessment year 2011-12 were Rs. 19,09,30,64/-, and therefore, on these additions the

humble assessee had claimed 10% additional depreciation which come to Rs. 19,09,306/- in the assessment year 2011-12 and balance 10% Rs. 19,09,306/- was thus claimed in the next assessment year 2012-13 (previous year 2011-12).

The above calculations are also verified and certified by the tax auditor as stated at Point No. 14 of the Form 3 CD annexed to the Tax Audit Report for the relevant assessment years."

10. We therefore find that the query raised and response submitted is limited to additional depreciation of Rs 19,09,306 on plant and machinery acquired in the earlier financial year 2010-11 relevant to assessment year 2011-12 and not plant and machinery which has been acquired and installed during the current financial year 2011-12 relevant to impugned assessment year 2012-13. Therefore, as far as additional depreciation on windmills capitalized under the head "wind mills at wind power generation unit" during the year under consideration is concerned and which is the subject matter of dispute, we find that there was no specific query raised by the Assessing officer during the course of original assessment proceedings as part of notice u/s 142(1) is concerned.

11. Now coming to the assessment order passed u/s 143(3) of the Act, which has been relied upon by the Id AR in support of his contention that assessee's claim of depreciation alongwith additional depreciation was examined by the Assessing officer.

12. On perusal of assessment order dated 17.03.2015, we find that the matter under examination by the Assessing officer was limited to claim of normal depreciation @ 80% as claimed by the assessee as compared to depreciation @ 10% on civil works (buildings) and @ 15% on electrical items

(plant and machinery). The matter relating to claim of additional depreciation was therefore not examined by the Assessing officer. Where the matter has not been examined by the Assessing officer, there is no question of change of opinion as there is no formation of opinion at first place. Therefore, the contentions so advanced by the Id AR that it is a case of change of opinion and reassessment proceedings cannot be sustained on such change of opinion is not accepted.

13. Further, we find that in the reasons so recorded by the Assessing officer, he has stated that by virtue of amendment brought-in by the Finance Act, 2012, the claim of additional depreciation u/s 32(1)(ia) is allowable w.e.f 1.04.2013 relevant to assessment year 2013-14 which ex-facie suggest that such claim has been wrongly claimed and allowed in the original assessment proceedings without examination is clearly a case of excess claim of depreciation and jurisdiction has been rightly invoked by the Assessing officer u/s 147 of the Act. In the result, ground no. 1 and 2 of the assessee's appeal is dismissed.

14. In Ground No. 3, the assessee has challenged the disallowance of additional depreciation on merits. In this regard, briefly stated, the facts of the case are that during the year under consideration, assessee made additions amounting to Rs.52,55,72,612/- under the head "wind mills" at wind power generation unit & Rs.1,16,03,810/- under the head "energy saving equipments" at textile unit and claimed additional depreciation of 10% (being less than 180 days), i.e. Rs.5,37,17,642/-. The AO observed that in view of the provision of sec. 32(1)(ia), the claim of additional depreciation on new plant & machinery is not allowable as the same is allowable w.e.f. 01.04.2013 as per the amendment made in Finance Act, 2012. Accordingly, he disallowed the claim of additional depreciation of Rs.5,37,17,642/-.

15. Being aggrieved, the assessee carried the matter in appeal before the Id CIT(A). The Id. CIT(A) held that the amendment in clause (iia) of sub-section 1 of section 32 was inserted w.e.f. 01.04.2013 to include "or in the business of generation or generation and distribution of power". Before the amendment inserted by the FA, 2012, additional depreciation was not admissible on any plant or machinery acquired or installed by an assessee engaged in the business of generation and distribution of power. Therefore, he confirmed the disallowance of additional depreciation of Rs.5,37,17,642/-.

16. During the course of hearing, the Id. AR submitted that for claim of additional depreciation u/s 32(1)(iia), what is required is that new P&M has been acquired and installed by an assessee engaged in the business of manufacture or production of any article or thing. There is no dispute as to the fact that assessee is engaged in the business of manufacturing and sale of textile yarn and fabrics. For uninterrupted supply of power to its yarn manufacturing unit, it installed new P&M for production of power. Therefore, the electricity produced by power plant are basically for manufacturing of article or thing. Hence, the subsequent amendment made in A.Y. 13-14 does not affect the claim of additional depreciation on the power plant. For this reliance is placed on the decision of ITAT Jaipur Bench in case of ACIT Vs. Mangalam Cement Ltd. (2017) 148 DTR 329 (Jaipur) (Trib.) wherein AO disallowed additional depreciation on power generating plant on the ground that generation and distribution of electricity was inserted in sec. 32(1)(iia) for the first time by the FA, 2012 which is prospective in operation. It was held that the 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 amendment by the FA, 2012 given an impetus to the view that generation of electricity is a manufacturing process. Further, once the AO has

accepted the assessee claim of depreciation u/s 32(1)(ii), there is no reason why the assessee should be denied the claim of additional depreciation on the same assets u/s 32(1)(iia). It was further submitted that the said decision of the Coordinate Bench has since been affirmed by the Hon'ble Rajasthan High Court in case of Pr. CIT, Kota vs M/s Mangalam Cement Ltd (*DB Appeal No. 211/2017 & 213/2017 dated 4.09.2017*) wherein the Hon'ble High Court has held that "we are in complete agreement with the view taken by the Tribunal. No substantial question of law arises." Further, reliance in this connection was placed on following cases:-

- PCIT Vs. NTPC Sail Power Co. (P) Ltd. (2019) 178 DTR 53 (Del.)
- Principal CIT Vs. Kanishk Steel Industries (2016) 96 CCH 0292 (Mad.)
- CIT Vs. Diamines & Chemicals Ltd. (2014) 109 DTR 62 (Guj.)
- JCIT Vs. Mineral Enterprises Ltd. (2013) 144 ITD 680 (Bang.)
- CIT Vs. VTM Ltd. (2009) 319 ITR 336 (Mad.)
- Giriraj Enterprises Vs. DCIT (2017) 149 DTR 95 (Pune)
- Sanwaria Agroils Ltd. Vs. ACIT (2017) 165 ITD 604 (Indore)

17. It was further submitted that the expression 'article or thing' used in section 32(1)(iia) is not defined in the IT Act, 1961. 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)(ia) on same.

18. In respect of disallowance of additional depreciation of Rs.11,60,381/-, it was submitted that the same is claimed in respect of energy saving devices of Rs. 1,16,03,810/- acquired and installed during the year in the textile manufacturing unit. Additional depreciation on these plant & machinery is directly allowable under section 32(i)(ia) of the Act.

19. In view of above, it was submitted that the disallowance of additional depreciation of Rs.5,37,17,642/- confirmed by Ld. CIT(A) is uncalled for and the same be directed to be deleted.

20. On the contrary, the Id. DR supported the orders of the authorities below. It was submitted that the amendment in clause (ia) of sub-section 1 of section 32 was inserted w.e.f. 01.04.2013 to include "or in the business of generation or generation and distribution of power". Before the amendment inserted by the Finance Act, 2012, additional depreciation was not admissible on any plant or machinery acquired or installed by an assessee engaged in the business of generation and distribution of power and our reference was drawn to the Memorandum explaining the Financial Bill, 2012. It was accordingly submitted that there is no infirmity in the action of the Id CIT(A) where he has confirmed the disallowance of additional depreciation of Rs.5,37,17,642/-.

21. We have heard the rival submissions and perused the material available on record. Firstly, we find that in respect of claim of additional depreciation of Rs.11,60,381/- on energy saving devices of Rs. 1,16,03,810/- which have been acquired and installed during the year, there cannot be any dispute as the

same is clearly allowable under section 32(i)(iia) of the Act and the amendment brought in by the Finance Act, 2012 doesn't in any manner impact such a claim of the assessee and thus, the disallowance so made of additional depreciation is hereby directed to be deleted.

22. In respect of additional depreciation of Rs 5,25,57,261/- on windmills in respect of which the assessee has made additions amounting to Rs 52,55,72,612/- under the head "wind mills at wind power generation unit", we find that the assessee is engaged in the business of manufacturing and sale of textiles (yarn & fabrics) and generation and supply of power and satisfies the necessary condition for claim of additional depreciation as prescribed under section 32(1)(iia) of the Act and such windmills have been acquired and installed in the financial year relevant to impugned assessment year 2012-13 much after 31.03.2005. Further, we find that the assessee's case is squarely covered by the decision of the Coordinate Bench in case of Mangalam Cements (supra) wherein the amendment brought in by the Finance Act 2012 have been duly considered and additional depreciation on windmills for AY. 2008-09 and AY 2009-10 was allowed. We refer to the relevant findings of the Coordinate Bench which reads as under:

"16.5 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 @ 80% on the assets pertaining to the power plant at Morak and windmill at Jaisalmer in the year under consideration.

16.6 We now refer to the provisions of section 32(1)(ii)(a) 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)."

16.7 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.

16.8 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. 2013-14 whereby 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), M. Satish Kumar (supra) and Damodar Valley Corpn. (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. As held by Coordinate Bench in M Satish Kumar (supra), 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 the power plant and the windmill installed during the year. Hence the ground of the department is dismissed."

23. The aforesaid decision of the Coordinate Bench has since been affirmed by the Hon'ble Rajasthan High Court holding that it is in complete agreement with the view taken by the Tribunal. Therefore, respectfully following the

decision of the Coordinate Bench and the Hon'ble Rajasthan Court in case of Mangalam Cements (supra), the claim of additional depreciation on windmills is allowed and the ground of appeal is thus allowed.

In the result, appeal of the assessee is allowed.

Order pronounced in the open Court on 27/02/2020.

Sd/-
(विजय पाल राव)
(Vijay Pal Rao)
न्यायिक सदस्य / Judicial Member

Sd/-
(विक्रम सिंह यादव)
(Vikram Singh Yadav)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 27/02/2020

*Ganesh Kr.

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

1. अपीलार्थी / The Appellant- M/s Maharaja Shree Umaid Mills Ltd., Jaipur
2. प्रत्यर्थी / The Respondent- DCIT, Circle-06, Jaipur
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. 783/JP/2019}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar

