

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES, "B" BENCH : BANGALORE**

Before Shri Chandra Poojari, AM & Smt. Beena Pillai, JM

ITA No. 705/Bang/2020
(Assessment Year: 2012-13)

Mr.Syed Mustafa Kamal Pasha, No.3, 4 th Main Road, Jayamahal Extension, Bangalore	Vs.	Deputy Commissioner of Income Tax, Circle - 6(2)(1) Bangalore
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PAN – ADCPK8497N

Appellant

Respondent

Assessee by	:	Sri Sanketh Nayak, CA
Revenue by	:	Sri Manjunath Karkihalli, CIT-DR

Date of Hearing	:	29-03-2022
Date of Pronouncement	:	11-04-2022

ORDER

PER CHANDRA POOJARI, A.M. :

This appeal by the assessee is directed against the order of the CIT(A)-11, Bengaluru, dated 22-09-2020 for the AY.2012-13.

2. The assessee raised the following grounds of appeal:

"1. The Commissioner of Income tax (Appeals)-11, Bengaluru ("Learned CIT(A)"/the Deputy Commissioner of Income Tax, Circle-6(2)(1)("Learned AO) has erred in facts and in law by passing an order which is opposed to the facts of the case.

2. The learned CIT(A)/Learned AO has erred in facts and in law by adding Rs.2,82,68,352 to Total Income by disallowing depreciation on wind mills amounting to Rs.20,40,00,000.

3. The learned CIT(A)/Learned AO has ignored the documents provided by the appellant and rejected the appeal by relying on the report of a letter from KPTCL (Karnataka Power Transmission Corporation Limited) TL&SS Subdivision.

4. The learned CIT(A)/Learned AO has erred in law and in facts, by disregarding the report received from KPTCL, wherein it has been disclosed that the Appellant has generated 540 units of power within the AY.2013-14.

5. The learned CIT(A)/Learned AO has erred in facts and in law, by upholding one letter received from KPTCL and disregarding another report received from KPTCL,

wherein both such communications were signed by the same authority, thereby causing undue harassment to the Appellant.

6. The learned CIT(A) has erred in facts and in law by upholding the erroneous fact relied upon by the learned AO, of treating the letter received from KPTCL on April 1, 2015, as being received March 31, 2015, whereas the order is passed on March 31, 2015 i.e before the receipt of the said letter.

7. Notwithstanding the above grounds, the Learned CIT(A) has erred in facts and in law, while upholding the claim of the learned AO of disallowing the depreciation claimed by the Appellant, of not directing the Learned AO to provide relief to the Appellant in the subsequent years of depreciation on higher written down value.

8. Such other grounds as may be urged at the time of hearing”.

3. The crux of the above grounds is with regard to non-granting of depreciation on wind mill though said to be installed and commissioned within 31-03-2012 (relevant AY.2012-13). The facts of the case are that, the assessee has purchased windmills worth Rs.51 crores during the year and claimed depreciation on the same. The bills produced were examined and found that the windmills were billed only on 29-03-2012 and 30-03-2012. The AR was asked to furnish material to support that the windmills were put to use during the year. The AR submitted copies of certificates confirming the commissioning of the windmills. However, by commissioning, it is implied that connection or wiring is done, meter is fixed but it does not prove that the windmills were put to use. Hence, a letter dated 27-03-2015 was faxed addressed to the officer in KPTCL u/s.133(6) of the Act, for confirming the production of electricity and bills if any to support the same. The Executive Engineer, TL & SS division, KPTCL, Chikkodi vide return fax in his letter dated 31-03-2015 has confirmed categorically that no production of electricity was started during the year. His reply to query No.2 is reproduced below:

No, M/s.Golden Hatcheris has not started production of electricity and not supplied to KPTCL during the month of March 2012 after commissioning. The firm started production of electricity and started e4xport of electricity to KPTCL in the month of April 2012.

A copy of the reply of the EE is made part of this order as Annexure. In view of the foregoing, the depreciation claimed by the assessee in respect of the windmills purchased during the year is not allowed and accordingly, the sum of Rs.20,40,00,000/- is brought to tax and computation sheet is enclosed.

3.1. Accordingly, the AO denied depreciation on the windmill.

4. On appeal, the CIT(A) observed that there was no documentary evidence to show the alleged wind mill has been installed and commissioned in the assessment year under consideration. Against this, the assessee is in appeal before us.

5. The Ld.AR stated that the CIT(A) ignored the documents in relation to commissioning, testing and B-Form issued by the Executive Engineer TL & Division KPTCL, Chikkodi, which indicates 540 units have been generated. The CIT(A) has only relied on the order of the AO, which has been made on the basis of the letter received on 01-04-2015 while passing an order dt.31-03-2015 by the same Executive Engineer. Accordingly, the Ld.AR stated that the CITA(A) committed an error by upholding one letter received from KPTCL and this is regarding another report received from KPTCL, wherein both such communications were sent by the same authority, thereby causing undue harassment and upholding of the facts relied upon by the Ld.AO of treating the letter received from KPTCL on 01-04-2015 while passing an order dt.31-03-2015 i.e., before receipt of the said letter. In this regard, he relied on the following judgments:

- i. Union Carbide (I) Ltd Vs. Commissioner of Income Tax [254 ITR 488] (Calcutta) wherein the Hon'ble High Court of Calcutta has held that *trial production is quite sufficient for the assessee to claim justly and properly depreciation allowance.*
- ii. The Hon'ble Chennai Tribunal in the case of Mr.V.K.Rajendran Vs. Deputy Commissioner of Income Tax, Circle-II, Trichy, in ITA No.823/Mds/2011, dt.25-07-2012 held that *Except for the statement of Executive Engineer, the Department has no other conclusive evidence to show that windmill was not commissioned or no unit of electricity was generated on 31-03-2015.* We set aside the order of the CIT(A) and allow the appeal of the assessee.

- iii. The Hon'ble High Court of Gujarat in the case of Ashima Syntex Ltd. Vs. Assistant Commissioner of Income Tax [251 ITR 133] is on the view that *Even trial production of a machinery would fall within the ambit of 'used for the purpose of business'. Further, as the statute does not prescribe a minimum time-limit for 'use' of the machinery, the assessee cannot be denied the benefit of depreciation on the ground that the machinery was used for a very short duration for trial run.*"
- iv. The Hon'ble Ahmedabad Tribunal in the case of Omkar Textile Mills (P) Ltd Vs. Income Tax Officer [115 TTJ 716] has held that *We find that the Wind Turbine Generating Sets was commissioned and Trial run was also undertaken which is evident from the certificate of Gujarat Energy Development Agency for the share of power certifying that 11.9 KW were supplied to the Gujarat Electricity Board therefore, the assessee is entitled to depreciation in respect thereof in accordance with law. The Assessing Officer is directed to allow the claim of the assessee*".
- v. The Hon'ble High Court of Bombay in the case of Principal Commissioner of Income Tax-4, Vs. Larsen & Toubro Ltd., [89 Taxman.com 186] held that *There is no merit in the denial of depreciation in respect of plant and machinery and that even if the same was to be used for trial production business of manufacture of 'Clinker', the assessee would be entitled to claim depreciation*".
- vi. The Hon'ble Mumbai Tribunal in the case of Hindustan Platinum Pvt. Ltd. Vs. ACIT-2(1), in ITA No.3352/Mum/2010, dt.15-06-2011 held that *it is clear from the documents filed by the assessee that the Wind Mills were installed and commissioned on 31st March. The claim for depreciation has to be allowed if the conditions prescribed in law are satisfied, we direct the Assessing Officer to allow the claim of the assessee.*
- vii. The Hon'ble Delhi Tribunal in the case of Joint/Addl. Commissioner of Income Tax Vs. Goyal MG Gases Ltd. [1 SOT 477]

held that *There is enough material to substantiate that power was generated by the electric generators. There can, thus, be no ground for disallowing depreciation on the ground that there was no user during the year*".

- viii. The Hon'ble High Court of Delhi in the case of Commissioner of Income Tax, Delhi-IV Vs. Escorts Tractors Ltd. in ITA No.90/2003, dt.12-12-2014 held that *The Tribunal has come to the conclusion that the machine having been installed before the end of the Financial year and used for trial in terms of the certificate of factory manager*".
- ix. The Hon'ble Chennai Tribunal in the case of D.M.Kathir Anand Vs. Assistant Commissioner of Income Tax [65 SOT 195] (Chennai – Trib.), held that *The TNEB has issued a letter dated September 30, 2006 stating that generation of power by the windmill has been effected on September 29, 2006. The Department has not disputed the certificate issued by the TNEB that the windmill effected supply on September 29, 2006. In the absence of any material placed before us by the Department to show that the assessee has not filed all these details before the Assessing Officer at the stage of completion of assessment under section 143(3) of the Act, it can be said that the Assessing Officer has examined all these documents and came to the conclusion that the wind-mill has been erected and commenced generation of power on September 29, 2006 and, therefore, the claim of the assessee is in accordance with the provisions of the Act*".

Accordingly, the assessee prayed before the Hon'ble Tribunal that, in view of the facts submitted above and in line with the views expressed in the judicial precedents, the appeal may be allowed.

6. On the other hand, Ld.DR relied on the orders of the Ld.CIT(A).
7. We have heard both the parties and perused the material on record. In the present case, the assessee stated before the lower authorities that

assessee purchased wind mill for Rs.51 Crores and produced bills dt.29-03-2012 and 30-03-2012. The AO doubted the genuineness of the claim of the assessee with regard to commissioning and installation of the wind mill. He has called for report from KPTCL u/s.133(6) of the Act. It was said to be received by the AO on 1st April, 2015. The AO passed assessment order on 31-03-2015, hence the Ld.AR made a plea before us that the assessment order passed earlier to receipt of report from KPTCL which has no evidentiary value. Further, the assessee filed the details of production of power upto 01-04-2012 signed by the Executive Engineer (EE), TL&SS Division, KPTCL, Chikkodi. This letter is undated.

7.1. As seen from the above, the assessee has given the power production details upto 01-04-2012. There are no details of power production up to 31-03-2012. Hence, we are not in a position to appreciate the contents of this letter as this is un-dated and not shown the power production upto 31-03-2012. Contrary to this, the assessee placed reliance on various decisions as cited above and submitted that once the wind mill is installed and commissioned in the assessment year under consideration, the assessee is entitled for depreciation on it. However, in the case of DCIT Vs. Yellamma Dasappa Hospital [290 ITR 353](KA) wherein held that *the machinery has not been actually put to use, the depreciation cannot be granted*. Further, Hon'ble Bombay High Court in the case of B.Malini and Co. Vs. CIT [214 ITR 192] (Bom) held that *there was a gap of one year between installation of machinery and its usage, and hence it was held that no depreciation can be claimed*. Further, in the case of PCIT Vs. Larsen & Toubro Ltd., [403 ITR 248] (Bom) held that *machinery which is used for trial production was held to be qualified for depreciation as trial production would amount to usage of the machinery for the purpose of business and the assessee is entitled for depreciation*. In our opinion, if the assessee has installed and commissioned machinery and used for trial production, the assessee is entitled for depreciation. The cases relied by the assessee's counsel also supported this view. Being so, there is a burden on the assessee to prove that the machinery i.e., wind-mill is not only installed and commissioned but also

carried out the trial production. Though the assessee has placed certificate before us, received from KPTCL, stating the 540 units were produced upto 01-04-2012, there are no details of power production upto 31-03-2012. In the absence of details of trial production or power produced upto 31-03-2012, we are not in a position to appreciate that the power was actually produced by installing and commissioning within 31-03-2012. Further, there was an allegation by Ld.AR that the AO has pre-dated his assessment order as on 31-03-2015, though he received copy of letter from KPTCL on 01-04-2015. In view of this, in our opinion, it is appropriate to remit the entire issue in dispute to the file of AO to furnish all the documents, which he relied for framing this assessment to the assessee and thereafter carry out the necessary examination of these documents and concerned parties after summoning them, who have issued various certificates in this regard and also provide an opportunity of cross-examination of the parties if the assessee seeks for the same and decide the issue afresh. All the grounds raised by the assessee before us remitted back to the AO in its entirety for *Denovo* consideration in the light of the above observation and to decide afresh.

8. In the result, the appeal of assessee is treated as partly allowed for statistical purposes.

Order pronounced in the open court on 11th April, 2022

Sd/-
(BEENA PILLAI)
JUDICIAL MEMBER

Sd/-
(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Bengaluru, Dated: 11th April, 2022

TNMM

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) - 11, Bengaluru*
4. *The Pr.CIT (Central)- Bengaluru*
5. *The DR, ITAT, Bengaluru*
6. *Guard File*

By Order

//True Copy//

*Assistant Registrar
ITAT, Bengaluru*