

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G": NEW DELHI**

**BEFORE SHRI NARENDRA KUMAR BILLAIYA, ACCOUNTANT MEMBER
AND
SHRI KUL BHARAT, JUDICIAL MEMBER**

**ITA No. 6564/DEL/2018
[Assessment Year: 2013-14]**

Ujjawala Power Pvt. Ltd., H-23A, 204, Kamal Tower, Vikas Marg, Near Sai Mandir, Laxmi Nagar, New Delkhi-110092 PAN: AABCU2728H	<u>Vs</u>	DCIT, Circle-27(1), New Delhi.
APPELLANT		RESPONDENT
Assessee represented by	Shri Satyen Sethi, CA & Shri A.T. Panda, Adv.	
Department represented by	Ms. Maninder Kaur, Sr. DR	
Date of hearing	05.01.2023	
Date of pronouncement	13.01.2023	

ORDER

PER KUL BHARAT, JM:

This appeal, by the assessee, is directed against the order of the learned Commissioner of Income-tax (Appeals)-9, New Delhi, dated 16.07.2018, pertaining to the assessment year 2013-14. The assessee has raised following grounds of appeal:

“1. That the Learned Commissioner of Income Tax Appeal has erred in law and on facts in upholding a non-speaking assessment order of the learned assessing officer.

2. That the learned commissioner of income tax appeals has erred in facts in assuming that no single piece of evidence was adduced by the AR,

demonstrating that civil construction is indispensable, at assessment proceedings. On the other hand the learned assessing officer was ignorant while deciding the case, as without considering the documents submitted he blindly classified civil construction of Rs. 9,67,06,991/- as building.

3. *That the learned commissioner of Income Tax appeals failed to call any information to verify this assumption. Therefore, no opportunity of being heard was given to the appellant.*

4. *That the learned commissioner of income tax is unjustified in relying upon a nonspeaking and ambiguous order.*

5. *That the order of the learned Commissioner of Income Tax Appeal is against the principles of natural justice.*

6. *That the impugned order is erroneous and perverse as the learned Commissioner of Income Tax Appeals failed to consider the details and submissions made by the assessee company.*

7. *That the appellant craves leave to add, alter, amend or withdraw any or all the grounds of appeal on or before the date of hearing.”*

2. The facts giving rise to the present appeal, in brief, are that in this case the assessee filed its return of income through electronic mode on 27.09.2013 declaring total loss of Rs. 98,05,80,834/-, which was processed u/s 143(1) of the Income-tax Act, 1961, hereinafter referred to as the “Act”. Subsequently, the case was selected for scrutiny and the assessment u/s 143(3) of the Act was framed vide order dated 18.03.2016. The Assessing Officer while framing the assessment, called upon the assessee to provide details of additions to the fixed assets and the reason for claiming depreciation at higher rate i.e. 80%. The assessee submitted the details. However, the Assessing officer recorded that while analyzing details of plant & machinery the assessee had shown civil construction of Rs. 9,67,06,991/-

and claimed depreciation of Rs. 3,86,82,796/- for part of building where rate of depreciation is @ 5% (for half year) where assets has been used less than 180 days with solar plant machinery installed which fall under depreciation claimed @ 80%. Therefore, the Assessing officer was of the view that depreciation of Rs. 48,35,350/- was allowable. Accordingly, he disallowed depreciation of Rs. 3,38,47,446/- and made addition of the same to the income of the assessee.

3. Aggrieved against this, the assessee preferred appeal before the learned CIT(Appeals), who also sustained the addition. Aggrieved against this the assessee is in appeal before this Tribunal.

4. Learned counsel for the assessee reiterated the submissions as made in the brief synopsis. For the sake of clarity, the synopsis of the assessee is reproduced as under:

“BRIEF SYNOPSIS

ISSUE - Disallowance of depreciation on Rs.9,67,06,991/- on solar power generating system.

Factual background

The Appellant is engaged in the business of renewable energy power generation (solar power). During the relevant year, power purchase agreement was signed with "Gujarat Urja Vikas Nigam Ltd.", a State Govt undertaking for setting up 25 megawatt (MW) solar power plant at Kamalpur, Distt Surendranagar. Out of 25MW power plant, the Appellant commissioned 23.06MW solar power plant on 31.3.2013. Certificate dated 3.5.2013 issued by Gujarat Energy Development Agency certifying that

solar power plant was commissioned on 31.3.2013 was submitted vide letter dated 29.2.2016 (page 21 r/w 17-20 of the paper book).

Claim of depreciation

During the relevant year, total addition to the fixed assets was Rs.261.04 Cr., which included land of Rs.9.66 Cr., on which depreciation was not admissible. Excluding Rs.9.66 Cr. Out of total addition, depreciation was claimed on addition of Rs.251.37 Cr. [261.04 - 9.66].

Out of addition of Rs.251.37 Cr., deprecation @40% (less than 180 days) was claimed on renewable energy devices (solar power generating systems) of Rs.243,77,56,207/- (243.77 Cr), which comprised of following (page 12 of the paper book):

<i>(i)</i>	<i>Transmission line</i>	<i>47,47,371</i>
<i>(ii)</i>	<i>Balance of system 9BOS)</i>	<i>14,35,79,104</i>
<i>(iii)</i>	<i>Modules</i>	<i>143,79,99,373</i>
<i>(iv)</i>	<i>Structures</i>	<i>31,93,95,992</i>
<i>(v)</i>	<i>Investers</i>	<i>30,70,10,258</i>
<i>(vi)</i>	<i>Switchyard/Switchgear</i>	<i>14,87,22,161</i>
<i>(vii)</i>	<i>Transformers</i>	<i>7,63,01,948</i>
	<i>TOTAL</i>	<i>243,77,56,207</i>

Letter dated 10.3.2016

In response, to the query raised on 7.3.2016, why depreciation on "structure" be allowed @80%, it was explained that the solar module / panel is mounted. Detailed note on "mounting structure" was placed on record (page 32-36 of the paper book).

Invoice-wise statement of account of "structure" with specimen bills were furnished (page 40-42 of the paper book), which included Rs.9,67,06,991/- being civil, service and pre-operative cost. It comprised of 'civil foundation of Rs.8,28,81,518/-' and 'structure of Rs.1,38,25,473/-'.

Assessment order

By the assessment order, addition of Rs.9,67,06,991/ -, which was part of

addition was treated as "**building**" and depreciation was allowed @10% (5% for half year). As such, depreciation of Rs.3,38,47,446/- was disallowed.

Appellate proceedings before CIT(A)

Before the CIT(A), vide submissions dated 12.1.2018 and 27.3.2018, it was submitted that module cannot be mounted without structure and the structure requires civil foundation. Since without proper installation, solar power generating system cannot function, therefore, structure is integral part of solar power generating system (page 69-70 & 79 of the paper book).

Order of CIT(A)

The CIT(A) rejected the stand of the Appellant observing that (page 5 of the order):

"...it is not ascertainable whether the AO has examined the crucial facts as claimed by the appellant that this civil structures are integral part of the solar plant. The whole edifice of argument advanced by the AR of the appellant hinges on the basic premises that civil structures are the very foundational requirement to mount the solar plant for making them operational. However, there is no single piece of evidence adduced by the AR of the appellant either at assessment proceedings stage or at the appellant proceedings to this effect demonstrating clearly that those civil structures are literally indispensable for the erection and implementation of solar plant".

Submissions

Issue: rate of depreciation on Rs.9,67,06,991/-

1. *Since depreciation on civil, service and pre-operative cost of Rs.9,67,06,991/- was allowed @10% treating the same as building, therefore, the limited issue is the rate at which depreciation on Rs.9,67,06,991/- is admissible i.e. whether it is admissible @ 10% or 80%.*

Evidence to prove that civil structure is part of solar power generating system was furnished

2. *CIT(A) is not correct in holding that the Appellant did not furnish*

any evidence to demonstrate that civil structure was integral part of solar power generating system.

2.1 Under the cover of letter dated 10.3.2016, detailed note on "mounting structure" was filed (page 32-36 of the paper book), which included system component list and installation guidelines. From the detailed note, it is evident that:

(i) Anchor bolts are casted along with Civil Pile Cap to ensure proper alignment (para 2.1)

(ii) Structure installation work starts with fixing Column post with Base plates to the anchor bolts (para 2.2.1)

(iii) Rafter connection (channel section) is fastened to the Column post in X & Y direction (para 2.2.2)

(iv) Small and Long Bracing post is connected both to the Column post and the Rafter (para 2.2.3)

(v) Angle of all Rafters are aligned using Inclinator (para 2.2.4)

(vi) Purlins (Channel sections C shaped) are mounted on Rafters (para 2.2.5)

(vii) Purlins (North - South direction) used for module mounting are mounted on East - West Purlins (para 2.2.6).

(viii) Solar modules are mounted /installed (para 2.3 to 2.3.3)

2.2 The starting point of mounting of solar module is civil pile cap / civil work in which anchor bolts are casted. Without civil work, solar module cannot be mounted and generation of power is not possible without mounting, for the module by itself cannot generate power. Hence, civil work is integral part of solar power energy systems.

2.3 The note on installation method, layout and how the module is

mounted was comprehensive enough to prove that structure installation is fundamental to the functioning of solar power generating systems. From the diagram at page 37 of paper book, it is clear that without civil and other structure, generation of solar power is not possible. Admittedly, solar power was generated and the same was not possible without proper installation, for which civil work was must.

The Assessing Officer did not consider the submissions dated 10.3.2016

3. *The Assessing Officer in allowing depreciation on Rs.9,67,06,991/- @10% did not consider the submissions dated 10.3.2016, whereby, note on "mounting structure" was filed.*

Significance of the word "systems"

4. *That depreciation @ 80 % is admissible on 'renewable energy devises', which includes "solar power generating systems". The word "systems" is of significance, for it brings in everything to form a complete whole - a system of solar power generation. It would encompass complete infrastructure for generation of solar power - all aspects that go into to generate solar power.*

Akin cases

5. *In CIT vs K.K. Enterprises [2014] 227 Taxman (Mag) 181, Hon'ble Rajasthan High Court considering similar issue in the context of windmill referring judgment of Hon'ble Gujarat High Court in CIT v. Parry Engg. and Electronics (P.) Ltd. Tax Appeal No.604/2012 has made following observations:*

In the case aforesaid Hon'ble Gujarat High Court held that "Windmill would require a scientifically designed machinery in order to harness the wind energy to the maximum potential. Such device has to be fitted and mounted on a civil construction, equipped with electric fittings in order to transmit the electricity so generated. Such civil structure and electric fittings, therefore, it can be well imagined, would be highly specialized. Thus, such civil construction and electric fittings would have no use other than for the purpose of functioning of the windmill. On the other hand, it can be easily imagined that windmill cannot function without appropriate installation and electrification. In other words, the installation of windmill and the civil structure and the

electric fittings are so closely interconnected and linked as to form the common plant. As already noted, the legislature has provided for higher rate of depreciation of 80 % on renewable energy devices including windmill and any specially designed device, which runs on windmill. The civil structure and the electric fitting, equipments are part and parcel of the windmill and cannot be separated from the same. The assessee's claim for higher depreciation on such investment was, therefore, rightly allowed."

5.1 *In CIT v. Mehru Electricals & Mechanical Engineers (P) Ltd. [2016] 388 ITR 169, Hon'ble Rajasthan High Court has again reiterated that rate of depreciation on civil work would be same as admissible to a windmill.*

5.2 *In Dy. CIT v. Anik Industries Ltd. (ITA-993/M/2016 dated 27.6.2018), though depreciation @80% was allowed on the boiler - energy saving device, however, depreciation on civil work, ancillary equipments and cost of installation was allowed @15% treating the same as plant & machinery. In first appeal, the CIT(A) decided the issue in favour of the assessee. On appeal by the Revenue, ITAT upheld the order of the CIT(A) observing that additional plant & machinery had no separate existence and could not be utilized for any other purpose and formed integral component of the boiler.*

6. *That the ratio of judgments rendered in the context of generation of power by "windmills" are equally applicable to solar power generating systems. Just as windmills cannot generate power without proper installation including civil work, similarly, solar modules cannot generate power, without the civil work. Therefore, civil, service and preoperative cost of Rs.9,67,06,991/- is integral part of solar power generating systems and hence, depreciation @40% was admissible on Rs.9,67,06,991/-.*

5. Thus, the learned counsel for the assessee relied upon the judgment rendered in the case of CIT v K.K. Enterprises (2014) 227 Taxman (Mag) 181 (Raj). He further relied on the judgment of the Hon'ble Rajasthan high Court in the case of CIT v. Mehru Electricals & Mechanical Engineers (P) ltd. 92016) 388 ITR 169 (Raj.); decision of the Coordinate Bench rendered in the case of DCIT v. Anik Industries Ltd. [ITA

993/Mum/2016 dated 27.06.2018] and the judgment of the Hon'ble Supreme Court in the case of CIT v. Karnataka Poner Corp. (2001) 247 ITR 268 (SC). The learned counsel contended that the authorities below grossly erred in disallowing the claim of he assessee. He contended that assessee has installed solar power generating system. He contended that the authorities below grossly erred in treating the structure as a building instead of plant and machinery. He contended that issue is squarely covered in favour of the assessee by various judicial pronouncements.

6. On the other hand, learned Departmental Representative (DR) opposed these submissions. He contended that the assessee failed to prove with specifications regarding its claim for treating building as plant and machinery. He heavily relied on the orders of authorities below.

7. We have heard rival contentions and perused the material available on record. We find that the learned CIT(Appels) confirmed the view of the assessing authority by observing as under:

“5.2 I have carefully considered the facts of the case, submission of the appellant and gone through the judicial precedents relied on in the submission by the appellant. It is noticed that the AO has considered the civil structure as an asset falling in the bracket of buildings qualifying for depreciation @10% of WDV, whereas the AR of the appellant has contended that civil structure is integral part of the plant in the sense the said civil structure are of no use and will not serve any purpose if not integrated with those solar plant.

5.3 From the impugned assessment order, it is not ascertainable whether

the AO has examined the crucial facts as claimed by the appellant that this civil structures are integral part of the solar plant. The whole edifice of argument advanced by the AR of the appellant hinges on the basic premises that civil structures are the very foundational requirement to mount the solar plant for making them operational. However, there is no single piece of evidence adduced by the AR of the appellant either at assessment proceedings stage or at the appellate proceedings to this effect demonstrating clearly that those civil structures are literally indispensable for the erection and implementation of solar plant. It is not the case of the AR that any qualified technical advisory has been submitted at the stage of assessment or appeal that could demonstrate the inevitability of those civil structures as integral part of the solar plant. Besides, it is also not ascertainable whether whole of the civil constructions are part of those plants or there are other purposes being fulfilled by those civil structures.

5.3 So far judicial precedents are concerned, as the appellant has not been able to prove the integral character of civil structures for existence plant, the judicial precedent are not applicable in its case.

5.4 Therefore in absence of basic evidences demonstrating the integrality of civil structures for existence of those solar plants, I am not inclined to accept the contention that those civil structures are assets in the category of 'plants' and qualify for a higher depreciation rate @80%.

Resultantly, I do uphold the views taken by the AO and hence the disallowance made of Rs. 33847446/- is confirmed. The appellant fails in these grounds of appeal.

Ground no. 4 is directed against the initiation of penalty proceedings u/s 271(1)(c) of the Act. Since the initiation of penalty proceeding is premature and beyond the purview of appeal u/s 246A of the Act, the same is dismissed."

8. The learned CIT(Appeals) rejected the claim of the assessee for higher depreciation on the basis that the assessee could not produce the basic evidence demonstrating the integrality of civil structure for existence of these civil structure. It was

contended before us that the issue is covered in favour of the assessee by the judgment of the Hon'ble Rajasthan High Court in the case of CIT Vs. K.K. Enterprises [2014] 227 Taxman and also in the case of CIT Vs. Mehru Electricals & Mechanical Engineers Pvt. Ltd. (2016) 388 ITR 169 (Raj.). The Hon'ble High Court of Rajasthan in the case of CIT vs. Mehru Electricals & Mechanical Engineers Pvt. Ltd. (supra) held as under:

“The first issue is regarding depreciation claimed on civil foundation as well as on electric turbine generator for the wind mill. The Commissioner has made a reference to the judgment of the Madras High Court in the case of Hi Tech Arai Ltd. (supra) so as the order passed by the Tribunal at Delhi. The observations are however that the Department has not accepted the verdict of the High Court, though the judgment of the Madras High Court in the case of Hi Tech Arai Ltd. (supra) has been affirmed by the Apex court. In view of the above, learned counsel for the Revenue could not contest the issue in regard to the admissibility of depreciation. The issue before the Madras High Court was again of a wind mill where depreciation on power generation was claimed. It was found that main business of the assessee was not of producing or generating electricity and thus, the Madras High Court decided the issue in favour of the assessee and against the Revenue. The issue having been confirmed by the apex court on dismissal of appeal, we are unable to take a different view as has been taken by the Madras High Court and has to be applied herein also.

The other issue is regarding the rate of depreciation.

According to the Revenue, rate of depreciation claimed by the assessee should not have been allowed. The issue aforesaid has not been decided by the Tribunal properly.

We find that when the civil work and electric generator are taken to be a part of the wind mill, rate as is applicable for the depreciation for the wind mill would apply to the present case also.

In the background aforesaid, we do not find that even a dispute can be raised regarding the rate of depreciation admissible to the assessee. In our opinion, the Tribunal has rightly allowed the appeal. Finding no illegality therein, we are unable to cause interference in the order passed by the Tribunal.”

9. In the light of the binding precedents rendered in the case of CIT Vs. Mehru Electricals & Mechanical Engineers Pvt. Ltd. (supra), we are of the considered view that the authorities below are not justified in declining the claim of the assessee regarding higher depreciation. We, therefore, direct the Assessing Officer to allow the claim of depreciation and delete the impugned disallowance. The grounds of appeal are allowed.

10. Appeal of the assessee is allowed.

Order pronounced in open court during the course of hearing on 13th January, 2023.

Sd/-
(NARENDRA KUMAR BILLAIYA)
ACCOUNTANT MEMBER

MP

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-
(KUL BHARAT)
JUDICIAL MEMBER

ASSISTANT REGISTRAR
ITAT, NEW DELHI