

**IN THE INCOME TAX APPELLATE TRIBUNAL
“RAJKOT” BENCH, RAJKOT**

[Conducted through E-Court at Ahmedabad]

**BEFORE SHRI MAHAVIR PRASAD, JUDICIAL MEMEBR
& SHRI WASEEM AHMED, ACCOUNTANT MEMEBR**

आयकर अपील सं./I.T.A. No. 362/Rjt/2015

A/w.

CROSS OBJECTION No. 56/Rjt/2015
(निर्धारण वर्ष / Assessment Year : 2010-11)

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| Deputy Commissioner of Income Tax Circle-1(2), Room No.521, Aayakar Bhavan, Race Course Ring Road, Rajkot 360001 | बनाम/ Vs. | M/s. S. Kumar 602/603, Embassy Towers, Jawahar Road, Opp: Public Garden, Rajkot |
| स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAIFS7890J | | |
| (Appellant/Respondent) | .. | (Respondent/Cross Objector) |

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| राजस्व की ओर से/Revenue by : | Bhavna Yashroy, CIT.DR. |
| अपीलार्थी ओर से /Assessee by : | Shri Manish J. Shah, A.R. |

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| सुनवाई की तारीख / Date of Hearing | 10/05/2022 |
| घोषणा की तारीख /Date of Pronouncement | 31/05/2022 |

ORDER

PER MAHAVIR PRASAD, JM:

The captioned appeal and Cross Objection have been filed at the instance of the Revenue and assessee against the order of the Commissioner of Income Tax (Appeals)-1, Rajkot ('CIT(A)' in short) vide Appeal No. CIT(A)-I/Rjt/0057/13-14, dated 07.05.2015 arising out of assessment order dated 12.03.2013 passed by the Assessing Officer (AO)

under s. 143(3) of the Income Tax Act, 1961 (the Act) concerning AY 2010-11.

2. The grievances, in Revenue's appeal and assessee's Cross Objection, raised being common, both the cases were heard together and disposed of by the common order.

3. The ground of appeal raised by Revenue reads as under:

- "1. The ld. CIT(A) has erred on facts and in law in not appreciating the factual and legal matrix for the disallowance of Rs 1,66,90,000 on account of depreciation claimed on windmill.*
- 2. The ld. CIT(A) has erred on facts and in law in not appreciating the fact that, the assessee has failed to prove the use of wind mill even for trial run because the power so produced, it required to be transmitted.*
- 3. The ld. CIT(A) has erred on facts and in law in not appreciating the fact that, in case of windmill even trial run necessarily requires production and transmission of electricity and where there is no transmission, it can be inferred that there is no production and therefore, the assessee's claim of running windmill for trial run is nothing but a devise to claim depreciation.*
- 4. The appellant craves for leave to alter, amend and/or add any ground of appeal subsequently."*

4. The facts of the case that the assessee was having three windmills at the beginning of the year under appeal i.e. as on 01/04/2009 and the same formed part of the block of asset entitled to depreciation @80%. The opening WDV of this block of asset as on 01/04/2009 was of Rs.2,70,46,326/- . The assessee in the year under appeal sold one wind mill, stated to be Unit-II situated at site CK5, Vill.: Chikanyakanalli Tal.Sira, Dist.Tumker, Karnataka for Rs.3,18,75,000/-. While calculating the short term capital gain in the return of income, the assessee deducted the entire WDV (of the three wind mills taken together) which was of Rs.2,70,46,326/- from the sale price of the wind mill of Unit-II at Vill.: Chikanyakanalli Tal.Sira, Dist.Tumker, Karnataka which was sold for

Rs.3,18,75,000/-. The difference of Rs.48,28,674/- was offered to tax by the assessee, as short term capital gain (as this was a depreciable asset and depreciation was claimed thereon, in its return of income for A.Y.2010-11). Thus, so doing the assessee firm deducted entire WDV of the wind mills, considering three wind mills as an inseparable block, from the sale price of the Unit-II, and thus, the result was that that the said block became NIL on the date of sale of wind mill of Unit-II. As against the short term capital gain of Rs.48,28,674/- offered to tax by the appellant in the return income, the A.O. recalculated the WDV of the wind mill of Unit III at Vill.: Chikanyakanalli Tal.Sira, Dist.Tumker, Karnataka, considering it as a separate and independent asset, without considering it as a part of the block of asset entitled to depreciation @80%. So doing, the A.O. calculated the WDV of the wind mill of Unit-II Vill.: Chikanyakanalli Tal. Sira, Dist. Tumker, Karnataka at Rs.9,38,155/-. The short term capital gain on sale of this wind mill, thus calculated by the AO is of Rs.3,09,36,845/-.

5. Against the order of the learned CIT(A), the Revenue came before us and stated that learned CIT(A) ought to have confirmed the disallowance of Rs.1,66,90,000/- on account of depreciation claimed on windmill. The learned CIT.D.R. Bhavna Yashroy cited judgment in the case of CIT vs. Suhrid Geigy Ltd. [1982] 133 ITR 884 (Guj) wherein it is held that depreciation is allowable when assessee has started its business, only then assessee can claim the depreciation. The learned CIT.D.R. also cited a judgment of Hon'ble Bombay High Court, Nagpur Bench in case of Dineshkumar Gulabchand Agrawal [2004] 141 TAXMAN 62 (Bom.) wherein it is held that:

“If the vehicle was not actually used but since it was ready for use, the assessee was entitled to claim the benefit of depreciation on such assets. He sought to place reliance on the judgment of this court in the case of Whittle Anderson Ltd. v. CIT [1971] 79 ITR 613. In the above judgment, this court was concerned with the

interpretation of the expression "use" or "used", whereas we are concerned with the interpretation of the word "used". It appears that after the above judgment, there was an amendment to Section 32 of the Income-tax Act, the word "used denotes actually and not merely ready for use. The expression "used" means actually used for the purposes of the business. The view is taken by the Tribunal. In this view of the matter, no substantial question of law is involved. The appeal is dismissed in limine with no order as to costs".

6. The main contention of the learned CIT.D.R. was that a certificate was issued by the Divisional Engineer (Operations), APCPDCL, Nandyal as under:

"This is to certify that 01 No x 800 KW (0.8 MW) Enercon make Wind Energy Converter of M/s, S. Kumar, near Kondameedipalli village in Kolimigundla mandal, Kurnool district, Andhra Pradesh, has been erected and interconnected to APTRANSCO grid on 31-03-2010. From the date of Interconnection, the machines are under trial run until the company declares commercial operation date."

7. On the other hand, learned AR Mr. Manish Shah has cited the judgment of Hon'ble Gujarat High Court in the case of ACIT vs. Ashima Syntex Ltd. [2002] 122 Taxman 230 (Guj) wherein it is held that:

"The trial run of the machinery is obviously for the purpose of business and not for any other purposes. What is required to be seen is that the machinery must be 'used' for the purpose of business and keeping in mind the wider meaning ascribed by various decisions of various Courts for the term 'use', 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."

8. After going through the record and hearing both the parties and in our considered opinion, the matter is crystal clear in favour of the assessee in view of the above said latest judgment in the case of ACIT vs. Ashima Syntex Ltd. (supra) wherein it is clearly held that:

"even trial production of machinery would fall within ambit of 'used for purposes of business'"

Therefore, respectfully following the above said judgment, we dismiss the appeal of the Revenue.

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

10. Now we come to assessee's CO No. 56/Rjt/2015. Since, the cross objection is supporting the order of learned CIT(A) and we have dismissed the Revenue's appeal and granted relief to the assessee, therefore, same is also dismissed as infructuous.

11. In the combined result, the appeal filed by the Revenue and Cross Objection of the assessee are dismissed.

This Order pronounced in Open Court on 31/05/2022

Sd/-

(WASEEM AHMED)
ACCOUNTANT MEMBER
Ahmedabad: Dated 31/05/2022

Sd/-

(MAHAVIR PRASAD)
JUDICIAL MEMBER

True Copy

S.K.SINHA

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद /
DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

Deputy/Asstt. Registrar
ITAT, Rajkot