आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

'A' BENCH, CHENNAI

श्री वी दुर्गा राव,न्यायिक सदस्य एवं श्री जी. मंजुनाथ, लेखा सदस्य के समक्ष

BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER AND SHRI G. MANJUNATHA, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA No.:2972/CHNY/2017**

निर्धारण वर्ष / Assessment Year: 2008-09

The ACIT, Non-Corporate Circle 3, Chennai – 34.	v.	**M/s. Vishranthi Realty Services,** No.7 (Old No.4), 1st Cross Street, Seethammal Colony Extension, Teynampet, Chennai – 600 018. **PAN: AAFPV3879F**
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by : Shri D. Manoj Kumar, CIT

प्रत्यर्थी की ओर से/Respondent by : Shri S. Sridhar, Advocate

सुनवाई की तारीख/Date of Hearing : 30.08.2021

घोषणा की तारीख/Date of Pronouncement : 17.09.2021

आदेश /O R D E R

Per G. MANJUNATHA, AM:

This appeal filed by the Revenue is directed against order of learned Commissioner of Income Tax (Appeals)-4, Chennai, dated 31.08.2017 and pertains to assessment year 2008-09.

2. The Revenue has raised the following grounds of appeal:-

"1. The order of the ld CIT(A) is contrary to law and facts and circumstances of the case.

2.1 The ld CIT(A) erred in deleting the addition made by the AO towards receipt Assignment of Fee to the tune of Rs.14,74,78,764/-, as not assessable for the current assessment year.

2.2 The 1d CIT(A) ought to have noted that as per the terms of the Escrow Agreement, the main condition imposed is that the assessee has to give bank guarantee and as evident from the Addendum Agreement, bank guarantee was provided on 28-11.2007 itself, which pertains to FY 2007-08, relevant to Ay 2008-09,, i.e., the year under consideration and accordingly the impugned receipt has to be taxed in the current year in full.

2.3 The ld CIT(A) failed to note that it was the contention of the assessee that unless the conditions imposed in the Escrow Account are fulfilled, the assessee cannot use the money advanced / deposited into the Escrow Account. There are several withdrawals from the Escrow Account during the FY 2007-08, relevant to Ay 2008-09, which shows that the conditions of the Escrow Account have been fulfilled and accordingly money from this account has been allowed to be withdrawn by the assessee during the current year and accordingly the receipts from HTMT accrued to the assessee in AY 2oo8-09 itself and has to be taxed in the current year only and not in AY 2Oo9- 10, since the assessee is following mercantile system of accounting.

3.1 The ld CIT(A) erred in deleting the disallowance of deprecation on Wind Turbine Generators to the tune of Rs.2,29,54,319 /-.

3.2 The ld CIT(A) ought to have noted that the invoices were dated 30-09-2007 and as evident from the certificate issued by supplier viz., M/s Poineer Wincon Private Limited, after commissioning it takes atleast 2-3 days for the windmill to start generation and accordingly they could not have been put to use the same day, i.e., 30-09-2007.

3.3 The ld CIT(A) failed to note that given the facts that the invoices are dated 30-09-2007, the WTGs had to be transported from Pondicherry to Tirunelveli and it will take a minimum of 2-3 days for the windmill to start generation after commissioning, there is no possibility that the WTGs would have begun operation on the same

day, i.e., 30-09-2007 so as to become eligible for full depreciation for having been used for 180 days or more.
3.4 The ld CIT(A) failed to appreciate that commissioning itself does not mean that the windmill has stated generation, which only means that it has been connected to the transmission lines of TNEB and the actual generation starts only after a few days when the trial runs are over and accordingly there is no possibility" of the impugned assets having been put to use and generated power as on 30.09.2007 itself.
4. For these and other grounds that may be adduced at the time of hearing, it is prayed that the order of the learned CIT(A) may be set aside and that of the Assessing Officer restored."

3. The brief facts of the case are that the assessee is a partnership firm engaged in the business of real estate consultancy services, filed its return of income for the assessment year 2008-09 on 31.12.2018 declaring total income of Rs.4,97,51,952/-.The assessment was completed u/s.143(3) of the Income Tax Act, 1961 (hereinafter the 'Act') on 29.12.2010 and determined total income of Rs.22,06,85,035/-, after making additions towards disallowance of donation and charity amounting to Rs.5 lakhs and further disallowance of claim of depreciation on Wind Turbine Generators (WTGs) for Rs.2,29,54,319/- as against the claim of full depreciation at Rs.4,59,08,637/-. The AO had also made additions towards assignment fee received from M/s. HTMT Global Solutions Ltd., for Rs.14,74,78,764/- on the ground that income from

assignment is accrued for the assessment year. The assessee challenged additions made by the AO before the CIT(A). The ld.CIT(A) in his appellate order dated 30.03.2012, confirmed addition made towards disallowance of donation and charity, however deleted addition made towards depreciation after analyzing the facts and materials available on record. The ld.CIT(A) had also deleted addition made by the AO towards assignment fee received from M/s. HTMT Global Solutions Ltd., by considering the distinctive features in the assignment agreement entered into between said company and other agreements entered into by the assessee with third parties by holding that assignment with M/s. HTMT Global Solutions Ltd., is conditional and conditions of assignment agreement are satisfied during assessment year 2009-10 and thus, income from assignment is taxable for assessment year 2009-10. The Revenue has challenged the order of ld.CIT(A) before the ITAT. The ITAT vide its order dated 04.03.2016 has set aside the appeal to the file of the AO after considering relevant material placed by the Revenue on the violation of Rule 46A of Income Tax Rules, 1962 and directed the AO to examine the facts and decide the issue in accordance with law. In the effect giving

order dated 22.02.2017 passed u/s.143(3) r.w.s. 254 of the Act, the AO has assessed assignment fee received from M/s. HTMT Global Solutions Ltd., for the assessment year on two counts, one as much as the bank guarantee, as per agreement entered into was provided in the previous year relating to the assessment year under consideration and further the fact of several withdrawals from Escrow account would establish the correctness in reckoning the revenue for the purpose of taxation. Insofar as claim of full depreciation on wind turbine generators, the AO had reiterated his finding to allow 50% of depreciation on the ground that wind turbine generators were commenced towards the fag end of September and further, the assessee would not have put to use those generators in the business of the assessee for more than 180 days to allow full depreciation.

4. Aggrieved by the assessment order, the assessee preferred an appeal before the CIT(A). Before the CIT(A), the assessee has challenged additions made by the AO towards recognition of revenue from assignment agreement with M/s. HTMT Global Solutions Ltd., and further agitated partial disallowance of

depreciation. The ld.CIT(A) for the reasons stated in his appellate order dated 31.08.2017 allowed appeal filed by the assessee, where he has deleted additions made towards assignment fee by holding that assignment agreement with M/s. HTMT Global Solutions Ltd., was completed only when the builder had obtained necessary planning approvals from the concerned authority. Since, the approval from concerned authority has been obtained in the financial year relevant to assessment year 2009-10, assignment fee received from M/s. HTMT Global Solutions Ltd., is taxable for assessment year 2009-10, as claimed by the assessee but not for assessment year 2008-09 as considered by the AO. The ld.CIT(A) had also taken note of the fact that the assessee itself had admitted fee received from assignment agreement in the return of income for the assessment year 2009-10 and further, tax rates for assessment year 2008-09 and 2009-10 is same and also there was no accumulated and current year business loss with the assessee to set-off the income in the subsequent assessment year. Thus, there was no ultimate loss of revenue to the Department.

4.1 The ld.CIT(A) had also deleted additions made towards partial disallowance of depreciation by holding that evidences brought on record clearly indicate that out of 5 wind turbine generators, 3 wind turbine generators were commissioned on 28.09.2007 and the remaining 2 were commissioned on 30.09.2007 and had started generating electricity. The electricity readings provided for the month of October 2007 issued by the office of the Superintending Engineer also reveal that the initial meter reading was taken on 28.09.2007 and up to the date of 13.10.2007 in the case of 2 WTGs and with regard to the remaining 3 WTGs, the initial meter reading was taken on 30.09.2007 and up to the period of 13.10.2007. The above facts clearly support the case of the assessee that said WTGs were commissioned and started generating power in the month of September itself. Therefore, it is amply clear that WTGs were put to use in the business for more than 182 days and thus, entitled for full depreciation as claimed by the assessee. Aggrieved by the CIT(A) order, the Revenue is in appeal before us.

5. The first issue that came up for our consideration from Ground Nos.2.1 to 2.3 of Revenue appeal is deletion of additions made towards receipt of assignment fee to the tune of Rs.14,74,78,764/- as not assessable for the impugned assessment year.

6. The facts with regard to impugned dispute are that the assessee had entered into an assignment / nomination agreement with M/s. HTMT Global Solutions Ltd., and M/s. Vishranthi Homes Pvt. Ltd., for assignment of certain properties in favour of assignee vide agreement dated 29.10.2007. As per the said agreement, the assessee's sister concern M/s. Vishranthi Homes Pvt. Ltd., (VHPL) entered into a Joint Venture Agreement on 29.07.2004 with M/s. Jayanth Packaging Pvt. Ltd., to construct a commercial building. As per the Joint Development Agreement, VHPL will get a share of the built-up area. Out of this share, VHPL entered into a Builders Agreement with the assessee to sell certain portion of the built-up area for a sum of Rs.19.36 crores. The assessee then entered into nomination / assignment agreement with four parties and out of which, one agreement was entered into with

M/s. HTMT Global Solutions Ltd. The assessee has recognized assignment fee received from 3 agreements with other parties as income for the assessment year 2008-09 however, in respect of assignment agreement with M/s. HTMT Global Solutions Ltd., revenue recognition was deferred to assessment year 2009-10. The assessee had explained the reasons for deferring recognition of revenue to assessment year 2009-10 and according to the assessee, nomination agreement with M/s. HTMT Global Solutions Ltd., was conditional with reference to obtaining planning permit for the project under construction. The assessee further submitted that although assignment agreement was entered in the financial year relevant to assessment year 2008-09, but consideration received for assignment was kept in Escrow account, as per agreement between the parties with Indian Overseas Bank. The assessee can avail the amount kept in Escrow Account either by fulfilling the conditions of nomination agreement or furnishing a Bank Guarantee equivalent to amount of assignment fee. The assessee has utilized part of assignment fee by furnishing a bank guarantee in favour of the assignee i.e., M/s. HTMT Global Solutions Ltd., in the financial year 2007-08 relevant to

assessment year 2008-09. But, since the builder has obtained planning permission from concerned authorities in the financial year relevant to assessment year 2009-10, the assignee has agreed for utilization of consideration and thus, income from assignment was recognized in the return of income filed for the assessment year 2009-10.

7. The AO however, was not convinced with the explanation furnished by the assessee and according to him, even if you go by the arguments of the assessee that revenue would be recognized only when the conditions of the Escrow agreement are fulfilled, a reading of the Escrow agreement shows that the basic requirement to be fulfilled was to give a bank guarantee and the assessee has given bank guarantee on 28.11.2007 itself and hence, the conditions for Escrow agreement was fulfilled during the financial year 2007-08 relevant to assessment year 2008-09. Secondly, the Escrow account shows several withdrawals. The assessee on the one hand has contended that it would not be able to use the money till the conditions of Escrow agreement are fulfilled but, on the other hand Escrow account shows numerous withdrawals in the

financial year relevant to assessment year 2008-09. Therefore, he opined that assignment fee received from M/s. HTMT Global Solutions Ltd., is taxable for assessment year 2008-09 and thus, made addition of Rs.14,74,78,764/-.

8. The ld.DR submitted that the ld.CIT(A) has erred in deleting addition made by the AO towards receipt of assignment fee without appreciating the terms of Escrow agreement as per which, the only condition for utilization of Escrow account is to furnish a bank guarantee and further as per agreement, the assessee has given bank guarantee on 28.11.2007 itself which pertains to assessment year 2008-09 i.e., the year under consideration and accordingly, the AO was right in taxing assignment fee for the assessment year 2008-09. The ld.DR further submitted that the ld.CIT(A) failed to note that although, the assessee contended that unless conditions imposed on the Escrow account was fulfilled, the assessee cannot use the money but, the AO has brought out clear facts to the effect that there are several withdrawals from the Escrow account during the financial year 2007-08 relevant to assessment year 2008-09, which shows that conditions of

Escrow account have been fulfilled and thus, there is no merit in arguments of the assessee that assignment fee is taxable in the assessment year 2009-10.

9. The ld.AR for the assessee on the other hand strongly supporting order of the ld.CIT(A) submitted that the CIT(A) has brought out clear facts to the effect that nomination agreement with M/s. HTMT Global Solutions Ltd., is conditional which was subjected to fulfillment of certain conditions as per which the builder has obtained approval from concerned authorities in the financial year relevant to assessment year 2009-10 and further, the assessee has furnished bank guarantee equivalent to the value of amount received from assignee before withdrawal of money from Escrow account. The ld.AR further referring to Assignment agreement, Escrow agreement and Addendum to Escrow agreement dated 03.12.2007, submitted that if you go through the conditions between the assessee and the assignee, consideration paid for assignment was parked in Escrow account as per the Escrow agreement with Indian Overseas Bank and further the assessee has furnished bank guarantee on 28.11.2007 and the same has been extended from time to time

upto 28.07.2008 till such time the builder obtained planning permission from concerned authorities. Therefore, from the above it is very clear that income from assignment / nomination agreement was accrued in the financial year 2008-09 relevant to assessment year 2009-10 and thus, the assessee has rightly recognized revenue from assignment agreement in the assessment year 2009-10. The CIT(A) after considering relevant facts has rightly deleted addition made by the AO and his order should be upheld.

10. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. The facts borne out from record indicate that assignment agreement with M/s. HTMT Global Solutions Ltd., dated 29.10.2007 was conditional, as per said agreement, assignor and assignee have agreed to park the consideration in Escrow account till such time, the builder has obtained planning permission from concerned authorities. We further noted that as per said agreement, the assessee has received partial agreed consideration of Rs.8,84,87,260/- on the date of signing agreement subject to a condition that the assessee shall furnish

bank guarantee equivalent to the amount given by the assignee having a validity period up to the date on which developer obtains necessary planning permit for the proposed building from the competent authority. The agreement further states that remaining amount shall be paid after the developer obtaining the planning permit, from the competent authorities for their proposed building. According to the assessee, the builder has obtained planning permit from Chennai Metropolitan Development Authority on 01.08.2008 and thus, as per the agreement between the parties, the assignment agreement is completed only when the builder has obtained the planning permit from the concerned authority i.e., 01.08.2008. Since, the date of obtaining planning permission pertains to financial year relevant to assessment year 2009-10, assignment fee received from M/s. HTMT Global Solutions Ltd., is assessable for the assessment year 2009-10 but not for assessment year 2008-09 as claimed by the AO. The AO has not disputed these facts. In fact, the AO has admitted that the assessee had entered into a conditional assignment agreement with M/s. HTMT Global Solutions Ltd., but disputed the claim of the assessee only for the reason that the assessee has satisfied

conditions of assignment agreement by furnishing bank guarantee to the assignee. Therefore, he opined that the assignment agreement is complete when the assessee has furnished bank guarantee on 28.11.2007 itself.

10.1 We have given our thoughtful consideration to the reasons given by the AO in light of various evidences filed by the assessee including assignment agreement, Escrow agreement and Addendum agreement and we ourselves do not in agreement with the AO for the simple reason that on perusal of assignment agreement, we find that it was conditional one and subjected to fulfillment of certain conditions. We further noted that as per assignment agreement, the assignee shall pay part of agreed consideration on the date of signing the agreement, but subject to furnishing bank guarantee equivalent to the amount given by the assignee till date the builder obtains planning permission from concerned authorities. We further noted that as per the Escrow agreement, the bank guarantee given by the assignee is irrevocable and unconditional and shall have a validity period of 180 days or till such time, the builder obtains planning permission from CMDA.

The said bank guarantee has been extended from time to time and upto 28.07.2008. We further noted that the builder has obtained planning permission from CMDA on 12.08.2008. From the above, it is very clear that the assignment agreement with M/s. HTMT Global Solutions Ltd., is complete in all aspects in the financial year relevant to assessment year 2009-10 after fulfilling the conditions imposed upon the assessee and hence, we are of the opinion that the AO was incorrect in coming to the conclusion that the assignment agreement would be complete when the assessee has given bank guarantee on 28.11.2007.

10.2 Another reason, the AO has assessed assignment fee for the impugned assessment year is withdrawal from Escrow account. According to the AO, the assessee has withdrawn amount from Escrow account and utilized for its business purpose and therefore, he opined that assignment is complete and fees received is taxable for the assessment year 2008-09. We do not agree with the AO for the simple reason that once assessee has furnished bank guarantee equivalent to the value

of amount paid by the assignee in pursuant to assignment agreement, then the rights of assignee is protected and the money received from assignee can be utilized as wished by the assessee. In this case, the assessee has furnished bank guarantee to the assignee and such bank guarantee is irrevocable and unconditional. Therefore, merely for the reason that money has been withdrawn from Escrow account, it does not mean that assignment is complete in all aspects and fees received from assignment agreement is accrued for the assessee in assessment year 2008-09. Moreover, it is not a case of the AO that amount received under assignment agreement is not offered to tax at all. In fact, the assessee itself had admitted assignment fee in the assessment year 2009-10 and paid relevant taxes. Although, there is a timing difference between assessment year 2008-09 and 2009-10, but because there is no change in rate of tax, there is no loss to the Revenue by deferring recognition of income to assessment year 2009-10. It is also a matter of fact that the assessee has not claimed any set-off of loss against said income in the subsequent years.

10.3 In this view of matter and considering facts and circumstances of the case, we are of the considered view that the AO was completely erred in taxing assignment fee for the assessment year 2008-09. The ld.CIT(A) after considering relevant facts, as rightly deleted addition made by the AO. Hence, we are inclined to uphold the findings of the ld.CIT(A) and reject ground taken by the Revenue.

11. The next issue that came up for our consideration from Ground No.3 of Revenue appeal is 50% disallowance of depreciation on Wind Turbine Generators (WTGs) to the tune of Rs.2,29,54,319/-.

12. The facts with regard to impugned dispute are that the assessee has purchased and installed 5 WTGs of 250kW each from M/s. Pioneer Wincon P. Ltd. The assessee claimed that all 5 WTGs were installed and commissioned before 30th September, 2007 and hence, claimed 100% depreciation as applicable to the asset. It was the findings of the AO that although invoices were raised before 30.09.2007, but the

actual delivery of WTGs were made subsequent to 30.09.2007 and thus, the assessee is entitled 50% depreciation as per law. On appeal, the ld.CIT(A) has deleted addition made by the AO by holding that the assessee has furnished relevant evidences to prove that all 5 WTGs were commissioned before 30.09.2007 and thus, entitled for 100% depreciation as per law.

13. The ld.DR submitted that the ld.CIT(A) has erred in deleting disallowance of depreciation on WTGs without considering the fact that invoices for supply of WTGs was dated 30.09.2007 and as per the certificate issued by the supplier, after commissioning it takes atleast 2 to 3 days for the windmill to start generation and accordingly, the WTGs could not have been put to use for production before 30.09.2007. The ld.DR further submitted that if you go by the invoice date, the WTGs had to be transported from Pondicherry to Tirunelveli and it will take a minimum of 2 to 3 days for the windmill to start generation after commissioning and thus, it is impossible to say that windmills were put to use in the business for more than 182 days.

14. The ld.AR for the assessee on the other hand strongly supporting order of the CIT(A) submitted that the WTGs were put to use for more than 182 days, which is evidenced from the fact that supplier has delivered and installed windmills on 18.09.2007, 20.09.2007 and 22.09.2007 respectively. The invoices were raised by the supplier after installation and commissioning as per agreed terms. Further, the TamilNadu Electricity Board had confirmed issuing commissioning certificate for the relevant WTGs on 28.09.2007 & 30.09.2007. The CIT(A) after considering these facts, has rightly held that the assessee is entitled for full depreciation and thus, there is no error in the order of the CIT(A) to delete addition made by the AO and his order should be upheld.

15. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. We find that the ld.CIT(A) had recorded categorical finding in light of various evidences filed by the assessee including delivery note for transportation of WTGs, invoices issued by the supplier, installation and commissioning certificate issued by the supplier and commissioning certificate

issued by the Superintending Engineer, Tirunelveli Electricity Distribution Circle of TNEB, as per which all 5 windmills were installed and commissioned before 30.09.2007 and thus, the assessee is eligible for 100% depreciation as per law. We further noted that although the supplier invoice dated 30.09.2007, but the delivery note issued by the supplier clearly establish the fact that WTGs were transported and installed on 18.09.2007, 20.09.2007 & 22.09.2007. The supplier had also certified installation and commissioning of WTGs. We further noted that TNEB had certified commissioning of WTGs, as per which the Superintending Engineer had issued commissioning certificate for 3 WTGs on 28.09.2007 and for remaining 2 WTGs on 30.09.2007. The assessee had also furnished electricity readings provided for the month of October, 2007 issued by TNEB, which reveals that initial meter reading was taken on 28.09.2007 and upto 13.10.2007. From the above, it is very clear that all 5 WTGs were installed and put to use for more than 182 days and hence, we are of the considered view that the assessee is entitled for 100% depreciation as claimed. The ld.CIT(A) after considering relevant facts has rightly deleted addition made by the AO and hence, we are inclined to uphold

the findings of the ld.CIT(A) and reject ground taken by the Revenue.

16. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the court on 17th September, 2021 at Chennai.

Sd/-	Sd/-
(वी दुर्गा राव)	(जी. मंजुनाथ)
(V. Durga Rao)	**(G. Manjunatha)**
न्यायिक सदस्य/Judicial Member	लेखा सदस्य /Accountant Member

चेन्नई/Chennai,
दिनांक/Dated, the 17th September, 2021

RSR
आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant	2. प्रत्यर्थी/Respondent	3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त /CIT	5. विभागीय प्रतिनिधि/DR	6. गार्ड फाईल/GF.