IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'E' NEW DELHI

BEFORE DR. BRR KUMAR, ACCOUNTANT MEMBER
AND
SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER

ITA No.5548/Del/2017
Assessment Year: 2011-12

DCIT, CIRCLE-17(2), New Delhi	**Vs.**	NALWA STEEL AND POWER LTD., 28-Najafgarh Road, New Delhi-1100 15
PAN :AABCN3209I		
(Appellant)		**(Respondent)**

ITA No.4941/Del/2017
Assessment Year: 2011-12

NALWA STEEL AND POWER LTD., 28-Najafgarh Road, New Delhi-1100 15	**Vs.**	DCIT, CIRCLE-17(2), New Delhi
PAN :AABCN3209I		
(Appellant)		**(Respondent)**

Department by	Shri Sunil Kumar Rajwanshi, SR.DR
Assessee by	Ms. Ananya Kapoor & Shri Salil Kapoor, Adv.

Date of hearing	19.04.2022
Date of pronouncement	18.05.2022

ORDER

PER YOGESH KUMAR U.S., JUDICIAL MEMBER:

These two appeals have been filed by the Revenue and the assessee against the order dated 27/02/2014 passed by CIT(A)-38, Delhi for Assessment Year 2011-12

2. The assessee is engaged in the field of manufacturing and selling of sponge iron, billets, wire rod, TMT and generation of power etc. The assessee filed its e-return declaring total income of Rs.13,46,04,924 on 02/09/2011 and the said return was revised on 25/02/2012, by declaring return of income of Rs.13,76,20,792. After following the due proceedings under law and the assessment order has been passed against the assessee by assessing the income of the assessee at Rs.20,03,31,190/- and recomputed Book profit at Rs. 48,49,78,360/- u/s. 115JB of the Act.

3. The assessee has preferred an appeal before the learned Commissioner of Income-Tax (Appeals). The learned Commissioner of Income-Tax(Appeals) by order dated 30/05/2017 deleted the disallowance of Rs. 5,38,95,043/- on account of excess deduction claimed u/s 80IA(8) of the Act, deleted the addition of Rs. 69,89,846/- on account of depreciation made while calculating books profit u/s 115JB of the Act. Further, upheld the action of Assessing Officer in making addition of Rs.9,46,866/- on account of additional depreciation u/s 32(1) (iia) of the Act.

4. Aggrieved by the above deletion made by the CIT (A), the Department has filed the appeal in ITA No.5548/Del/2017 on following grounds:

1. *Whether on facts and in circumstances of the case, the Ld.CIT(A) is legally justified in deleting disallowance of Rs.5,38,95,043/- on account of excess deduction claimed u/s. 80IA(8) of the Income-Tax Act, 1961 (the Act) without considering the facts recorded by the AO in assessment order and without recording his clear findings regarding allowing relief to the assessee in appellate order?*

2. *Whether on facts and in circumstances of the case, the Ld.CIT(A) is legally justified in deleting the addition of Rs.69,89,846/- on account of disallowance of depreciation made while calculating Book Profit u/s. 115JB of the Act by ignoring clause (g) to Explanation 1 to section 115JB(2) of the Act introduced by Finance Act 2006 is applicable to the assessee for the year under consideration?*

3. *That the appellant craves leave to add, amend, alter or forgo any ground(s) of appeal either before or at the time of hearing of the appeal.*

5. The assessee has also preferred an appeal in ITA No.4941/Del/2017 as against additions made by the A.O which has been confirmed by the CIT(A) on following grounds:

1. *That the Commissioner of Income-Tax(Appeals)-38, Delhi ['CIT(A)'] has grossly erred on facts and in law in upholding the action of the Assessing Officer in making a disallowance of Rs.9,46,866 on account of additional depreciation under the provisions of section 32(1)(iia) of the Income-Tax Act, 1961 ('the Act') in respect of plant & machinery purchased for the purpose of power generation.*

1.1 *That the CIT(A) grossly erred on facts and in law in confirming the aforesaid disallowance by following CIT(A) orders in the matter of the appellant for the assessment years 2008-09 and 2009-10.*

1.2 *That the CIT(A) grossly erred on facts and in law in confirming the aforesaid disallowance of blatant disregard to the principle of judicial discipline as the issue of additional depreciation in respect of plant & machinery purchased for the purpose of power generation stands decided in favour of appellant vide the Hon'ble Delhi Tribunal's order in the matter of the appellant only for the assessment year 2005-06.*

1.3 *That the CIT(A) grossly erred on facts and in law in confirming the aforesaid disallowance made by the assessing officer on an incorrect basis that generation of power is not akin to manufacture of article or thing as mentioned in the provisions of section 32(1)(iia) of the Act.*

2. That the CIT(A) grossly erred on facts and in law in upholding the action of the assessing officer in not enhancing the rate of depreciation from 10% to 15% in respect of purchase of railway sidings by the appellant during the relevant assessment year.

2.1 That the CIT(A) grossly erred on facts and in law in upholding the action of the assessing office without properly appreciating the facts and circumstances of the case.

2.2 That the CIT(A) grossly erred on facts and in law in upholding the action of the assessing officer without appreciating that the appellant had inadvertently disclosed railway sidings as 'factory building' in the books of accounts instead of disclosing the same as 'plant and machinery', since the same formed a profit earning apparatus for the appellant.

6. The Ground No.1 of the Revenue is on deletion of the disallowance on account of deduction claimed to have been made under Section 80IA(8) of the Act.

7. The learned Departmental Representative contended that the CIT(A) committed an error in deleting the disallowance on account of deduction claimed to have been made under Section 80IA(8) of the Act and relied on the Assessment Order.

8. Per contra, the learned counsel for the assessee submitted that, the issue of deduction claimed under Section 80IA(8) of the Act is recurring one, this Tribunal as well as Hon'ble Delhi High Court have already decided the

issue in favour of the assessee for the assessment years 2006-07 to 2009-10, 2013-14 and 2014-2015 and relied on the following decisions:

i) Nalwa Steel Power Ltd. vs. DCIT, in ITA No.4449/Del/2010 order dated 24/04/2018 passed by Delhi ITAT for assessment years 2006-07 to 2009-10;

ii) ITA No. 211/2019 decided by the Hon'ble Delhi High Court in the case of PCIT vs. Nalwa Steel and Power Ltd. – order dated 06.03.2019.

iii) ITA No.4022/Del/2017 order dated 31.05.2021 in the case of DCIT vs. Nalwa Steel and Power Ltd.

iv) ITA No. 7176/Del/2017 order dated 31.12.2018 in the case of ACIT vs. Nalwa Steel and Power Ltd.

v) ITA No.451/Del/2019 order dated 10.10.2019 in the case of Nalwa Steel and Power Ltd. vs. DCIT.

9. We have heard the parties and perused the material available on record. The similar issue in ITA No. 451/Del/2019 for assessment year 2013-14 has already been dealt and decided by the co-ordinate Bench of this Tribunal and the same has been confirmed by the jurisdictional Hon'ble High Court by observing as under:

> *"12. We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that the assessee is regularly claiming deduction u/s 80IA of the Act in respect of profits derived from the captive power plant/ undertaking. The assessee transfers the power for captive use as per the market rate/below on which CSEB selling the power which is @ 4.64 p.u. In the previous years the Revenue disputed*

CSEB rates consists @ Rs.0.38 p.u. on account of electricity tax, cess and for which the transfer price or power price was adjusted to that extent by disallowing to that extent and for the remaining the assessee is entitled for transfer price by treating sale price of power transferred for captive use. The assessee filed appeal before the CIT (A) wherein the CIT (A) allowed the appeal of the assessee. Against the said order the Revenue filed appeal before the Tribunal wherein the Tribunal upheld the finding of CIT (A). The Ld. AR pointed out that as per the new Finance Act, 2013 from A.Y. 2013-14, the domestic transaction took place u/s 92C whereas the Assessing Officer adopted a figure that CSEB purchasing power @ 1.89 p.u. on the basis of the information gathered from the CSEB U/s 133(6). The TPO has not taken into consideration that there are criteria for purchase from State generating station when excess production are there. In such situation, the generating station are under obligation to sale the extra power at the lowest price & this lowest price cannot be considered as equivalent to the market rate as defined u/s 80IA(8) of the Income Tax Act, 11 ITA No.451/Del/2019 1961. The matter further referred to the DRP where the DRP adopted different approach i.e. the averaging of IEX rate but, the DRP has not given any reason for adopting the said rate. The Tribunal in assessee's own case held as under in A.Y. 2009-10:

> *59. We have considered the rival arguments made by both the sides and perused the material available on record. We have also considered the various decisions cited before us. The only issue to be decided in the impugned ground is regarding the action of the Assessing Officer in excluding Rs.0.2932/- per unit while computing the market price of power for the purposes of computing deduction admissible to power units u/s 80-1A of the I.T. Act. We find the assessee in the instant case has sold the electricity to its captive plant*

at the rate of Rs.3.92 per unit i.e. rate at which CSEB was selling to industrial consumers as on 01.04.2008. The above rate of Rs.3.92 included electricity duty at the rate of 8% of energy charges and cess of Rs.0.05 paise per unit. Since according to the Assessing Officer, the assessee has not been making actual sales to its other units because the power generated is consumed captively by other units. According to him, since the assessee is only generating power but it does not have the licence to distribute it, it cannot charge the electricity duty at the rate of 8% and cess 0.05% on the transfer of power. Thus, according to him, the assessee has inflated the sale of power by Rs.0.293 per unit and has accordingly inflated the deduction u/s 80IA by a sum of Rs.3.63 per unit. We find the Id. CIT(A) following various decisions including the decision of the Delhi Bench of the Tribunal in the case of Jindal Steel & Power Limited reported in (2007) 16 SOT 509 decisions of the Mumbai Bench of the Tribunal in the case of D.C.W Ltd. Vs. Addl. CIT(A) vide ITA Nos. 5560 & 5569/Mum/2008 deleted the addition made by the Assessing Officer . We do not find any infirmity in the order of the Ld.CIT(A) on this issue."

10. Similar views have also been taken in the previous years of the assessee's own case by following the judicial precedents.

11. In view of the above said binding decisions, since, the issue in Ground No. 1 of the Revenue is covered in the above decisions, we are inclined to dismiss ground No.1 of the Revenue. **Accordingly, Ground No.1 of the Revenue is dismissed.**

12. Ground No. 2 is in respect of disallowance of depreciation while calculating book profit under Section 115JB of the Act.

13. The learned Departmental Representative by relying on the findings and conclusions of the Assessing Officer, justified the orders of the lower Authorities.

14. Per contra, the learned counsel for the assessee submitted that, the issue is also recurring in nature and the same has been decided in favour of the assessee and relied on the judgment of the Hon'ble Supreme Court in the case of Apollo Tyre reported in 225 ITR 273 (SC). The assessee has also relied on assessee's own case for earlier and subsequent years.

15. We have heard the parties and perused the records. The similar issue has already been dealt and decided by the co-ordinate Bench of this Tribunal for assessment year 2009-10 in ITA No.4449/Del/2010, vide order dated 24.04.2018 in the case of Nalwa Steel Power Ltd. vs. DCIT, wherein it is held as follows:-

> *"30. Before the Id. CIT(A), it was submitted that the Assessing Officer does not have the jurisdiction to go beyond the net profit shown in the Profit & Loss Account except to the limited extent as provided in the Explanation. The decision of the Hon'ble Supreme Court in the case of Apollo Tyres Ltd. vs. CIT reported in 255 ITR 273 was brought to the notice of the Id. CIT(A), according to which,*

the Assessing Officer has limited power of making additions and reductions only to the extent provided in Explanation to section 115J of the IT. Act.

31. Based on the argument advanced by the assessee, Id. CIT(A) directed the Assessing Officer to delete the additions made to the book profit by observing as under:-

> *"6.2 1 have considered the submission made by the authorized representative of the appellant company. I do agree with the contentions of the Ld. AR that the assessing officer has very limited powers to make adjustments in the profit and loss account of the assessee. The adjustments can be made to the profit and loss account as provided in Explanation to section 115JB of the Act and except this, the assessing officer cannot make any additions to the P & L account. In view of the Supreme Court decision in the case of Apollo Tyres Ltd. (supra), / direct the assessing officer to delete the additions representing the disallowance on 'excess depreciation on UPS/ electrical installation/disallowance of additional depreciation on electrical installation/disallowance additional depreciation on assets acquired prior to 31/03/2003….. and disallowed u/s 14A of the Act' as the same is not permitted as per the Statute. This ground of appeal is allowed to the appellant accordingly."*

32. Aggrieved with such order of the ld, the Revenue is in appeal before the Tribunal.

33. After hearing both the sides, we do not find any

infirmity in the order of the Id. CIT(A) directing the Assessing Officer to delete the various additions for computation of book profit u/s 115JB of the I.T. Act. We find the id. CIT(A) while directing the Assessing Officer to delete the various additions/disallowances made by him for computation of book profit u/s 115JB of the I.T. Act has relied on the decision of the Hon'ble Supreme Court in the case of Apollo Tyres Ltd. (supra). Ld. DR could not bring any material before us so as to take a contrary view than the view taken by the ld. CIT(A) on this issue. We, therefore, do not find any infirmity in the order of the Id. CIT(A) directing the Assessing Officer to delete the various additions/disallowances for computation of book profit u/s 115JB of the I.T. Act. We, therefore, uphold the order of the Id. CIT(A) on this issue and the grounds raised by the Revenue are dismissed.

16. The similar views have been also taken in the following decisions:

i) DCIT vs. Nalwa Steel and Power Ltd. – ITA No.4022/Del/2017 – order dated 31.05.2021 – page 225-227;

ii) Nalwa Steel Power Ltd. – ITA No. 4449/Del/2010 – order dated 24.04.2018 passed by ITAT, Delhi Bench for assessment years 2006-07 to 2009-10.

17. In view of the above said binding decisions of the co-ordinate Bench of this Tribunal rendered in the assessee's own case, respectfully following the

same, we uphold the order of the Ld. CIT (A) on the issue and dismiss the ground No.2 of the Revenue.

18. The Revenue's ground of Appeal No. 3 is too general in nature, therefore the same is dismissed.

ITA No.4941/Del/2017:

19. Assessee's ground Nos. 1 to 1.3 are in respect of disallowance on account of additional depreciation on plant and machinery claimed under Section 32(1)(iia) of the Income-Tax Act, 1961.

20. The learned counsel for the assessee submitted that, the learned Commissioner of Income-Tax(Appeals) has committed grave error in upholding the action of the Assessing Officer in making disallowance of Rs.9,46,866 on account of additional depreciation under the provisions of section 31(1)(iia) of the Act and further submitted that, the said issue has already been decided in favour of the assessee in assessee's own case for the earlier and subsequent years.

21. Per contra, the learned Departmental Representative has relied on the order of the learned Commissioner of Income-Tax(Appeals) and submitted that orders of the Assessing Officer and the learned Commissioner of Income-Tax(Appeals) are well reasoned which require no interference by this Tribunal.

22. We have heard the learned counsel for the assessee and the learned Departmental Representative at length. We have perused the assessee's own case while dealing with the same issue for the assessment years 2006-07 to 2009 in ITA No. 449/Del/2010, dated 24/04/2018, wherein the Co-ordinate Bench of this Tribunal held as under:

> *"74. After hearing both the sides, we find the ld.CIT(A) upheld the action of the Assessing Officer in disallowing of Rs.33,39,892 claimed by the assessee on account of additional depreciation u/s. 32(1)(iia) on electrical installation on the ground that the production/general of power by the assessee does not quality as manufacture/production of an article or thing as contemplated u/s.32(1)(iia) of the I.T. Act. We find the Co-ordinate Bench of the Tribunal in assessee's own case vide ITA No.4549/Del/2016 order 09.08.2016 for assessment year 2006-07 has held that electrical installation is part of plant and machinery used for manufacturing steel. It has been held in various decisions including the decision of the Delhi Bench of the Tribunal in the case of NTPC vs. DCIT vide ITA No.1438/Del/2009 order dated 30.04.2012, the Jaipur Bench of the Tribunal in the case of ACIT vs. Manglam Cements Ltd. vide ITA No.82/Jaipur/2014 and 681/Jaipur/2014 order dated 30.01.2017 that the process of generation of electricity is akin to manufacture of article or thing and, therefore, the assessee is eligible for additional depreciation. It has further been held that the amendment which has been brought in by the Finance (No.2) Act, 2012 e.w.f. assessment year 2013-14 whereby the assessee engaged in the business of generation or distribution of power have specifically been included and held eligible for claim of additional depreciation. It has been held by the Co-ordinate Benches of the Tribunal that even prior to the amendment brought in by the Finance Act. 2012, the assessee's engaged in generation or generation or distribution*

of electricity were held to be eligible for additional depreciation. It was accordingly held that the assessee is entitled to additional depreciation. It was accordingly held that the assessee is entitled to additional depreciation on the power plant and the windmill installed during the year. In view of the above, we hold that the assessee is entitled to additional depreciation on account of production/generation of power. The grounds raised by the assessee on this are accordingly allowed."

23. Similar views were also taken in the following decisions:

i) DCIT vs. Nalwa Steel Power Ltd. in ITA No.4022/Del/2017 – order dated 31.05.2021.

ii) DCIT vs. Nalwa Steel Power Ltd. in ITA No.5199/Del/2014 for assessment year 2010-11.

24. In view of the above binding decisions, relying on the same, **we allow the Assessee's grounds of appeal No. 1 to 1.3.**

25. Grounds No. 2 to 2.2 are in respect of not enhancing the rate of depreciation from 10% to 15% in respect of purchase of railway sidings by the assessee during the year under consideration.

26. The learned counsel for the assessee submitted that, the Assessing Officer has not assigned reasons and no findings have been given on the claim raised by the assessee during the assessment proceedings on the letter dated 11/11/2013 filed by the Assessee.

27. The assessee has claimed that railway sidings were used by the assessee for transporting raw-material machinery etc. to the Plant-2 Raigarh. Further claimed that the same has been used for the purpose of the business and depreciation has been claimed. The case of the assessee is that the assessee had inadvertently shown it under 'factory building' and claimed 10% depreciation. However, railway sidings were used for the purpose of the business and the assessee is entitled for depreciation of 15%. Though, the claim was raised during the course of assessment proceedings, no finding has been given by the Assessing Officer.

28. Further, the learned counsel for the assessee has relied on the judgment of the Hon'ble Supreme Court in the case of Wipro Finance Vs. CIT Civil Appeal No. 677 of 2008 dated 01.04.2022 wherein upheld the action of the assessee to raise the claim at the appellate stage.

29. We have heard the parties, perused the records and gave our thoughtful consideration on the issue. It is not in dispute that the assessee has claimed depreciation at 10% on the railway siding and during the assessment proceedings, claimed depreciation at 15% on the ground that railway sidings were used by the assessee for the purpose of the business ie: transporting raw-material machinery etc. The Assessing Officer has not dealt with the said issue, therefore, in our considered opinion; the said issue deserves to be remanded to the file of the Assessing Officer for fresh consideration by verifying all the records produced by the assessee. Accordingly, **we allow the grounds of appeal No. 2 to 2.2 for statistical**

purposes with a direction to A.O. to consider the claim of the assessee and pass appropriate order in accordance with law after providing opportunity of being heard to the assessee.

30. **In the result, ITA No. 5548/Del/2017 of the Revenue is dismissed and ITA No. 4941/Del/2017 is allowed for statistical purposes.**

Order pronounced in the open court on 18th h May, 2022.

Sd/-	**Sd/-**
(DR. BRR KUMAR)	**(YOGESH KUMAR U.S.)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 18th May, 2022.
Mohan Lal/R.N

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT,
New Delhi