



IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, MUMBAI

BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT AND
SHRI S. RIFAUH RAHMAN, ACCOUNTANT MEMBER

ITA no.2492/Mum./2019
(Assessment Year : 2012-13)

M/s. Ramniklal S. Gosalia & Co.
608, National House, B.J. Marg
Jacob Circle, Mumbai 400 011
PAN – AADFR2284G

..... Appellant

v/s

Asstt. Commissioner of Income Tax
Range-2(2), Mumbai

..... Respondent

Assessee by : Shri Mahazaver Patel
Revenue by : Shri Vidhyadhar V.

Date of Hearing – 17.03.2021

Date of Order – 31.05.2021

ORDER

PER S. RIFAUH RAHMAN, A.M.

The present appeal has been filed by the assessee challenging the impugned order dated 31st January 2019, passed by the learned Commissioner (Appeals)-48, Mumbai, pertaining to the assessment year 2012-13.

2. The only effective ground raised by the assessee is reproduced below:-

"1. The Id. A.O. erred in disallowing the depreciation of ₹

4,17,137, claimed by the appellant without considering the facts and circumstances including the detailed submission made by the assessee. The same be allowed."

2. Facts in brief are, the assessee is a partnership firm engaged in the business of selling chemicals as wholesaler, solvents and polymers. The assessee is also in the business of generating electricity through wind mills. For the assessment year under consideration, the assessee filed its return of income on 25th September 2012, declaring total income of ₹ 7,44,73,910. The Assessing Officer completed the assessment on 26th March 2015, determining the total income of the assessee at ₹ 7,48,91,0580, after making addition of ₹ 4,17,137, on account of disallowance of depreciation claimed by the assessee.

3. The learned Commissioner (Appeals)

"5. *APPELLATE DECISION:-*

I have perused the written submissions of the assessee and the facts contained in the assessment order. I have also gone through the CIT(A)'s order dated 03.09.2012 for AY 2007-08 in assessee's own case for the same issue and also Hon'ble ITAT, D bench, Mumbai's order dated 22.09.2016 for assessment year 2007-08, wherein the connected issue has been set aside to the assessing officer as per para-4 of Hon'ble ITAT's order. The two grounds of appeal are interconnected and relate to the same issue of grievance of assessee on account of disallowance of depreciation of RsA, 17, 137/- made by A.O. by refusing to accept the assessee's contribution to the Common Infrastructure Facility created by Suzlon Energy Ltd. as intangible asset. Both the grounds of appeal are therefore taken up together for disposal as below:-

5.1 *Following relevant facts emerge from the overall facts of the case:-*

1. Amount involved is sum of Rs. 37,50,000 towards proportionate cost as share of common infrastructure for the wind farm:- As mentioned in assessee's written submissions and also brought out by A.O. in para-5 and 5.1 of the assessment order, the amount on which the depreciation on intangible asset is being claimed by assessee is regarding contribution of some of Rs. 37,50,000/- towards the proportionate cost borne by assessee for the common infrastructure for entire wind farm. With this contribution, the assessee is entitled to use the same for the power generation evacuation and its ultimate transmission to MSEB power grid. It is the claim of assessee that with this contribution assessee has acquired the intangible asset in the form of commercial rights.

2. Facts of assessment year 2007-08: totally ambivalent and inconsistent stand of assessee:- A. Y. 2007- 08 was the first year when this issue regarding treatment of payment of Rs. 37,50,000, whether a revenue expenditure or a capital expenditure or whether the depreciable intangible capital asset first arose in assessee's case. In this regard I have perused the order of CIT A) dated 3 November 2012 and also order of Hon'ble ITAT dated 22nd September 2016, for AY. 2007-08.

Perusal of all these orders and the stand taken by assessee before CIT(A) and later on before the ITAT, clearly shows that assessee has a totally ambivalent and inconsistent stand before different forums and only consistency is regarding the attitude which shows that somehow. the deduction has to be claimed for this payment whether under capital head or under revenue head so that the tax liability is reduced. This inference is drawn by me on the basis of submissions made by assessee before CIT (A) and before the ITAT for A.y. 2007- 08 and the stand taken by assessee in this ground of appeal for A.Y. 2012-13. It would be relevant to quote the submissions and the prayer of assessee before CIT (A) and before hon'ble ITA T and the findings of hon'ble ITAT in this regard. The same are as below:-

5.2 Assessee's appeal for A.Y. 2007-08 before CIT(A):- As per the facts contained in the order of CIT(A) for A.Y. 2007-08 , following issues were raised by assessee:-

"1. The Ld A.O. erred in allowing expenditure incurred on common Power evacuation facility amounting of Rs.37,50,000/- without appreciating the facts and circumstances of the case. The Appellant, therefore prays that the expenditure of Rs.37,50,000/- may be allowed as revenue expenditure.

2. Without prejudice to the above, the Ld, A.O. erred in not treating the expenditure of Rs.37,50,000/- towards common power evacuation facility as part of the cost of the windmill and allowing depreciation of 80%. Hence disallowance of depreciation is not at all justified and the same may be deleted.

3. Without prejudice to the above the A.O. erred in not granting additional depreciation on the windmill as per the provisions of the section 32(1)(iia) of the Act as the Appellant satisfied the all the conditions to claim benefit of Sec. 32(1)(iia)."

5.3 As per para 2.3 of the CIT(A)'s order, Letter from Suzlon energy Ltd, Dated 31 March 2006, acknowledging receipt of Rs. 37,50,000/- towards common power evacuation infrastructure facility was filed. Contents of this letter were as below:-

"We do hereby confirm that we are developing a Common Power Evacuation Infrastructure Facility at Dhalgaon site on common sharing basis. Accordingly, we do hereby acknowledge tile Receipt of your total contribution of Rs.37,50,000/- (Rs. Thirty seven lacs fifty thousand only) towards this Common Power Evacuation Infrastructure Facility for your 1 No Windmills model S66 capacity 1250 KW at Dhalgaon site in the State of Maharashtra.

The relevant Common Power Evacuation Infrastructure Facility is being established by us on sharing basis as per the Policy Guidelines of GOM (G.R.No.Wind-2005/GO/22221Urja-7/dated 30.06.2005 read with GR No. Wind-2004/GO/1274/Urja-7 dated 26.02.2004) and as per the said policy."

The same letter was also filed during appeal proceedings before me.

5.4 CIT(A) after elaborate discussion of the overall facts of the case gave a finding that this is not an intangible asset as contemplated in the income tax act and therefore upheld the order of AO. disallowing the claim of depreciation.

5.5. Expenditure claimed as Revenue Expenditure: Additional Ground before CIT (A)s:- As it is seen from para-7 of CIT (A)'s order for assessment year 2007 08, assessee also filed 3 Additional Grounds during the appeal proceedings wherein the claim was made that this expenditure of Rs. 37,50,000/- may be allowed as revenue expenditure. (Reproduced above in Para 5.2). Without prejudice to this additional ground of treating the same expenditure as revenue and allowing as per section 37(1), assessee also raised without prejudice another ground that this expenditure of Rs.37,50,000/- should be held as part of windmill

and should be considered for allowing depreciation of 80%. CIT(A) had discussed the issue at length and thereafter rejected the assessee's request for admission of additional grounds.

5.6 ITAT set aside the issue to the file of AD after admitting additional grounds:- *It is seen that Hon'ble ITAT vide its order dated 22 September 2016 had reversed the order of CIT(A) and admitted the Additional Grounds raised by assessee. Hon'ble ITAT set aside the matter to the file of assessing officer for adjudicating the same.*

Therefore it is very clear from the conduct of assessee that there is total ambivalence and inconsistency in the stand of assessee. Clearly an expenditure can be either a revenue expenditure or a capital expenditure. It cannot be both. The facts of the case are fully known only to assessee and to his professional advisers. On the basis of these complete facts, an expenditure must be either a capital expenditure or a revenue expenditure as per the income tax law. Therefore the stand of assessee has to be clear and consistent since the facts have not changed. If the facts are consistent assessee must follow the rule of law and hold an expenditure either a capital or revenue expenditure. Such shifting of stand of assessee purely for the purpose of reducing the taxable income is totally undesirable. Also it is quite possible that an expenditure is capital expenditure however not all capital expenditures would result in the depreciable assets which is the scheme of income tax act and must be respected by one and all.

5.7. Claim of same expenditures in assessment year 12-13 as capital expenditure eligible for depreciation: *Continuing with the inconsistent and ambivalent stand on the issue, assessee has again taken a stand different from the additional grounds raised before the CIT (A) and Hon'ble ITAT for the same issue and has filed this Appeal. Considering the overall facts of the case as have been elaborately brought out by assessing officer in the order u/s.143(3) and the details brought out on the same issue by CIT(A) in the order for assessment year 2007-08, it is abundantly clear that this contribution of Rs.37,50,000/- towards the proportionate cost for common infrastructure is in the nature of capital expenditure however such capital expenditure does not result into any rights for assessee in the form of intangible assets in the nature of know-how patents, copy rights ,trademark, licenses, franchisee ,etc.*

5.8 Principle of Ejusdem Generis: *Principle of Ejusdem Generis is clearly applicable here and therefore the expression commercial rights of similar nature has to be constructed in the*

restricted sense in the light of know-how patents, copy rights, trademark. The common facility created with assessee's contribution of Rs.37,50,000/- cannot be by any stretch of imagination be held to be of the same genere as Copy right, Trademark, License, etc.

In the letter of Suzlon Energy Ltd dated 31 March 2006 which has already been referred above in para 5.3 clearly shows that it is only a creation of a facility for the windmill, which has been submitted by assessee in the appeal proceedings and was also reproduced in CIT(A) is order for assessment year 2007-08 in para-2.3. It is also mentioned in the same letter that this facility will be invoiced and. will be handed over to MSEB. Apart from this, even the cost has not been incurred fully by assessee in this regard and the cost for this common infrastructural facility is derived from the grant of money from the green electricity fund and partly from the loan. All these facts have been elaborately brought out by CIT(A) in his order for assessment year 2007-08 in para 2.5 & 2.6. All facts of the case brought out in this para's 2.5 & 2.6 of CIT(A)'s order for A.Y. 2007-08 are being scanned below for the ready reference.:-

MSEB means that the appellant does not have the right in ownership in the said facility. And in any case when this facility has been put to use has not been substantiated.

2.5 As per the policy of Maharashtra Governmental referred in the above letter of Suzlon, the clause 4 of the scheme reads as under:-

"MANAGEMENT OF EXIT

For the Plant to be applied Higher Pressure and most high pressure centre and the distribution line for the same, the inspection of the same shall be done by MSEB and MAHAURJA jointly. As per the survey, rising High and most Higher Pressure Centre and the wires to be used for the same and the work of distribution lines Great Power or Pvt. Air Electricity Promoter, recognized by MSEB and as per the Technical specifications of MSEB. This can be done under the guidance or care of the MSEB. In this Management, existing Sub-Station and wire and in distribution lines, whatever the changes or confirmation are to be done, that is it included. In this arrangement, at the place of Air Electricity Plant, 33 K.V. Pressure lines are included to the High pressure and High Pressure sub-stations. For all the above "Work, 50% amount is made available being the grant money from the Green Electricity fund and 50% amount shall be made being tile loan amount without interest, Pvt. promoters doing the Exit

Arrangement with own expenses and after getting the refund, being the Exit Arrangement activated has transferred to MSEB and this is also given to Put, Ltd. from the Great Power. To what extent the refund will be made to Pvt. promoters, this amount is estimated limit shall be with MSEB and this amount's refund shall be as per the availability of the Grew Electricity Fund on behalf of Great Power.

After the activation of the Exit arrangement that should be transferred to MSEB and the responsibility of the refund of the loan shall be with MSEB @ 50% without interest.

For the expenses of Exit Arrangement, 50% amount without interest loan amount refund shall be with MSEB and after the activation of Exit arrangement of one year shall be for the period of five years in 5 equal installments, the same will be the responsibility of the MSEB and the Owner of the said fund will be of MSED and taking care and repairing of the same shall be on behalf of the MSEB"

2.6 As per the above article 4 of the scheme, common infrastructure facility is to be developed and the cost of the same is to be met 50% by the grant money from Green Electricity fund and other 50% from loan without interest and 50% loan contribution is to be refunded and as per the scheme to private promoters are eligible for refund if the facility is developed with their own expenses. Responsibility for the refund of the loan lies with MSEB and the refund is to be given in 5 equal annual installments. Though the details of full arrangement between Suzlon and the appellant regarding the development and share of infrastructure facility has not been provided but the arrangement has to be within the framework of said policy of the Government, hence as per the said policy together with the letter of Suzlon it is evident that no cost for development of infrastructure facility is to be borne by any private party including the appellant. 50% of the cost is to be met by grant from Green Electricity fund and 50% from loan without. interest refundable in 5 equal installments. Hence' appellant has not incurred any cost for acquiring the right to use the common power evacuation facility.

Case Laws on Different facts and situation:- It would also be relevant to mentioned here that the various case laws relied upon by assessee do not come to the rescue of assessee as in all these cases the issues were different. In some cases it was the issue of National Highway authority of India and the license granted for period of 20 years and the upgradation operation and maintenance of the road project etc. The other case law of Sitalpur Sugar works Ltd. vs.CIT (1963)49 ITR 160(SC). is

regarding dismantling and refitting of the factory from one place to another and had treated the dismantling expenses as revenue. All these cases have very different facts and it is the facts of the each case which would be relevant to decide this issue.

As the specific facts of this case have already been discussed elaborately, it is clear that the nature of this expenditure and the overall terms and conditions of this facility being created, is very different from issues and facts of the Assets being discussed in all the case laws relied upon by assessee. Thus none of the case laws (Which have been decided in view of specific nature of Assets in those case) help the case of assessee.

In the light of these overall facts of the case, as discussed elaborately these two grounds of appeal taken by assessee are dismissed singly and collectively. The stand taken by assessing officer is upheld.”

4. Being aggrieved, the assessee is in further appeal before the Tribunal.
5. The learned Counsel for the assessee submitted before us that the issue of depreciation on intangibles has been decided by the Tribunal in assessee's own case for the assessment year 2007-08, 2008-09 and 2009-10, wherein the issue was restored to the file of the Assessing Officer for denovo adjudication.
6. The learned Departmental Authorities relied upon the order of the authorities below.
7. Considered rival submissions and perused the material on record. We find that the issue in the present appeal has been decided by the Tribunal in assessee's own case in ITA no.7347/Mum./2016, for the

A.Y. 2008-09, order dated 25th April 2018, ITA no.4142/Mum./2013, for the A.Y. 2009-10, order dated 20th December 2016 and ITA no.6463/Mum./2012, for the A.Y. 2007-08 order dated 22nd September 2016, wherein the Tribunal while deciding the issue relating to assessee's claim of depreciation relying upon the decision in assessee's own case rendered in preceding years, has restored the issue to the file of the Assessing Officer for denovo adjudication. Consequently, consistence with the view taken by the Tribunal in assessee's own case for the aforesaid assessment years, we set aside the impugned order passed by the learned Commissioner (Appeals) in the present years also and restore this issue to the file of the Assessing Officer for denovo adjudication and direct the Assessing Officer to decide the issue afresh in accordance with law and as per the decisions of the Tribunal in assessee's own case for the assessment years cited supra. Accordingly, the ground raised by the assessee is allowed for statistical purposes.

8. In the result, appeal is allowed for statistical purposes.

Order pronounced in the open court on 31.05.2021

Sd/-
MAHAVIR SINGH
VICE PRESIDENT

Sd/-
S. RIFAUH RAHMAN
ACCOUNTANT MEMBER

MUMBAI, DATED: 31.05.2021

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai