

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI “H” BENCH: NEW DELHI**

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER &  
SHRI M.BALAGANESH, ACCOUNTANT MEMBER**

**ITA No.1409/Del/2021**

**[Assessment Year : 2015-16]**

|  |                         |                                      |
|--|-------------------------|--------------------------------------|
| Viney Corporation Ltd.,<br>E-872, 1 <sup>st</sup> Floor, Saraswati Vihar,<br>Pitampura, New Delhi-110034.<br><b>PAN-AAACV0446L</b> | vs                      | ACIT,<br>Circle-26(2),<br>New Delhi. |
| <b>APPELLANT</b>   |                         | <b>RESPONDENT</b>                    |
| <b>Appellant by</b>  | Shri R.K.Kapoor, CA     |                                      |
| <b>Respondent by</b>   | Ms. Swati Joshi, CIT DR |                                      |
| <b>Date of Hearing</b>   | 30.05.2023              |                                      |
| <b>Date of Pronouncement</b>   | 21.07.2023              |                                      |

**ORDER**

**PER KUL BHARAT, JM :**

The present appeal filed by the assessee for the assessment year 2015-16 is directed against the assessment order passed u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (“the Act”) dated 31.10.2019. The assessee has raised following grounds of appeal:-

1. *“That the Assessment order passed by Ld. AO under the direction of Hon'ble DRP is bad in Law.*
2. *The Ld Assessing Officer (AO) has grossly erred in law and in facts and circumstances of the assessee's case in making additions amounting to Rs. 3,55,95,528/- to the returned income of the assessee. The additions proposed are wholly illegal, erroneous and untenable in law and on facts of the assessee's case and are prayed to be deleted.*

**Disallowance of depreciation and additional depreciation claimed on Solar Plant in AY 2015-16**

3. *That the Ld. DRP has erred in law and in facts in upholding the additions of Rs. 3,55,95,528/- made to the taxable income of the assessee by the Assessing Officer on erroneous interpretation of law and facts submitted by*

*the Assessee in respect to Solar Power Plant installed at Bikaner & Manesar and depreciation claimed during the year.*

- 3.1. That the Ld. DRP erred in law and in facts and circumstances of the assessee's case for issuing direction that the 50% of normal depreciation @ 80% has to be allowed in AY 2014-15 for both solar plant.*
- 3.2. That the Ld. DRP has failed to appreciate that the Assessee has installed and put to use solar power plant at Bikaner in financial year 2014-15 and is eligible to claim depreciation from AY 2015-16 onwards.*
- 3.3. That the Ld. DRP without any cogent reason directed that solar plant installed at the roof of the office premises for captive consumption is not eligible to claim additional depreciation u/s 32(1)(ia) of Income Tax Act, 1961.*
- 3.4. That the Ld. DRP misdirected himself in upholding the addition in spite of independent verification by him apart the year of put to use of solar power plant. The addition made by AO and upheld by Ld. DRP is prayed to be deleted.*
- 3.5. That without prejudice the depreciation on Solar Plant should be fully allowed in A.Y. 2015-16, if the same is not allowed in A. Y. 2014-15 as determined by the Ld.AO after the directions of Hon'ble DRP.*

**Additional claim of foreign exchange fluctuation gain on reinstatement of ECB Loan is not taxable**

- 4. That the Ld. DRP/Ld. AO has grossly erred in law in not reducing the income of the assessee to the extent of foreign exchange gain earned by the assessee on ECB loan taken for acquisition/investment in shares for acquiring an overseas company for business purposes and not following the Rule of consistency in treating the Foreign exchange gain/loss on ECB as capital in nature loan as treated by the Ld. AO in AY 2014-15.*
- 4.1. That the Ld. AO has grossly erred in law in travelling beyond the direction of Hon'ble DRP in adjudicating this issue and not allowing the claim on new grounds i.e claim not allowable as not have been made through a revised return, which is illegal, untenable and bad in law.*
- 4.2. That the learned AO has grossly erred in law and on facts of the appellant's case in not following the rule of consistency and erred in law in not accepting the additional claim of Gain amounting to Rs. 4,65,65,908/-*

*not taxable in the computation of taxable income earned on reinstatement of foreign currency external commercial borrowing taken for acquisition/investment in shares for acquiring an overseas company for business purposes being as revenue nature in previous assessment year as per treatment by same jurisdictional AO in the assessment order of AY 2014-15.*

- 4.3. That the learned AO has failed to give consequential effect to the views in holding in Assessment Years 2014-15 that the gain/loss on reinstatement of ECB loans in foreign exchange is capital nature.*
- 5. That the Ld. AO has erred in law in initiating penalty proceedings w/s 271(1)(c) for alleged concealment of income is on wholly illegal and untenable grounds since there was no concealment of any income or submission of inaccurate particulars of income, nor any default according to law by the assessee.*
- 6. That the aforesaid grounds are without prejudice to the one another raised herein.”*

2. The appeal filed by the assessee is time barred by 21 months. As per the assessee, the appeal was required to be filed on 03.12.2019. However, due to Covid-19 pandemic, the appeal could not be filed on time. Further, it is stated that the assessee was also pursuing remedy u/s 154 of the Act for rectification of the order. Ld.CIT DR opposed these submissions and submitted that there is no reasonable cause for condoning the delay in filing the appeal by the assessee.

2.1. We have heard the rival contentions and perused the material available on record. For the reasons stated in the application and respectfully following the judgement of Hon'ble Supreme Court in ***Suo Motu Writ Petition (Civil) No.3 of 2020 dated 08.03.2021***, we condone the delay in filing the appeal by the assessee.

3. Facts giving rise to the present appeal are that the assessee filed its return of income on 28.11.2015, declaring total income of INR 22,74,13,620/-. The case was selected for limited scrutiny through Computer Aided Scrutiny Selection ("CASS") and notice u/s 143(2) of the Act was issued on 16.03.2016 and served upon the assessee. Thereafter, notices u/s 142(1) alongwith questionnaire was issued and duly served upon the assessee. In response to the statutory notices, Ld. Authorized Representative ("AR") of the assessee attended the proceedings. It is noted by the Assessing Officer ("AO") that during the year under consideration, the assessee is engaged in manufacturing of auto components and entered into domestic transaction with its Associate Enterprise ("AE"). Accordingly, the issue was referred to Transfer Pricing Officer ("TPO"). On the basis of recommendation of TPO, a draft assessment order was passed u/s 143(3)/144C of the Act on 31.12.2018. The assessee filed its objection before Ld. Dispute Resolution Panel ("DRP"). In respect of claim of additional depreciation, Ld.DRP did not accept the prayer of the assessee on the basis that since the solar plant of 160 MW was installed at IMT Manesar, Gurgaon for the captive use of the office. Hence, it was not entitled for additional depreciation. In pursuance of direction of Ld.DRP, the AO passed assessment order dated 31.10.2019. Thereby, he made additions of INR 3,55,95,528/- qua depreciation claimed for installation of Solar Power Plants. Thus, The AO assessee the income at INR 26,30,09,150/-.

4. Aggrieved against this, the assessee preferred appeal before this Tribunal.

5. At the outset, it is submitted by the Ld. Counsel for the assessee that so far Ground Nos.4 to 4.3 are not pressed because no grievance left after the issue has been raised through this ground and decided in favour of the assessee for Assessment Year 2014-15. The Revenue has no objection in this regard. Therefore, **Ground Nos.4 to 4.3** raised by the assessee are dismissed as not pressed.

6. **Ground No.5** raised by the assessee is against the initiation of penalty u/s 271(1)(c) of the Act which is premature hence, dismissed.

7. **Ground No.6** raised by the assessee is general in nature, needs no separate adjudication hence, dismissed.

8. Therefore, the only effective **Ground No.3** raised by the assessee is related to the disallowance of depreciation of INR 3,55,95,528/-. In respect of this addition, Ld. Counsel for the assessee reiterated the submissions as made in the written submissions. For the sake of clarity, the relevant contents of the written submissions are reproduced asunder:-

**2. “Ground No. 3 to 3.2 and 3.5 pertain to the claim of depreciation made by the assessee on two 'Solar Power Plants' installed at two manufacturing units/factories at 'Bikaner' and 'Manesar' respectively. Although the power plants were installed and put to use during the year under consideration, however, the learned DRP while adjudicating on this issue has held that the said 'Solar Power Plants' were installed and put to use on 30.03.2014 and therefore the Assessee is eligible for depreciation in Assessment Year 2014-15 at half of the rates because the solar power plants were used for less than 180 days and balance 50% depreciation is allowable in AY**

2015-16. The learned DRP has discussed this issue at internal pages 18 to 23 of its order. The reasoning given by the learned Assessing Officer for not allowing depreciation at all on these solar power plants has been set aside by the Hon'ble DRP and those facts are undisputed that solar power plants were actually acquired by the assessee and used for its business.

The only grievance which has been raised through these grounds is that whole of the depreciation should be allowed in the present Assessment Year i.e. Assessment Year 2015-16 and the directions given by the learned DRP for allowing part of the depreciation in Assessment Year 2014-15 should be reversed.

Without prejudice to these submissions, it is respectfully submitted that although the learned Assessing officer has determined the depreciation allowable as per the directions of Hon'ble DRP as contained in his order u/s 143(3) read with section 144C dated 31.10.2019 at PB Page No. 67, yet he has not passed order for Assessment Year 2014-15 giving effect to the directions of Hon'ble DRP. Therefore, if Hon'ble Tribunal is of the view that the directions of learned DRP are correct in law, the Assessing Officer should be directed to allow the depreciation in Assessment Year 2014-15 which has been determined by him but not allowed as yet although the assessee has filed necessary rectification application before him and taking up the matter with him from time to time (refer PB Page No. 82 to 88).

3. **Ground No. 3.3** has been raised wherein the learned DRP has misdirected itself in holding that one of the solar power plant was installed in office and additional depreciation u/s 32(1)(iia) of the Income Tax Act is not allowable on this solar power plant.

The facts as also discussed by the learned DRP are that assessee had installed two solar power plants, one of which was installed at Bikaner, Rajasthan, from where electricity generated and sold to

*'Rajasthan State Electricity Board' and second was installed at factory premises of the assessee in IMT Manesar, Gurgaon. The cost of these plants were Rs.6,03,75,057/- and Rs.1,04,00,000/- respectively. As regards the first solar power plant, additional depreciation has been held to be allowable. However, it is in respect of second solar power plant which although admittedly installed in factory premises has been treated to have been installed in the office premises, which according to the learned DRP gets covered in the exception as contained in section 32(1)(iia) of the Income Tax Act.*

*It is respectfully submitted that once it has been accepted that the solar power plant has been installed at the factory premises of the assessee, for which all the evidences were available, the DRP was not justified in treating the factory premises as the office premises. Your honour would appreciate that this solar power plant was of 160 Kilo Watt which was put to use for in-house production at the factory. Factory premises are mostly meant for carrying out the production activities although it does have some office part which is also very much part of the factory functioning.*

*Therefore, it is prayed that it may please be held that the assessee was eligible for additional depreciation on this solar power plant as well as it was installed in the factory premises.”*

7. On the other hand, Ld. CIT DR opposed these submissions and supported the orders of the authorities below.

8. We have heard Ld. Authorized Representatives of the parties and perused the material available on record and gone through the orders of the authorities below. It is the contention of the assessee that the authorities below grossly erred in not allowing the additional depreciation claimed by the assessee. It is stated that the assessee had installed two Solar Power Plants, one at Bikaner

in Rajasthan, from which electricity generated and sold to 'Rajasthan Electricity Board' and another at factory premises in IMT Manesar, Gurgaon. The cost of these Solar Power Plants were INR 6,03,75,057/- and INR 1,04,00,000/- respectively. So far, the Solar Power Plant installed at Bikaner, Rajasthan, the depreciation has been held to be allowed. However, in respect of other solar Power Plant, the depreciation is declined on the basis that the same has been installed in the office premises. It is the contention that the lower authorities were not justified in treating the 'factory premises' as the 'office premises'. The authorities below failed to appreciate the fact that the Solar Power Plant was 160 Kilo Watt capacity which is put to use for in house production at the factory. Therefore, it was prayed that it may be held that the assessee is eligible for additional depreciation on the Solar Power Plant as well. The assessee had raised an objection before Ld.DRP. For the sake of clarity, the findings of Ld.DRP are reproduced as under:-

*12.7. "The AO has also disallowed the depreciation on Solar plant installed at Manesar, Gurgaon for captive consumption. It is submitted by the assessee that no specific enquiry was made in respect of this plant during the assessment proceedings. VAT invoice, service invoice & a certificate from the authorized signatory of M/s Rays Power Experts Pvt. Ltd. was provided during the present proceedings on 14.05.2019, in regard to the 160 KW solar power plant installed at roof of the factory premises of the assessee situated at plot no. 42, Sector 3, IMT Manesar, Gurgaon for in-house consumption of power.*

*12.8 In view of the above facts, we are of the view that sufficient evidences are available on record in the form of documents related to acquisition of land, purchase of solar power plants, installation and*

*commissioning certificate, confirming the installation and commissioning of these solar power plants during the FY 2013-14.*

*12.9 However, it is found that the assessee has capitalized these two Solar Plant, i.e (i) 1 MW Grid interactive Solar Photovoltaic Power Project commissioned at Bikaner, Rajasthan for a value of Rs. 6,03,75,057/- and (ii) at Manesar office premise for a value of Rs. 1,04,00,000/- in its books of account in AY 2015-16 and claimed depreciation @ 80% alongwith additional depreciation 20% during the relevant assessment year instead of AY 2014-15 in which these plants were purchased, installed, commissioned and used for the purpose of the business of the assessee.*

*12.10 All the evidences on record establishes that these two solar plants were installed and commissioned and put to the use of business in the FY 2013-14 relevant to AY 2014-15.*

*12.11 In this regard, provision of Section 32 of the Act is relevant to see which reads as under:*

*32. (1) In respect of depreciation of-*

*(i) buildings, machinery, plant or furniture, being tangible assets;*

*(ii) know-how, patents, copyrights, trade marks, licenses, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998, owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed-*

*(i) in the case of assets of an undertaking engaged in generation or generation and distribution of power, such percentage on the actual cost thereof to the assessee as may be prescribed.*

(ii) *in the case of any block of assets, such percentage on the written down value thereof as may be prescribed*

12.12 *As per the provision of section 32(1) of the Act, the assessee can claim depreciation on the assets owned and used for the business of the assessee. It is evident beyond doubt the assessee had owned the assets as solar power plant and used for the business purposes in the AY 2014-15 only.*

12.13 *It is further provided as first proviso to section 32(1) of the Act as under:*

*"Provided further that where an asset referred to in clause (1) or clause (ii) or clause (ia) for the first proviso to clause (iia)], as the case may be, is acquired by the assessee during the previous year and is put to use for the purposes of business or profession for a period of less than one hundred and eighty days in that previous year, the deduction under this sub-section in respect of such asset shall be restricted to fifty per cent of the amount calculated at the percentage prescribed for an asset under clause (i) or clause (ii) or clause (iia), as the case may be:"*

12.14 *Now, there is a question as to whether depreciation is optional or mandatory. To remedy this situation, Explanation 5 to Section 32 (1) was inserted vide the Finance Act 2001 with effect from 1st April 2002. The said explanation reads as under:*

*"Explanation 5-For the removal of doubts, it is hereby declared that the provisions of this sub- section shall apply whether or not the assessee has claimed the deduction in respect of depreciation in computing his total income;"*

12.15 *Pursuant to the insertion of the said Explanation, depreciation has become mandatory whether or not the assessee has claimed a deduction for depreciation in computing total income of the relevant assessment year.*

12.16 In view the above provisions of the Act, and particularly after the insertion of Expln 5 to section 32(1) it clearly takes away the right of choice of the assessee to make a claim for depreciation or not. It is incumbent upon the AO to grant depreciation in the year in which the assets was owned by the assessee and put to use for the purpose of business. Hence, Panel is of the view that depreciation at the relevant rate on the solar plants has to be first given in the AY 2014-15 only. Further, it is provided in the Act that if the asset is acquired by the assessee during the previous year and is put to use for the purposes of business or profession for a period of less than one hundred and eighty days in that previous year, the deduction under this sub-section in respect of such asset shall be restricted to fifty per cent of the amount calculated at the percentage prescribed for an asset under clause (i) or clause (ii) or clause (iia), as the case may be. In view of the same, 50% of the normal depreciation @ 80% has to be allowed in AY 2014-15 for both solar plants.

12.17 Assessee has also claimed additional 20% depreciation on the solar plant as per the provision of section 32(1)(iia) of the Act which reads as under:

*(iia) in the case of any new machinery or plant (other than ships and aircraft), which has been acquired and installed after the 31st day of March, 2005, by an assessee engaged in the business of manufacture or production of any article or thing or in the business of generation or generation and distribution of power, a further sum equal to twenty per cent of the actual cost of such machinery or plant shall be allowed as deduction under clause (ii):*

12.18 However, there are certain exceptions provided in the said section vide second proviso to the sub section (iia) of section 32(1) of the Act which reads as under:

*"Provided that no deduction shall be allowed in respect of-*

*(A) any machinery or plant which, before its installation by the assessee, was used either within or outside India by any other person; or*

*(B) any machinery or plant installed in any office premises or any residential accommodation, including accommodation in the nature of a guest-house; or*

*(C) any office appliances or road transport vehicles; or*

*(D) any machinery or plant, the whole of the actual cost of which is allowed as a deduction (whether by way of depreciation or otherwise) in computing the income chargeable under the head "Profits and gains of business or profession" of any one previous year;*

*12.19 In view of this exception, it is evident that additional depreciation of 20% is not allowed on any plant installed in any office premises. Since the solar plant of 160 MW is installed at the roof top of the office premise at Manesar, Gurgaon, for the captive use of the office, additional depreciation @ 20% is denied to the assessee on this solar plant.*

*12.20 In view of the above discussion, it is held that*

*i. Depreciation @ 50% of normal depreciation @ 80% on both solar plants will be allowed in AY 2014-15.*

*ii. Additional depreciation @ 50% of 20% is allowed for the 1 MW Solar Plant in AY 2014-15.*

*iii. No additional depreciation 20% is allowed on 160MW solar plant.*

*iv. After allowing depreciation as directed above in AY 2014-15, w.d.v of the block of assets will be carried forward to AY 2015-16.*

*v. Depreciation will be allowed in AY 2015-16 on the w.d.v brought forward from AY 2014-15.*

*12.21 The AO is directed to compute and allow depreciation in AYS 2014-15 and 2015- 16 accordingly. Ground of objection is disposed off with above directions.”*

9. From the above finding, it is clear that the Ld.DRP rejected the claim on the premise that the Solar Power Plant is installed at the roof top of office building for captive use for office. However, the contention of the assessee has been that office building is part of factory premise and the electricity is used for factory only. Thus, authorities below grossly erred in appreciating the facts. The Solar Power Plant in question is of 160 Mega Watt capacity and even in the wildest of imagination, it cannot be presumed that this is installed for meeting the need of office only. We therefore, are of the considered view that authority below ought to have verified the fact by making field inquiry. Considering the fact that Solar Power Plant is of very high capacity and it is stated at bar that the office building is part of factory and electricity so generated is used for factory only. The issue is restored to the file of AO for verification. If the AO finds that the office is part of factory building and electricity is generated for captive use of factory. He would allow the depreciation as per provision of law. This ground of assessee's appeal is allowed for statistical purposes.

10. In the result, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open Court on 21<sup>st</sup> July, 2023.

**Sd/-**

**(M.BALAGANESH)  
ACCOUNTANT MEMBER**

**Sd/-**

**(KUL BHARAT)  
JUDICIAL MEMBER**

*\* Amit Kumar \**

Copy forwarded to:

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

ASSISTANT REGISTRAR  
ITAT, NEW DELHI