

**IN THE INCOME TAX APPELLATE TRIBUNAL  
AMRITSAR BENCH, AMRITSAR.**

**BEFORE DR. M. L. MEENA, ACCOUNTANT MEMBER  
AND SH. ANIKESH BANERJEE, JUDICIAL MEMBER**

**I.T.A. Nos.405&406/Asr/2019  
Assessment Year: 2014-15**

Dy. Commissioner of Income Tax, Circle-3, Ferozpur.  <b>(Appellant)</b>	Vs.	M/s Sukhbir Agro Energy Ltd. Guruharsahai, Distt. Ferozpur. [PAN:AAECS2724A] <b>(Respondent)</b>
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<b>Appellant by</b>	Sh. Rahul Dhawan, CIT. DR
<b>Respondent by</b>	None (Written Submission)

<b>Date of Hearing</b>	23.05.2023
<b>Date of Pronouncement</b>	30.05.2023

**ORDER**

**Per:Anikesh Banerjee, J.M.:**

Both the appeals of the revenue are filed against the order of the Id. Commissioner of Income Tax (Appeals) Bathinda,[in brevity the ‘CIT (A)’] order passed u/s 250(6) of the Income Tax Act 1961[in brevity the ‘Act’], for A.Y. 2014-15. Both the appeals are emanated from the order of assessing officer [in brevity the AO], passed u/s 143(3) and section 154 of the Act.

2. At the outset both the appeals are related to common factual ground and have a similar issue. We heard together and disposed of together for the sake of convenience. The ITA 405/Asr/2019 is taken as lead case.

3. The revenue has taken the following grounds:

*“(i) The CIT(A) erred in holding the return filed by the assessee on 27.05.2016 in response to notice u/s 139(9) as valid return without appreciating that the return was declared as invalid by the AO, CPC.*

*(ii) The CIT(A) failed to appreciate that time limitation for filing of revised return of income u/s 139(5) of the Act expired on 31.03.2016 and hence the return filed on 27.05.2016 by the assessee could not be held as valid return.*

*(iii) The CIT(A) failed to appreciate that the provisions of Section 139(9) of the Act afforded an opportunity to the assessee to rectify specific defect in the return of income but not to file a revised return of income with some additional claim of deduction.*

*(iv) The CIT(A) failed to appreciate that the assessee could not travel outside provisions of Section 139(9) and clause (a) to (f) of the Explanation to said provision and substitute the return originally filed.*

*(v) The CIT(A) erred in admitting appeal of the assessee in violation of provisions of Section 249(4) of the Act without*

*appreciating that the assessee failed to pay the tax due on the income returned by it at the time of filing of appeal.*

*(vi) The CIT(A) erred in holding that once the AO had raised no objection in respect of claim of depreciation, the claim of additional depreciation was automatic and merely a matter of calculation without appreciating that 2nd proviso of Section 32(l)(iia) of the Act prescribed various conditions to be fulfilled by the assessee for claim of additional depreciation u/s 32(l)(iia) of the Act.*

*(vii) The CIT(A) erred in holding that Explanation 5 to Section 32(l)(ii) of the Act was applicable to clause (iia) of Section 32(1) of the Act without appreciating that clause (iia) was inserted w.e.f. 01.04.2006 below Explanation 5 to Section 32(l)(ii) of the Act and Explanation was not applicable to clause (iia) of Section 32(1) of the Act.*

*(viii) The CIT(A) erred in ignoring the fact that additional depreciation u/s 32(l)(iia) of the Act was neither claimed by the assessee in the return of income nor during assessment proceedings and hence the conditions prescribed in 2nd proviso of Section 32(l)(iia) of the Act were never subjected to any verification.”*

4. When the appeal was called for hearing, none was present on behalf of the assessee. The assessee placed the written submission and requested for

adjudication on the basis of the written submission. We proceed to dispose the appeal after hearing the ld. DR and on the basis of material available on the record

5. Tersely, we advert the fact of the case that the assessee filed return u/s 139(1). The return was processed and considered as defective by the CPC. The notice was issued u/s 139(9) to assessee on dated 20.04.2015. The assessee filed return u/s 139(9) on dated 27.05.2016 and claimed the additional depreciation, which was not calculated in the original return, filed U/s 139(1). The assessment was completed u/s 143(3) on dated 27.05.2016. The assessee claimed that before completion of the assessment the claim was made for the additional depreciation before the assessing authority. The ld. AO had not allowed the relief of additional depreciation u/s 32(1) in assessment order, passed U/s 143(3) of the Act. The assessee considered it as mistake apparent from the record during passing the assessment order. Considering this, the assessee filed a rectification petition u/s 154 on 16.06.2016 with a claim of additional depreciation U/s 32(1) of the Act. The ld.AO disallowed the assessee's claim and rejected the rectification petition, filed U/s 154 of the Act. Being aggrieved assessee filed an appeal before the ld. CIT(A) by challenging the orders of the ld. assessing authority, passed u/s 143(3) and section 154 of the Act. The ld. CIT(A) considered the assessee's appeal and

allowed the depreciation after a due verification completed from the Id. AO. The grievance of the revenue is that the assessee is not eligible for additional depreciation u/s 32(1) due to improper claim without verification. Aggrieved revenue filed an appeal before us.

6. The Id. CIT-DR Mr. Rahul Dhawan (here in after called DR) vehemently argued and has invited our attention in the ground of appeal no (v) and placed that the appeal order itself caused nullity due to non-payment of admitted tax which is contravening section 249(4) of the Act. The Id. DR explained section 249(4) which is extracted as below:

*“249 (4) No appeal<sup>32</sup> under this Chapter shall be admitted unless at the time of filing of the appeal, —*

*(a) where a return has been filed by the assessee, the assessee has paid the tax due on the income returned by him; or*

*(b) where no return has been filed by the assessee, the assessee has paid an amount equal to the amount of advance tax which was payable by him.”*

6.1 Mr. Dhawan further argued that in the written submission of the assessee the ground of the revenue is not rebutted, related non-payment of admitted tax. Violation of section 249(4), both the appeals are not maintainable.

7. We heard the submission of the ld. DR and considered the documents available in the record. The particular legal issue was taken by the ld. DR in both the grounds of appeal filed before us. Without payment of the due tax during filing of return, the appeal before the ld. CIT(A) is caused the violation of section 249(4) and the appeal order U/s 250 is caused nullity which will be not maintainable before the bench. The Tribunal is without jurisdiction if the first appeal is not maintainable on account of non-payment of admitted tax. In terms of section 249(4)(a) of the Act, appeal against such order of the CIT(A) is not maintainable before the Tribunal. The orders against which appeals are maintainable before the Tribunal U/s 253 include an order passed under section 250 of the Act which is an order in appeal passed by the CIT(A) on merits after entertaining the appeal. However, no appeal is provided against order of the CIT(A) declining to entertain appeal as defective or one not maintainable on account of non-payment of tax during filing of return. The assessee had never explained this issue or not made any objections related to this ground of revenue in the written submission. In our considered view, the issue related claim of section 32(1)(ia) for additional depreciation is entirely factual issue. But the appeal order itself caused not maintainable for violation of section 249(4) for non-payment of the admitted tax.

So, the other grounds are kept open before the Id. CIT(A). We remit back the matter to the Id. CIT(A) for adjudication the issue in relation to contravening of section 249(4) of the Act. In the result, the appeal **ITA No. 405/Asr/2019** is allowed for statistical purposes. The **ITA No. 406/Asr/2019** is mutatis mutandis applicable to **ITA No. 405/Asr/2019** and follows accordingly.

8. In the result, the appeal of the revenue bearing **ITA Nos. 405/Asr/2019&406/Asr/2019** are allowed for statistical purposes.

**Order pronounced in the open court on 30.05.2023**

Sd/-

**(Dr. M. L. Meena)**  
**Accountant Member**

Sd/-

**(ANIKESH BANERJEE)**  
**Judicial Member**

AKV

Copy of the order forwarded to:

- (1)The Appellant
- (2) The Respondent
- (3) The CIT
- (4) The CIT (Appeals)
- (5) The DR, I.T.A.T.

True Copy  
By order