आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'D' अहमदाबाद ।

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

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

आयकर अपील सं./I.T.A. No. 1821/Ahd/2014

(**निर्धारण वर्ष /** Assessment Year : 2006-07)

The DCIT (OSD) Room No.208, 'B' Wing, Pratyaksh Kar Bhavan, Nr. Ahmedabad Stock Exchange, Panjrapole, Ambawadi, Ahmedabad	**बनाम**/ Vs.	**M/s. Vishal Export Overseas Ltd.** Dawoodi Bohra Jamat, Noor Masjid Complex, Navanaka Road, Rajkot
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACV2354D		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से/**Appellant by :**	Shri Alok Kumar, CIT. D.R.
प्रत्यर्थी की ओर से / **Respondent by :**	Shri Bandish Soparkar & Shri Parin Shah, A.Rs.

सुनवाई की तारीख / **Date of Hearing**	27/07/2022
घोषणा की तारीख /**Date of Pronouncement**	29/07/2022

ORDER

PER MAHAVIR PRASAD, JM:

The appeal has been preferred by the Revenue against the order of the Commissioner of Income Tax (Appeals)-XIV, Ahmedabad ('CIT(A)' in short) vide Appeal No. CIT(A)-XIV/ACIT/Cir.8/111/2011-12 dated 07.03.2014 arising in the assessment order dated 14.11.2011 passed by the Assessing Officer (AO) under s. 143(3) r.w.s. 147 of the Income Tax Act, 1961 (the Act) concerning to AY 2006-07.

2. The grounds of appeal raised by the Revenue read hereunder:

> *"1). The Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in deleting the disallowance of additional depreciation of Rs.9,17,06,000/- in respect of Wind-Mills commissioned and operated by the Assessee on the ground that generation of electricity was not in the nature of "manufacture" or "production" as intended u/s.32(1)(iia) of the Act.*
>
> *2). The Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in deleting the addition of Rs.14,62,000/- made u/s.14A of the Act for the purpose of computing book profits as per Section 115JB of the Act.*
>
> *3). On the facts and in the circumstances of the case, the Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad ought to have upheld the order of the Assessing Officer.*
>
> *4). It is therefore, prayed that the order of the Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad may be set-a-side and that of the order of the Assessing Officer be restored."*

3. The assessee has also made an application under Rule 27 of ITAT Rules vide letter dated 23.03.2022. However, learned AR at the time of hearing submitted that he has been instructed by the assessee not to press the application filed under Rule 27 of ITAT Rules. Therefore, the application filed under Rule 27 of ITAT Rules has been dismissed as withdrawn.

4. The first ground of appeal raised by the Revenue is that the learned CIT(A) erred in deleting the disallowance made by the AO on account additional depreciation of Rs. 9,17,06,000/- in respect of windmills under the provisions of Section 32(1)(iia) of the Act.

5. Briefly stated facts are that the assessee, in the present case, is a Limited Company and engaged in the business of exports, imports and trading of various commodities. The AO during the assessment proceedings found that the assessee has claimed additional depreciation on

the plant and machinery acquired in the year under consideration amounting to Rs. 9,17,06,000/- being 20% of the value of plant and machinery. However, the AO was of the view that the activity of generating electricity does not classify as manufacturing activity as mandated under the provisions of Section 32(1)(iia) of the Act. Thus, the AO disallowed the same and added the sum of Rs. 9,17,06,000/- to the total income of the assessee.

6. Aggrieved, the assessee preferred appeal before the learned CIT(A) who has deleted the addition made by the AO by observing as under:

> *"The appellant referred two decisions of different Tribunals as discussed at para 4C above where on the interpretation of Hon'ble Supreme Court in various cases "Electricity" is treated as goods and electricity generation is treated as production and manufacture of Electricity (as goods) satisfying the phrase "Production or manufacture of article or thing." It is also held by Hon'ble ITAT, Bangalore that amendment brought about in section 32(1)(iia) by the Finance Act 2012 to include the business of generation and distribution of Power is of clarificatory in nature i.e. applicable retrospectively.*
> *(v)(a) I am Inclined with the contention of appellant that since appellant was already under the business of production / generation of electricity which is covered under sale of goods Act 1930 i.e. electricity is an article & thing, and appellant installed /commissioned windmill during previous year, its claim for additional depreciation duly supported by Form No.3AA is admissible and justified. I am inclined that ratio of Hon'ble ITAT that the govt. vide Finance Act 2012 has amended the provisions of section 32(1)(iia) to include the business of 'generation or generation and distribution of power' is eligible for benefit u/s.32(1)(iia) although effective from 01.04.2013 but it gives impetus to the view that generation of electricity is a manufacturing process and qualifies for the benefits u/s. 32(10(iia).*
> *(b) I am inclined with appellant that it fulfilled all the eligible conditions for claim of additional depreciation (discussed by appellant at para 3 of written submission dated 17.2.2014). Hon'ble Gujarat High Court in the case of Diamonds & Chemicals Ltd, (supra) upheld the ratio of Hon'ble ITAT, Ahmedabad in the. same case for such additional depreciation for windmill as relied on by appellant. I am inclined the ratio of Hon'ble High Court is squarely applicable in the facts of the appellant's case.*
>
> *It is therefore disallowances made by A.O. are neither justified nor substantial in law. The A.O: is directed to allow such additional depreciation of Rs.9,17,06,000 . The appellant gets relief accordingly. This ground is allowed."*

7. Being aggrieved by the order of learned CIT(A), the Revenue is in appeal before us.

7.1 The Learned DR before us contended that there was an amendment by the Finance Act, 2012 wherein activity of generating electricity was classified as manufacturing activity and therefore the same is eligible for additional depreciation under S. 32(1)(iia) of the Act. However, such amendment is applicable w.e.f. 01.04.2013 whereas the year involved in the impugned appeal relates to AY 2006-07. Thus, according to the learned DR, the assessee is not eligible for the additional depreciation.

7.2 On the other hand, learned counsel appearing on behalf of the assessee contended that Hon'ble Madras High Court in case of S. Srinivasaraghavan vs. ACIT [2022] 139 taxmann.com 230 (Madras) held that the activity of generating electricity is a manufacturing activity. Therefore, the assessee is eligible for additional depreciation on the cost of windmill acquired in the year under consideration. Both the learned DR and learned AR before us vehemently supported the order of the authorities below as favourable to them.

8. We have heard the rival contentions of both the parties and perused the materials available on record. At the outset, we note that the Hon'ble Madras High Court, in the case of S. Srinivasaraghavan vs. ACIT [2022] 139 taxmann.com 230 (Madras) involving identical facts and circumstances for A.Y. 2006-07, has allowed the additional depreciation on windmill considering the activity of generating the electricity as manufacturing in nature. The relevant extract is reproduced as under:

> *"8. It is settled law that for the purpose of claiming additional depreciation for manufacture or production of new item under section 32(1) (Ha), the basic*

requirement is that it should be acquired or installed after 3 1-3-2002. Admittedly, the appellant acquired the windmill after 31-3-2002. Taking note of the same and also in the light of the decision cited supra, this court is of the opinion that the appellate authority has correctly set aside the assessment order and remanded the matter to the assessing officer for fresh consideration. Whereas, the Tribunal erred in setting aside the said order of the appellate authority, by order dated 30-3-2012 and hence, the same is liable to be set aside and is accordingly, set aside. Consequently, the matter is remanded to the assessing officer to recompute the depreciation allowable after duly allowing the claim made by the appellant for additional depreciation, in addition to the depreciation already allowed. Such order be passed by the assessing officer, on merits and in accordance with law, after providing an opportunity of personal hearing to the appellant, within a period of six weeks from the date of receipt of a copy of this judgment."

The facts of the case on hand are identical to the facts of the case as discussed in the case cited above. Before us, learned DR has not brought anything on record suggesting that the ruling given by the Hon'ble Madras High Court has been stayed or overruled. Likewise, learned DR has not brought any distinguishing features in the facts of the case on hand vis-à-vis the facts of the case cited above. Similarly, learned DR has not brought any contrary binding decision at the time of hearing. Thus, in view of the above, we do not find any infirmity in the order of the learned CIT(A). Hence, the ground of appeal of Revenue is hereby dismissed.

9. Second issue raised by the Revenue is that the learned CIT(A) erred in deleting the addition made by the AO for Rs. 14,62,000/- while calculating the book profit under S.115JB of the Act.

10. During the assessment proceedings under S. 143(3) of the Act, the AO has made disallowance of Rs. 15,000/- under the provisions of Section 14A of the Act which was enhanced to Rs. 14,62,000/- by the learned CIT(A). However, the AO while giving effect to the order of the learned CIT(A) omitted to make the addition for Rs. 14,62,000/- while calculating the book profit under the provisions of Section 115JB of the Act.

Accordingly, the AO added the same to the book profit determined under S.115JB of the Act.

11 Aggrieved, the assessee preferred an appeal before the learned CIT(A) who has deleted the addition made by the AO by observing as under:

> *"5.3.(i)Ground No.3 is against the addition of Rs.14,62,000 disallowed u/s.14A' of the Act for the purpose of computing book profit u/s.115JB of the Act.*
>
> *(ii) The A.O. during reasstt. noticed that while giving appeal effect to ld.CIT(A) order dated 28.06.2010, the disallowances enhanced by ld.CIT(A) u/s.14A of the Act from Rs.15,000 to Rs.14,62,000 were not given effect to while computing book profit u/s.115 JB of the Act.*
>
> *(iii) The appellant contended that A.O. could have taken the recourse of section 154 of the Act if the effect given to ld.CIT(A) order is not properly given. The appellant further contended that no such income escaped the asstt. was mentioned in reasons recorded for reopening. The appellant relying on the ratio of Hon'ble Bombay High Court in the case of CIT vs. Jet Airways (supra) contended that it is only escaped income which can be considered while completing reasstt. but not such omission.*
>
> *(iv) The appellant contended that even on merit, such disallowances of expenses u/s.14A of the Act cannot be adjusted for book profit in view of Hon'ble ITAT order in the case of Reliance Petroproducts Pvt.Ltd. (supra).*
>
> *(v) I am partly inclined with appellant that disallowance of enhanced expenditure u/s.14A of the Act by ld.CIT(A) in, the case of appellant cannot be held as escaped income and A.O. could have invoked provisions of section 154 of the Act to rectify such mistake if proper effect of such order is not given. But, I am not inclined with appellant that working of Book profit by taking cognizance of such enhancement is not legally, tenable. In the case of any corporate assessee, the A.O. is duly bound to compute total income as well as total tax. It is in this regard, for each & every asstt. order of corporate assessee the A.O. is duty bound to compute total income as per that order as well as to compute book profit to ascertain whether the appellant comes / liable to pay tax under normal provisions or under MAT I.e. u/s.115 JB of the Act. It is in this reference, the A.O. has to take correct income i.e. Book profit u/s.115JB of the Act which the A.O. has done. This book profit is irrespective of the fact whether appeal effect is properly given or not or whether rectification is done or not. This legal proposition is based on 'Doctrine of Merger' i.e. the A.O's original asstt. order in which he had computed book profit u/s.115JB of the Act if enhanced by ld.CIT(A) then A.O.'s such original order merges with ld.CIT(A) order and for all subsequent order of A.O. such book profit is required to be taken at enhanced profit.*
>
> *(vi) In reference to merit aspect, the ld.CIT(A) had already enhanced such disallowances u/s.14A of the Act in regular provisions and not in the provisions of*

section 115 JB of the Act. It is verified from the order giving effect to CIT(A)'s order dated 09.08.2010 that A.O. computed both total income at Rs.9,35,29,370 as well as book profit u/s.115JB of the Act at Rs.50,19,45,000 (as computed u/s. 143(3) order dated 24.12.2.008) and held that MAT provisions are applicable in the case of appellant. Therefore, A.O. is not justified in disturbing such book profit u/s.115JB of the Act in the impugned asstt. order without reasons or grounds.

(vii) I am inclined with appellant's contention that as per legal proposition as per the order of Hon'ble ITAT; Ahmedabad in the case of Reliance Petroproducts Pvt.Ltd. (ITA No.2324/Ahd/2009 A.Y.2001-02 order dated 13.1.2012) such disallowances of expenditure u/s.14A of the Act are not to be considered as disallowances while working out book profit u/s.115JB of the Act. It is therefore such addition made by A.O. is not justified."

12. Being aggrieved by the order of learned CIT(A), the Revenue is in appeal before us.

12.1 The learned DR inter alia contended that the disallowance has to be made under Clause (f) to Explanation 1 of Section 115JB of the Act. Therefore, the amount of disallowance calculated under S. 14A of the Act can also be adopted while working out the book profit under the provisions of Section 115JB of the Act.

12.2 On the other hand, learned AR contended that no reference can be made to the provisions of Section 14A of the Act while determining the book profit under the provisions of Section 115JB of the Act.

13. We have heard the rival contentions of both the parties and perused the materials available on record. At the outset, we note that in the recent judgment of Special Bench of Hon'ble Delhi Tribunal in the case of ACIT vs. Vireet Investment Pvt. Ltd. reported in 82 Taxmann.com 415 has held that the disallowances made u/s 14A r.w.r. 8D cannot be the subject matter of disallowances while determining the net profit u/s 115JB of the Act. The relevant portion of the said order is reproduced below:

> *"In view of above discussion, the computation under clause (f) of Explanation 1 to section 115JB(2), is to be made without resorting to the computation as contemplated under section 14A, read with rule 8D of the Income-tax Rules, 1962."*

The ratio laid down by the Hon'ble Tribunal is squarely applicable to the facts of the case on hand. Thus it can be concluded that the disallowance made under section 14A r.w.r. 8D cannot be resorted while determining the expenses as mentioned under clause (f) to explanation 1 to section 115JB of the Act.

However, it is also clear that the disallowance needs to be made with respect to the exempted income in terms of the provisions of clause (f) to section 115JB of the Act while determining the book profit. In holding so, we draw support from the judgment of Hon'ble Calcutta High Court in the case of *CIT Vs. Jayshree Tea Industries Ltd.* in GO No.1501 of 2014 (ITAT No.47 of 2014) dated 19.11.14 wherein it was held that the disallowance regarding the exempted income needs to be made as per the clause (f) to Explanation-1 of Sec. 115JB of the Act independently. The relevant extract of the judgment is reproduced below:-

> *"We find computation of the amount of expenditure relatable to exempted income of the assessee must be made since the assessee has not claimed such expenditure to be Nil. Such computation must be made by applying clause (f) of Explanation 1 under section 115JB of the Act. We remand the matter for such computation to be made by the learned Tribunal.*
> *We accept the submission of Mr. Khaitan, learned Senior Advocate that the provision of section 115JB in the matter of computation is a complete code in itself and resort need not and cannot be made to section 14A of the Act."*

Given above, we hold that the disallowances made under the provisions of Sec. 14A r.w.r. 8D of the IT Rules, cannot be applied to the provision of Sec. 115JB of the Act as per the direction of the Hon'ble Calcutta High Court in the case of *CIT Vs. Jayshree Tea Industries Ltd.* (Supra).

Now the question arises to determine the disallowance as per the clause (f) to Explanation-1 of Sec. 115JB of the Act independently. In this regard, we note that there is no mechanism/ manner given under the clause (f) to Explanation-1 of Sec. 115JB of the Act to workout/ determine the expenses with respect to the exempted income. Therefore in the given facts & circumstances, we feel that ad-hoc disallowance will serve the justice to the Revenue and assessee to avoid the multiplicity of the proceedings and unnecessary litigation. Thus we direct the AO to make the disallowance of 1% of the exempted income as discussed above under clause (f) to Explanation-1 of Sec. 115JB of the Act subject to the maximum amount of disallowance made by the lower authorities. We also feel to bring this fact on record that we have restored other cases involving identical issues to the file of AO for making the disallowance as per the clause (f) to Explanation-1 of Sec. 115JB of the Act independently. But now we note that there is no mechanism provided under the clause (f) to Explanation-1 of Sec. 115JB of the Act to make the disallowance independently. Therefore our action for restoring back the issue to the file of AO would unnecessarily cause further litigation. Thus we limit the disallowance on an ad-hoc basis @ 1 % of the exempted income as per the clause (f) to Explanation-1 of Sec. 115JB of the Act. Thus the ground of appeal of the Revenue is partly allowed.

14. In the result, the appeal of the Revenue is partly allowed.

This Order pronounced in Open Court on 29/07/2022

Sd/-	Sd/-
(WASEEM AHMED)	(MAHAVIR PRASAD)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Ahmedabad: Dated 29/07/2022

True Copy

S.K.SINHA

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

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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,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, अहमदाबाद ।