

आयकर अपीलिय अधिकरण, 'बी' न्यायपीठ, चेन्नई।
IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH: CHENNAI

श्री महावीर सिंह, माननीय उपाध्यक्ष, एवं
श्री जी. मंजूनाथा, माननीय लेखा सदस्य के समक्ष
BEFORE SHRI MAHAVIR SINGH, HON'BLE VICE PRESIDENT AND
SHRI G. MANJUNATHA, HON'BLE ACCOUNTANT MEMBER

आयकर अपील सं./ITA Nos.571 & 572/Chny/2021
निर्धारण वर्ष /Assessment Year: 2015-16 & 2016-17

M/s.Regen Powertech Pvt. Ltd.,
Sivanandam,
No.1, Pulla Avenue,
Shenoy Nagar,
Chennai- 600 030.
[PAN: AADCR 5531 M]
(अपीलार्थी/Appellant)

v. The Dy. Commissioner –
of Income Tax,
Corporate Circle-5(1),
Chennai.
(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by : Mr.B.Ramakrishnan, FCA
प्रत्यर्थी की ओर से /Respondent by : Mr.S. Marudhu Pandian, CIT
सुनवाई की तारीख/Date of Hearing : 17.11.2022
घोषणा की तारीख /Date of Pronouncement : 07.12.2022

आदेश / O R D E R

PER G. MANJUNATHA, ACCOUNTANT MEMBER:

These two appeals filed by the assessee are directed against separate, but identical orders of the Commissioner of Income Tax (Appeals)-3, Chennai, both dated 16.12.2019 and pertains to assessment years 2015-16 & 2016-17. Since, the facts are identical and issues are common, for the sake of convenience, these appeals are being heard together and disposed off, by this consolidated order.

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2. The assessee has, more or less, raised common grounds of appeal for both the assessment years. Therefore, for the sake of brevity, grounds of appeal filed for the AY 2015-16, are re-produced as under:

1. The order of the Learned Commissioner of Income Tax (Appeals)-3 is contrary to the law, facts and circumstances of the case.

2. The Learned Commissioner of Income Tax (Appeals)-3 erred in confirming the disallowance additional depreciation claimed u/s. 32(1)(iia) amounting to Rs.69,81,108/-.

3. The Learned Commissioner of Income Tax (Appeals)-3 erred in confirming the disallowance of License fee u/s. 37(1) of the Act amounting to Rs.5,86,50,030/-.

4. The Learned Commissioner of Income Tax (Appeals)-3 ought to have considered the fact that the Hon'ble Chennai Tribunal, in the Appellant's own case for AY 2012-13 vide order in ITA No.685/CHNY/2017 dated 16-05-2019, had allowed the claim of License fee.

5. The Learned Commissioner of Income Tax (Appeals)-3 erred in confirming disallowance of claim made u/s. 35(1)(iv) of the Income Tax Act amounting to Rs.25,17,37,269/-.

6. The Leaned Commissioner of Income Tax (Appeals) - 3 erred in confirming disallowance of deduction claim made u/s. 35(2AB) of the Income Tax Act amounting to Rs.9,98,657/-.

7. The Learned Commissioner of Income Tax (Appeals) - 3 ought to have considered the fact that the Hon'ble Chennai Tribunal, in the Appellant's own case for AY 2012-13 vide order in ITA No.685/CHNY/2017 dated 16-05-2019 has allowed alternate claim of these capital and Revenue expenditure u/s 35(1)(i) and section 37(1) respectively.

For these grounds and such other grounds that may be adduced before or during the hearing of the appeal, it is prayed that the Hon'ble Tribunal may be pleased to delete the additions and/or disallowances made by the Assessing officer or pass such other orders as this Hon'ble Tribunal may deem fit.

3. At the outset, we find that there is a delay of 662 days in filing of both the appeals by the assessee, for which, a petition along with affidavit explaining reasons for delay in filing of the appeals, has been filed. The Ld.Counsel for the assessee referring to petition filed by the assessee submitted that order of the Ld.CIT(A) for both the assessment years have been received on 16.12.2019 and in normal course, the assessee ought to

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have filed appeal before the Tribunal on 14.02.2020 i.e. within 60 days from the date of receipt of the order from the appellate authority. However, the assessee had filed appeal before the Tribunal on 07.12.2021 with a delay of 662 days and reasons for such delay is on account of undergoing Corporate Insolvency Resolution Process (in short "CIRP") and the Interim Resolution Professional (in short "IRP") was appointed on 13.12.2019 only. Since, the IRP is new to the company, he was taking necessary steps to understand the affairs of the company. In the mean time, due to outbreak of Covid-19 pandemic, there is a lock down from March, 2020 onwards and it was extended from time to time. If you exclude period covered under Covid-19 pandemic, there is a small delay of less than 60 days which is on account of no representation from anybody due to IRP proceedings. Therefore, the delay may be condoned in the interest of advancement of substantial justice.

3.1 The Id.Sr.DR. Mr.S.Marudhu Pandian, CIT, appearing for the Revenue strongly opposing condonation petition filed by the assessee submitted that even before commencement of Covid-19 outbreak, there is a delay in filing of the appeals. Further, assuming for a moment, the delay covered under Covid-19 pandemic, needs to be excluded, but the remaining delay has not been properly explained with necessary evidences, and thus, the appeal filed by the assessee should be rejected.

3.2 We have heard both the parties and considered relevant contents of petition filed by the assessee for condonation of delay and from the reasons

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given by the assessee for not filing appeal within time under the Act, we find that the delay is mainly on account of two reasons i.e. (i) the company was undergoing Corporate Insolvency Resolution Process and the National Company Law Tribunal (in short "NCLT ") has appointed IRP on 13.12.2019. In the meantime, there was nobody to take care of day to day affairs of the company and further, the IRP after assuming charge on 13.12.2019 has undertaken steps to understand day to day affairs of the company and in the meantime, nationwide lock down has been imposed on account of outbreak of Covid-19 pandemic. Therefore, the assessee could not file within time allowed under the Act. Further, out of delay of 662 days, more than 600 days delay is covered under Covid-19 pandemic and which needs to be excluded for computing limitation in view of judgment of the Hon'ble Supreme Court in Miscellaneous Petition No.21 of 2022 in ***Suo Motu*** Writ Petition (C) No.3 of 2020. If, the period of delay covered within the period specified in the order of the Apex Court, then same needs to be condoned in view of specific problem faced by the public on account of Covid-19 pandemic. If you exclude Covid-19 pandemic period, remaining delay is nominal and which is on account of difficulty faced by the assessee on account of IRP proceedings initiated by lenders and creditors. Therefore, considering the reasons given by the assessee for not filing appeal within the time, we are of the considered view that there is a valid reason for condoning the delay in filing of the appeals for both the assessment years

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and thus, we condone the delay and admit the appeals filed by the assessee for both the assessment years.

4. The brief facts extracted from assessment order for the AY 2015-16 are that the assessee is engaged in the business of manufacturing, supply erection, commissioning, operations and maintenance services of Wind Energy Generators, filed its return of income for the AY 2015-16 on 27.11.2015 declaring total income of Rs.'NIL'. The assessment has been completed u/s.143(3) of the Act, on 29.12.2017 and determined total income of Rs.31,85,61,801/- by making various additions like disallowance of additional depreciation, disallowance of license fee to be considered as capital in nature, disallowance of expenditure incurred for scientific research u/s.35(1)(iv) of the Act, disallowance of CSR expenditure, disallowance of expenditure incurred for in-house R & D u/s.35(2AB) of the Act, and also disallowance u/s.14A of the Act. The assessee carried the matter in appeals before the First Appellate Authority and the Ld.CIT(A) for the reasons stated in their appellate order dated 16.12.2019 partly allowed the appeals filed by the assessee, where he has sustained additions made towards disallowance of excess depreciation, disallowance of license fee u/s.37(1) of the Act, disallowance of scientific research expenditure u/s.35(1)(iv) of the Act, disallowance of weighted deduction towards in-house R & D expenditure u/s.35(2AB) of the Act. Aggrieved by the order of the Ld.CIT(A), the assessee is in appeals before us.

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5. The first issue that came up for our consideration from Ground No.2 of the assessee's appeal is disallowance of depreciation u/s.32(1)(iia) of the Act. The AO has disallowed additional depreciation on Plant & Machinery amounting to Rs.69,81,108/- on the ground that the assessee could not furnish necessary invoices pertains to earlier years to prove acquisition of fixed assets and kept under work-in-progress account.

5.1 We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. The Ld.Counsel for the assessee submitted that the assessee has purchased Plant & Machinery in the earlier Financial Year and kept in work-in-progress account pending capitalization. Further, the assessee has capitalized work-in-progress account to Plant & Machinery a/c and claimed depreciation for the year under consideration. The assessee could not furnish necessary evidences before the AO, because, the company was undergoing Corporate Insolvency Resolution Process proceedings and nobody is there to take care of day to day affairs of the company. We find that the assessee was undergoing Corporate Insolvency Resolution Process before the NCLT and once, the insolvency proceedings have been initiated, the management of the company is suspended till IRP appointed by the NCLT. In this case, the NCLT appointed IRP on 13.12.2019 only. From the above, it is very clear that the assessee could not produce necessary evidences before the AO to justify the claim of additional depreciation on Plant & Machinery. Therefore, we are of the considered view that the issue needs to be set aside to the

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file of the AO and thus, we remit the matter back to the file of the AO and direct the AO to re-examine the claim of the assessee in accordance with law.

6. The next issue that came up for our consideration from Ground Nos.3 & 4 of the assessee's appeal is disallowance of license fee u/s.37(1) of the Act, amounting to Rs.5,86,50,030/-. The AO had disallowed the license fee paid to M/s.Wind-direct GMBH on the ground that the said payment is in the nature of capital expenditure which gives enduring benefit to the assessee. The AO further noted that the assessee could not justify payment of license fee to its parent company with necessary evidences, including the nature of services or technology received from its parent company.

6.1 We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. We find that an identical issue had been considered by the Tribunal in the assessee's own case for the AY 2012-13 in ITA No.685/Chny/2017, where the issue has been examined in light of agreement between the parties and held that expenditure incurred in the form of license fee paid to its parent company is clearly Revenue in nature and allowable u/s.37(1) of the Act. The relevant findings of the tribunal are as under:

18. We heard the rival submissions and perused the material on record. License fee were paid to the licensors towards use of technical knowhow for manufacturing wind energy generators. From the perusal of clauses of the technical collaboration agreement entered by the appellant and M/s.Vensys AG, Germany and Wind Direct GmbH, Germany, it is clear that appellant was granted non-exclusive nor transferable right to use the technical knowhow for the period of twenty years and the appellant cannot use the technical knowhow in event of termination of the agreement or on the expiry of period of twenty years. In the background of this fact, we need to decide the issue whether the expenditure of license fee is capital

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or revenue in nature. Fundamental test to determine whether the technical know-how has been licensed or assigned is to see whether licensor had retained any rights in the technical know-how. If the rights are retained by the licensor then it is a case of assignment. Therefore, license is nothing but right to use the technical know-how which can be revoked any time. Recently, Hon'ble Delhi High Court in the case of Hilton Roulunds Ltd. vs. CIT, 412 ITR 436, after analyzing the decisions of Hon'ble Supreme Court in the cases of CIT vs. CIBA of India Ltd, 69 ITR 692, Empire Jute Co. Ltd vs. CIT, 124 ITR 1 and Alembic Chemical Works Ltd vs. CIT, 177 ITR 377 had held that license is only mere right to use the technical knowhow or trade mark. From the perusal of the license agreement, it is clear that appellant is conferred only right to use technical knowhow. The ownership always lies with licensor and the assessee had already set up the business. The technical knowhow is not used for the purpose of setting up the plant for manufacturer of wind energy generator. The technical knowhow is used in manufacturing of wind energy generator and therefore the ratio laid down by the Hon'ble Supreme High Court in the case of Jonas Woodhead and Sons (India) Ltd (supra) is clearly not applicable. As regards to the decision of Hon'ble Jurisdictional High Court in the case of Southern Switch Gear Ltd (supra) is not applicable since the assessee is not entitled to use the technical know-how made available in pursuance to the agreement after termination of the agreement and after expiry of period of twenty years. The ratio laid down by the Hon'ble Supreme Court in the case of CIT vs. I.A.E.C (Pumps) Ltd, 232 ITR 316, where the Hon'ble Supreme Court had concurred with the view taken by the Hon'ble High Court, where the features of the agreement clearly establishes that it is only license to use the technical knowhow was a revenue expenditure is clearly applicable. In the present case also as mentioned by us (supra) features of the agreement clearly establishes that it is only a license to use the technical knowhow for the purpose of manufacturing wind energy generators. Therefore, we hold that the expenditure incurred in the form of license fees is clearly revenue in nature and accordingly we direct the Id. Assessing Officer to allow the same as deduction. Ground No.10 of the assessee is allowed.

6.2 In this view of the matter and consistent with view taken by the co-ordinate Bench in the assessee's own case for earlier assessment years, we direct the AO to delete additions made towards license fee paid to M/s.Wind-direct GMBH.

7. The next issue that came up for our consideration from Ground No.5 of the assessee's appeal is disallowance of claim made u/s.35(1)(iv) of the Act, amounting to Rs.25,17,37,269/-. The assessee has claimed deduction u/s.35(1)(iv) of the Act, towards capital expenditure incurred for R & D Facilities. The AO had disallowed expenditure incurred for R & D on the

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ground that the assessee could not file any supporting evidences to substantiate the claim.

7.1 We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. The Ld.Counsel for the assessee submitted that the assessee was undergoing the process of CIRP under the Insolvency and Bankruptcy Code and hence, could not furnish relevant evidences to justify the claim of the assessee. Therefore, one more opportunity of hearing may be given to the assessee to explain its case. The Ld.DR, on the other hand, fairly agreed that the issue may be set aside to the file of the AO. Having heard both the sides and considering the materials available on record, we find that the assessee could not file necessary evidences to justify expenditure incurred for R & D purpose and thus, to give one more opportunity of hearing to the assessee, we set aside the issue to the file of the AO and direct the AO to re-examine the claim of the assessee and decide the issue in accordance with law.

8. The next issue that came up for our consideration from Ground Nos.6 & 7 of the assessee's appeal is disallowance of deduction claimed u/s.35(2AB) of the Act. The assessee has made a claim for deduction u/s.35(2AB) of the Act, of Rs.3,22,69,330/-, whereas, the competent authority has certified the expenditure in Form 3CL, amounting to Rs.3,14,02,000/- only. Therefore, the AO has disallowed balance amount of Rs.9,98,657/- u/s.37(1) of the Act, and added back to the total income of the assessee.

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8.1 We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. The Ld.Counsel for the assessee submitted that if expenditure is not allowed u/s.35(2AB) of the Act, for want of certification from competent authority, then, the same can be allowed as expenditure incurred wholly and exclusively for the purpose of business as per Sec.37(1) of the Act or u/s.35(1)(iv) of the Act, in respect of capital expenditure. We find that the issue of deduction claimed u/s.35(1)(iv) of the Act, has been set aside to the file of the AO for want of verification and thus, we are of the considered view that since this issue is also consequential to the issue of deduction claimed u/s.35(1)(iv) of the Act, we deem it appropriate to set aside the issue to the file of the AO and thus, we set aside the issue to the file of the and direct the AO to re-examine the claim of the assessee in accordance with law.

9. In the result, appeal filed by the assessee in ITA No.571/Chny/2021 for the AY 2015-16 is allowed for statistical purposes.

ITA No.572/Chny/2021 for the AY 2016-17:

10. The first issue that came up for our consideration from Ground No.2 of the assessee's appeal is disallowance of operational and other expenses u/s.37(1) of the Act. The AO had pointed out various discrepancies in operational and other expenses and accordingly, had disallowed the operational and other expenses, amounting to Rs.47,80,20,000/-, being the difference of total expenditure incurred under the head 'operational and other expenses' for the FYs 2014-15 & 2015-16. It was the arguments of

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the assessee before us that expenditure incurred for earlier Financial Year, cannot be the yardstick to compare the expenditure allowable for the current Financial Year. Further, the assessee was under the CIRP proceedings under the Insolvency and Bankruptcy Code and hence, could not file necessary justification for increase in expenditure.

11. We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. Admittedly, the assessee could not justify sudden increase in operational and other expenses when compared to previous Financial Year. No doubt, expenditure incurred for previous Financial Year cannot be yardstick to allow expenditure incurred for the current Financial Year. But, facts remain that it is for the assessee to explain with necessary evidences the reasons for increase in expenditure to the satisfaction of the AO. In this case, the assessee claims that it could not file necessary evidences to justify increase in expenditure due to CIRP proceedings under the Insolvency and Bankruptcy Code. We find that although, the assessee could not furnish necessary evidences in support of operational and other expenses, but the AO has disallowed said expenses by comparing expenditure incurred for previous Financial Year, though he cannot disallow expenditure on the basis of expenditure incurred for earlier Financial Year. Therefore, we are of the considered view that the issue needs to go back to the file of the AO and thus, we set aside the issue to the file of the AO and direct the AO to re-examine the claim of the assessee in accordance with law.

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12. The next issue that came up for our consideration from Ground No.3 of the assessee's appeal is disallowance of excess depreciation claimed u/s.32 of the Act. The facts with regard to the impugned dispute are that the assessee is in the business of manufacturing, supply erection and commissioning and also operations and maintenance of Wind Energy Generators. The assessee had claimed higher depreciation of 60% and 80% on Plant & Machinery as per Appendix-I of Rule 5 of the Income Tax Rules, 1962, in Sl.No.Part A, III 8(xiii) Clause (L), which is applicable to windmills and any specially designed devices which run on windmill and said clause which is applicable to Plant & Machinery used in manufacturing of any of the above items. The AO disallowed excess depreciation on the ground that the assessee is entitled for normal rate of 15% depreciation on Plant & Machinery, but not higher depreciation as claimed by the assessee.

12.1 We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. As per Appendix-I of Rule 5 of the Income Tax Rules, 1962, in Sl.No.Part A, III 8(xiii) Clause (L), the rate of depreciation applicable to Plant & Machinery used in the manufacture of any of items specified in Clause (L) is also eligible for 80% depreciation. In this case, there is no clarity on facts with regard to whether the assessee is entitled for higher depreciation as applicable to manufacture of windmill, Plant & Machinery and its parts or 15% as applicable to general Plant & Machinery, because, the assessee could not justify the claim of higher depreciation with necessary evidences. Therefore, we are of the

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considered view that the issue needs to go back to the file of the AO for further verification. We further noted that the Tribunal in the assessee's own case in ITA No.570/Chny/2021 for the AY 2014-15 has considered an identical issue and remit the issue to the file of the AO for further verification. Therefore, considering the facts and circumstances of the case and also consistent with view taken by the co-ordinate bench of the Tribunal in the assessee's own case for earlier assessment years, we remit the issue back to the file of the AO and direct the AO to re-examine the claim of the assessee in light of depreciation applicable as per Appendix-I of Rule 5 of the Income Tax Rules, 1962, in Sl.No.Part A, III 8(xiii) Clause (L).

13. The next issue that came up for our consideration from Ground No.4 of the assessee's appeal is disallowance of additional depreciation u/s.32(1)(iia) of the Act, amounting to Rs.1,56,63,215/-. We find that an identical issue had been considered by the Tribunal in the assessee's own case for the AY 2015-16 in ITA No.571/Chny/2021. The reasons given by us in the preceding paragraphs shall ***mutatis mutandis*** apply to this appeal, as well. Therefore, for similar reasons, we set aside the issue to the file of the AO and direct the AO to re-examine the issue in accordance with law.

14. The next issue that came up for our consideration from Ground Nos.6 & 7 of the assessee's appeal is disallowance of deduction claimed u/s.35(2AB) of the Act, amounting to Rs.5,43,153/-. We find that an identical issue had been considered by the Tribunal in the assessee's own

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case in ITA No.571/Chny/2021, where the issue has been set aside to the file of the AO for further verification. The reasons given by us in the preceding paragraphs shall **mutatis mutandis** apply to this appeal, as well. Therefore, for similar reasons, we set aside the issue to the file of the AO and direct the AO to re-examine the issue in accordance with law.

15. In the result, appeal filed by the assessee in ITA No.572/Chny/2021 for the AY 2016-17 is allowed for statistical purposes.

16. In the result, appeals filed by the assessee in ITA Nos.571 & 572/Chny/2021 for the AYs 2015-16 & 2016-17 are allowed for statistical purposes.

Order pronounced on the 07th day of December, 2022, in Chennai.

Sd/-
(महावीर सिंह)
(MAHAVIR SINGH)
उपाध्यक्ष /VICE PRESIDENT

Sd/-
(जी. मंजूनाथा)
(G. MANJUNATHA)
लेखा सदस्य/ACCOUNTANT MEMBER

चेन्नई/Chennai,
दिनांक/Dated: 07th December, 2022.
TLN

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