

आयकर अपीलीय अधिकरण, सुरत न्यायपीठ, सुरत
IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND
Dr ARJUN LAL SAINI, ACCOUNTANT MEMBER

आ.अ.सं./ITA No.430/SRT/2023 (AY 2015-16)

(Hearing in Physical Court)

S J P Constructions Pvt. Ltd. E-3300, Radhakrishna Textile Market, Ring Road, Surat- 395002 PAN No. AAJCS 4313 C	Vs	Deputy Commissioner of Income Tax, Circle-2(1)(2) Surat, Aaykar Bhavan, Income Tax Colony, Athwa, Surat-395001
अपीलार्थी /Appellant		प्रत्यर्थी /Respondent

निर्धारिती की ओर से /Assessee by	Shri Bhupendra Shah, CA
राजस्व की ओर से /Revenue by	Shri Airiju Jaikaran, CIT-DR
अपील पंजीकरण/Appeal instituted on	27.06.2023
सुनवाई की तारीख/Date of hearing	13.10.2023
उद्घोषणा की तारीख/Date of pronouncement	20.11.2023

Order under section 254(1) of Income Tax Act

PER PAWAN SINGH, JUDICIAL MEMBER:

1. This appeal by assessee is directed against the order of National Faceless Appeal Centre, Delhi [for short to as “NFAC/Ld. CIT(A)”] dated 14.06.2023 for the assessment year 2015-16, which in turn arises out of assessment order passed by Assessing Officer under section 143(3) of Income Tax Act, 1961 (hereinafter referred to as ‘the Act’ for the sake of brevity) on 29.11.2017. The assessee has raised following grounds of appeal:

“1. In the facts and circumstances of the case and in law, the learned CIT(A), NFAC, Delhi erred in passing Ex-parte order by merely confirming the order of the AO without considering the contentions of the appellant which are already appearing in the assessment order.

a. By overlooking the fact that first three opportunities were during the period of Covid-19 and therefore the appellant was not aware.

- b. By overlooking the fact that last three opportunities were granted online but could not be accessed due to non-availability of an accountant at that time.*
- c. Without granting an opportunity of being heard through video conferencing.*
- d. Without serving physical notice through JAO.*

2. In the facts and circumstances of the case and in law, the learned Assessing Officer erred in making disallowance of depreciation of Rs.3,00,5,076/-.

a. By wrongly observing that no revenue was generated from windmill. Was not put to use even after submission of proof of commissioning of windmill w.e.f. 30-03-2014 as per Government certificate and monthly credit of energy generation received from MAHAVITRAN

b. By wrongly observing that no revenue was generated from windmill.

c. By wrongly holding that trial production does not tantamount commencement of business and hence ineligible for depreciation.

d. By overlooking the fact that depreciation is eligible even if windmill is ready to use.

e. By overlooking the fact that arbitration for loss of revenue was going on

f. By overlooking the fact that once the asset enters block of asset, there is no question of all being put to use separately since identity of each asset gets submerged in the block of asset.

g. Without prejudice, by wrongly disallowing depreciation of Rs.3,00,57,076/- as against correct figure of Rs.2,97,35,735/-.

3. In the facts and circumstances of the case and in law, the learned Assessing Officer erred in making disallowance of interest expense of Rs.2,38,08,019/- and capitalizing the same.

a) By wrongly holding that the windmill was not put to use even after submission of proof of commissioning of windmill w.e.f. 30-03-2014 as per Government certificate and monthly credit of energy generation received from MAHAVITRAN.

b) By wrongly observing that no revenue was generated from windmill.

c) By wrongly holding that trial production does not tantamount commencement of business and hence ineligible for claim for interest.

d) By overlooking the fact that interest is eligible even if windmill is ready to use.

- e) *By overlooking the fact that arbitration for loss of revenue was going on.*
- f) *By wrongly forcing the capitalization of interest.*

4. *In the facts and circumstances of the case and in law, the learned Assessing Officer erred in making a disallowance of Rs.90,246/- u/s 14A r.w.r.8D(iii).*

- a. *Even though no exempt income is earned.*
- b. *No satisfaction is recorded for invoking Rule 8D(iii).*
- c. *Only those investment which yield exempt income can be considered under the formula.*
- d. *Mechanically applying the formula.*
- e. *Without establishing nexus between income and the expenditure disallowed.*

5. *In the facts and circumstances of the case and in law, the learned CIT(A) erred in confirming Ground No.2 & 3.*

6. *In the facts and circumstances of the case and in law, the learned AO erred in charging interest u/s 234A, B, C &D.*

[C] Relief prayed:

The appellant therefore prays follows,

1. *To quash the appellate order passed ex-parte.*
2. *To delete the disallowance of depreciation of Rs.3,00,57,076/-*
3. *To delete the disallowance of claim of interest of Rs.2,38,08,019/- on windmill.*
4. *To delete the disallowance of Rs.90,246/- u/s 14A r.w.r. 8D(iii).*
5. *To delete the disallowance confirmed by the CIT(A)*
6. *To delete the disallowance interest u/s 234A, B, C and D.*

[D] General:-

- *The appellant reserve rights to add alter or delete any portion of this appeal before its conclusion.*
 - *This appeal is in time and may allowed in full.*
 - *A detailed paper book will be filed at the time of hearing.”*
2. Brief facts of the case are that assessee is a company, engaged in the business of purchase, sales & renting/letting of property and trading in F & O and shares and also installed Wind Mill power project. The assessee filed its return of income for assessment year 2015-16 on 21.09.2015 declaring loss at Rs.4.64 crores. The case was selected for

scrutiny. During assessment, Assessing Officer noted that assessee has claimed depreciation of Rs.4.62 crores and interest cost of Rs.2.38 crores on windmills. The Assessing Officer issued detailed show cause notice on 10.11.2017 to substantiate such claims. In the show cause notice, the Assessing Officer recorded that assessee has claimed depreciation and interest cost of borrowing for purchasing windmill as “revenue expenditure” but no production of power generation took place during the year. The assessee claimed that project was commenced in March, 2014 itself, but due to technical problem, no power generation production took place. The Assessing Officer was of the view that installation was not completed as claimed by assessee, as fault was not rectified throughout financial year and no power generation was started. The Assessing Officer asked the assessee as to why depreciation claim of Rs. 4.62 Crore and interest cost of Rs.2.38 crores should not be capitalized as machinery was not put to use, which is one of the conditions to claim depreciation.

In response to said show cause notice, assessee filed its reply on 29.11.2017. The relevant part of reply of assessee is extracted by Assessing Officer in para-4.1 of assessment order. The assessee in its reply submitted that windmill was installed in March, 2014 and commissioned on 30.03.2014 as per certificate issued by Maharashtra State Electricity Distribution Company Limited. The wind mill was installed and started generation of energy on 30.03.2014 but there was technical default in the line of supply due to which the credit of energy

generated could not be made from Maharashtra State Electricity Distribution Company Limited. The reply of assessee was not accepted by Assessing Officer. The Assessing Officer noted that as per assessee's admission that no power generated in the entire year due to technical reasons and problem persisted till 31st March, 2017. The assessee failed to satisfy the condition for claiming depreciation and interest on borrowed capital as there was no business activity and as such no expenses are allowable. Merely production was tested on 31.03.2014 as per certificate issued by Maharashtra State Electricity Distribution Company Limited, which cannot be taken as business was commenced. The Assessing Officer on the basis of aforesaid view disallowed depreciation as well as interest cost of Rs.2.38 crores.

3. The Assessing Officer further noted that assessee has made investment in share and mutual fund of Rs.1.61 crores and that provision of Section 14A is attracted. The assessee has not offered *suo motu* disallowances under section 14A. The Assessing Officer invoked provision of Rule 8D of the Income Tax Rules, 1962 and worked out the disallowance under third limb of Rule 8D(2). The Assessing Officer worked out the disallowance under section 14A of Rs. 90,246/-.
4. Feeling aggrieved by the additions / disallowances in the assessment order, the assessee filed appeal before Ld.CIT(A). Before Ld.CIT(A) the assessee challenged the disallowance, depreciation and interest expenses. No ground of appeal against the disallowance under section 14A was raised. The appeal of assessee was dismissed by Ld.CIT(A) by

holding that six notices of fixing the date of hearing in appeal was served / issued but the assessee has not made any compliance / response to such notices. The dates of issuance of notices and date of compliances on all six occasions are recorded in para-3.3 of the order of Ld.CIT(A). The Ld.CIT(A) dismissed the appeal of assessee by holding that statement of fact cannot be taken on its face value. The Ld.CIT(A) by referring the contents of assessment order on the disallowance of depreciation and interest expenses held that Assessing Officer passed a reasoned and by speaking order, which does not require any interference. Further aggrieved, the assessee has filed present appeal before the Tribunal.

5. We find that before Tribunal assessee has challenged the action of Ld.CIT(A) in passing *ex parte* order, addition/disallowance of depreciation and interest expenses. Surprisingly, the assessee has also raised grounds of appeal against the disallowance under section 14A without challenging such disallowance before First Appellate Authority/ CIT(A). The assessee has neither filed any application for seeking permission for raising additional grounds of appeal, nor any liberty was sought for raising such grounds of appeal, which was not the subject-matter of first appeal related to disallowance under section 14A. Such grounds of appeal, is not a legal ground rather exclusively based on factual issue.
6. We have heard the submission of Ld. Authorized Representative (Ld.AR) for the assessee and Ld. Commissioner of Income-Tax- Departmental

Representative (Ld.CIT-DR) for the Revenue. Ground No. 1 relates to passing ex-parte order by Id CIT(A) and ground No. 2 relates to disallowance of depreciation and ground No. 3 relates to interest disallowances. The Ld. AR for the assessee at the beginning of hearing apprised about the fact that order of Ld.CIT(A) is *ex parte* and that the assessee has raised a specific ground against such *ex parte* order passed by Ld.CIT(A). The Ld.AR for the assessee instead of showing reasonable cause for non-filing written submissions before Id CIT(A), submits that although the Ld.CIT(A) has dismissed the appeal of assessee in *limine* but he has discussed the facts regarding the issues of depreciation and interest disallowance. The Ld. AR for the assessee submits that assessee's case is covered by the decision of Mumbai Tribunal, in the case of ACIT vs. Hindustan Platinum Pvt. Ltd. in ITA No.1097/Mum/2017 for A.Y. 2006-07 dated 26.09.2018 and deserve to be allow straightway.

7. The Ld. AR for the assessee further submits that 'put to use' of asset is not condition precedent of allowance of depreciation and interest if the plant and machinery is included in the block of asset. The Ld. AR for the assessee further submits that he has placed on record the evidence about purchase of machinery for windmill and its testing report. So the assessee is eligible for depreciation on wind mill and interest expenses. The Ld. AR for the assessee further submits that he has already placed on record the certificate of commissioning and certificate of generation of power issued by the Competent Authority. The assessee has also filed

copy of bank sanctioned letter about the disbursement of loan. The Ld AR for the assessee submits that once the asset is included in the block of asset, the assessee is entitled for its depreciation even if such asset has not been put to use and was ready for passive use of it during relevant assessment year. To support such view, Ld.AR for the assessee relied upon the decision of Hon'ble Delhi High Court in the case of CIT vs. Hughes Escorts Communications [207] 165 Taxman 318 (Delhi)/[2009] 311 ITR 253 (Delhi)/[2007] 213 CTR 45 (Delhi)[17-09-2007]. The Ld. AR for the assessee also relied upon the decision of Hon'ble Delhi High Court in the case of CIT vs Oswal Agro Mills Ltd. [2011] 9 taxmann.com 58 (Delhi)/[2011] 197 Taxman 25 (Delhi)/[2012] 341 ITR 467 (Delhi)/[2011] 238 CTR 113 (Delhi)[24-12-2010].

8. Against ground No.4, which relates to disallowance under section 14A, the disallowance, the Ld. AR for the assessee submits that without recording dissatisfaction of working of *suo motu* disallowance under section 14A, no such disallowance is permissible. There is no dissatisfaction of the assessing officer before invoking provision of Rule 8D.
9. On the other hand, Ld. CIT-DR for the Revenue supported the order of lower authorities and submits that assessee itself has raised grounds of appeal that Ld.CIT(A) passed *ex parte* order. Before Ld CIT(A), the assessee has not filed its submission despite granting numerous opportunities. Even before the Assessing Officer, the assessee has filed its reply at the fag-end of limitation of period. The assessee has given

reply only on 29.11.2017 though in the show cause notice issued on 10.11.2017, the assessee was directed to furnish its reply by 20.11.2017. The assessee intentional and deliberately has not given sufficient time by assessee before Assessing Officer to examine the facts and for verification of details. Before Id CIT(A) the assessee has not filed any written submission. The Ld.CIT-DR submits that either the order of Ld.CIT(A) may be confirmed on ground No. 2 & 3.

10. In alternative and without prejudice submission, the Ld.CIT-DR for the Revenue submits that in case the bench is of the view that the assessee deserve any relief, matter may be restored back to the file of Assessing Officer for considering all the contention of assessee and verification of facts and to pass order afresh in accordance with law. The assessee has now raised new pleas which was not raised before assessing officer, that the wind mill was included in the block of asset during the year. The sole contention before assessing officer was that wind mill started generation of power, which could not be proved by the assessee.
11. On the disallowance under section 14A, the Ld.CIT-DR submits that no such ground of appeal was raised before Ld. CIT(A) thus, the disallowance made by the Assessing Office under section 14A attained finality. The assessee has not filed any application for seeking permission to raise such grounds of appeal, which was not the subject-matter before Ld. CIT(A).
12. We have considered the rival submissions of both the parties and have gone through the orders of lower authorities carefully. We have also

deliberated on various case laws relied by assessee in his written submission. We find that during assessment the assessing officer vide his show cause notice dated 10.11.2017, asked the assessee to explain the facts of depreciation on the wind mill and interest expense against the loan availed for procuring such machine, when no production is started. The assessee was directed to furnish reply before 20.11.2017. The assessee filed its reply on 27.11.2017, which was not accepted by the Assessing Officer by taking view that as per assessee's admission that no power generated in the entire year due to technical reasons and problem persisted till 31st March, 2017. The assessee failed to satisfy the condition for claiming depreciation and interest on borrowed capital as there was no business activity and as such no expenses are allowable. As recorded above that before the ld CIT(A), the assessee has not filed any written submissions. In absence of any submission the action of the assessing officer was confirmed. Now before us, the ld AR for the assessee raised the plea that once the cost of machinery is included in the block of asset and was ready to use, depreciation cannot be disallowed on such asset. We find that the assessee has now raised new pleas which was neither claimed before assessing officer nor it was examined by assessing officer. Even the primary facts that the wind mill was installed and was tested by the Maharashtra State Electricity Distribution company and commissioning certificate was issued, was not examined and verified by assessing officer. Though, we are convinced with the contention of ld AR for the assessee that once the

machinery was ready for its passive use, once it was made a part of block of asset as has been held by Hon'ble Delhi High Court in Sony India (P) Limited Vs CIT (2017) 88 taxmann.com 580(Delhi) as well as in CIT Vs Oswal Agro 341 ITR 467 (Delhi). Therefore, considering the facts that this plea is raised for the first time before the tribunal therefore, this issue to restore back to the file of assessing officer to examine the facts on the primary contention of the assessee as well as on this secondary contention raised before this bench and allow appropriate relief to the assessee in accordance with law. In the result, ground No. 1 to 3 of the appeal are allowed for statistical purpose.

13. Ground No. 4 relates to disallowance of section 14A. We find that no such ground of appeal is raised before Id CIT(A) at the time of filing appeal against the additions of section 14A in the assessment order. The disallowance under section 14A is based on factual analysis of financial statement of the assessee. Therefore, at the stage we are not inclined to entertain such issue which was not the subject matter before Id CIT(A). In the result, the ground No. 4 of the appeal is dismissed.

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

Order pronounced in the open court on 20/11/2023.

Sd/- (Dr ARJUN LAL SAINI) [लेखा सदस्य/ACCOUNTANT MEMBER]	Sd/- (PAWAN SINGH) [न्यायिक सदस्य JUDICIAL MEMBER]
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Surat, Dated: 20/11/2023
Dkp. Out Sourcing Sr.P.S

Copy to:

1. Appellant-
2. Respondent-
3. CIT
4. DR
5. Guard File // True Copy //

Sr. Private Secretary /Private Secretary
/Assistant Registrar, ITAT, Surat