

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'E': NEW DELHI**

**BEFORE,
SHRI S.RIFAUR RAHMAN, ACCOUNTANT MEMBER
AND
MS. MADHUMITA ROY, JUDICIAL MEMBER**

**ITA No.2509/De1/2017
(ASSESSMENT YEAR 2012-13)**

Dy.CIT Circle-16(1) New Delhi	Vs.	Magnum Power Generation Ltd. Defence Colony New Delhi PAN:AAACM7050R
(Appellant)		(Respondent)

Assessee by	Sh. Anil Bhalla, CA
Department by	Sh. Anshul, Sr. DR

Date of Hearing	29/05/2024
Date of Pronouncement	23/08/2024

ORDER

PER S.RIFAUR RAHMAN, AM:

1. This appeal has been filed by the Revenue against the order of Learned Commissioner of Income Tax (Appeals)-6, Delhi, ["Ld. CIT(A)", for short], dated 22/02/2017 for Asst. Year 2012-13.

2. The brief facts of the case are, assessee filed its return of income on 27/09/2012 declaring income at Rs.NIL by claiming carry forward loss of Rs.2,35,09,975/-. The case was selected for scrutiny under CASS and notices u/s 143(2) and 142(1) were issued and served on the assessee along with questionnaire. In

response AR of the assessee attended and submitted the relevant information as called for.

3. The company was incorporated on 01/03/1995 and it is engaged in the business of generating, transmitting, distributing and supplying electricity and to produce, buy, sell or otherwise deal with generation, transformer, insulation, material, boiler, pumps, etc. During the assessment proceedings, the Assessing Officer observed that the assessee has not carried any business activities during the current assessment year. In order to verify the same, the show cause notice issued to the assessee calling for information. In response, the assessee submitted as under:-

"Magnum Power Gen. Ltd has entered into a Power Purchase Agreement with HPGCL for supply of electricity. The MPGL plant situated at Gurgaon commenced its operation from the year 1998. As per the PPA the consideration was paid in two parts Viz Variable tariff which was to be on the basis of monthly average cost of fuel and fixed Tariff @ Rs. 1.29 per unit. The PPA provides that the fixed tariff has to be reimbursed to magnum even if no electricity was supplied.

The fact that the company is a power plant and which power plant has been used to generate electricity, which has been purchased by HSEB is not a dispute. The HSEB through power purchase agreement have specified that for the time they do not buy electricity they will pay the charges for the deemed generation because the company is incurring expenditure to keep the power plant in running condition.

Since the HVPNL has not paid our fixed tariff hence assessee company filed petition in the court which is still going on.

It is submitted that the first issue that arises in the present case is whether the business has been discontinued or has been temporarily suspended. In the querist's case, the attendant circumstances suggest that the business is not being discontinued but the querist has merely decided to temporarily suspend manufacturing activity at its factory. Suspension does not necessarily amount to discontinuance or closure of business.

Where an assessee is maintaining his establishment and is waiting or improved market conditions and there is nothing to show that he has completely abandoned or closed his business forever, the business must be said to be continuing. It is not necessary that for a business to be in existence, it should have worked all may be quiet and dormant for some time. [Lakshmi Narayan Board Mills Pvt. Ltd. v. CIT, (1994) 2005 ITR 88(Cal)]. The querist has only suspended manufacturing activity at its factory and its business is continued by way of trading in the same line of product. In L.V.E. Vairavan Chettiar v. CIT, (1969)72 ITR, 114, the Madras High Court held that maintaining the establishment and waiting for improved market conditions in a business which the assessee had temporarily stopped, the business must be deemed to have continued as there was nothing to show that he had completely abandoned or closed that business. The facts of the querist's case suggest that business has not been closed down but manufacturing at its factory has been suspended and trading is being carried out. The querist therefore has a good case to contend that its business has not been discontinued but manufacturing has been temporarily suspended and trading activity is carried out in the interim.

In our case business has not been discontinued it is just that a litigation with the HVPNL is going on, as and when decision comes business can be started again. As the assessee did not receive the amount of deemed generation that's why it stopped the operation. However, assessee is maintaining the necessary infrastructure so as to ensure that generation can be resumed as soon as pending dispute is settled. The expenses incurred during the previous year relate to maintaining thereto and should be allowed.

S.32 of the Income Tax Act, 1961 provides for depreciation allowance. As per 5.32(1), two requisites for depreciation allowance are (i) that the depreciable asset is owned, wholly or partly, by the assessee; and (ii) that it is used for the purposes of business or profession. Therefore an assessee on satisfaction of these two primary conditions can claim allowance for depreciation.

The Bombay High Court in CIT v. Vishwanath Bhaskar sathé, (1937) 5 ITR 621 (Bom.) held that the word 'used' should be understood in a wider sense so as to give a wider meaning and embrace passive as well as active user. The said decision was followed by the Patna High Court in CIT v. Dalmia Cement Ltd., (1945) 13 ITR 415 (Pat.) wherein it was held that depreciation should be allowed even though machinery was not in use or was kept idle. Further in the case of Whittle Anderson Ltd. V.CIT, (1971)

79 ITR 613 (Bom.), Bombay High Court held that when the machinery is kept ready for use it will be said to be used for the purpose of business.

On the basis of various judicial pronouncements as discussed above, it can be stated that word 'used in S.32(1) has been interpreted by the Courts to have a wider meaning so as to include not only the actual user but also the passive user. Further, the allowance for depreciation does not depend upon actual working of the machinery, it is sufficient if the assessee for the purpose of business employs the machinery in question and it is kept ready for actual use. In the querist's case in spite of the fact that there was no manufacturing activity carried on during the year, the querist had continued the business on a smaller scale by buying and selling of same line of products and had also retained and maintained its plant, in anticipation of restarting manufacturing activities as and when market conditions improve. Further the said plant and machinery were used for the purpose of the business in the earlier years. Applying the ratio of the judgements as discussed to the facts of the case of the querist, the querist has a good case to contend that it satisfies the primary conditions of S.32(1) and is therefore entitled to depreciation."

After considering the submissions of the assessee, the Assessing Officer rejected the same by observing as under:-

"The Auditors in Note No.18 of Notes to Financial Statement has mentioned that the company is supply electricity to Haryana Power Generation Corporation Ltd. (HPCL) under a 15 year Power purchase agreement (PPA). PPA was suspended by HPGCL w.e.f. 10.5.2005. As such company had not considered deemed generations from 10.5.2005 to 31.3.2006 in the books of accounts of previous year as HPGVL is not releasing outstanding balance and the company decided to make provision of doubtful debts relating to unpaid amount of deemed generation from the counting year 2002-03 till 9th May, 2005.

A petition was filed with HERC in July, 2008. An order was passed by HERC on 23rd March, 2010 as per which the figures of deemed generation ad other deductions were to e reconciled with a period of one month through joint meetings with the officers with the erstwhile HPGCL. Since nothing could be concluded within the allotted time MPGL has filed an appeal on 12.5.2010 against the HERC order in the Appellate Tribunal.

Appellate Tribunal has issued notice to the respondents i.e. HPPC/HERC. Respondent has taken several date for filing the reply of such notice. Therefore MPGL has further filed application for interim relief in Sept.2010.

Following the direction of the Tribunal both parties have held a meeting to reconcile the accounts but due to difference in interpretation of HERC order by either side the meeting never concluded and both parties agreed to seek a clarification order from HERC upon its earlier order.

HERC has passed a clarification order after hearing both the parties but MPGL having disagreed with the clarification order of HERC has filed an appeal in January 2011.

Respondent HPPC had also filed appeal against HERC impugned order dtd.23.3.2010 to Appellate after a delay of 335 days of order for condonation of delay, but Appellate having not satisfied had dismissed the appeal of HPPC.

The HPPC has filed appeal in Supreme Court against dismissal of appeal for condonation of delay by Appellate

Further judgment against MPGL appeal in Appellate came in March 2012, which rejected deemed generation dues and kept the HERC order intact. The assessee company is in appeal in Supreme Court against the order of Appellate.

Matching Principle requires that expenses incurred by the assessee must be charged to the Profit and Loss account in the financial year in which the revenue, to which those expenses relate, is earned.

It is an accounting practice whereby expenses are recognized in the same accounting period as the related revenues are recognized.

The matching concept thus helps avoid misstating earnings for a period. The matching concept, or matching principle, is not an alternative to accrual accounting, but rather a fundamental element of it.

This argument is based on the judgment of the Apex Court in Madras Industrial Investment Corporation Ltd. (225 ITR 802) (SC) In that case, the Supreme Court had referred to this 'matching concept'. It was held that ordinarily revenue expenditure incurred wholly or exclusively for the purpose of business, can be applied in the year in which it is incurred. However, the facts may justify spreading the expenditure and claiming it over a period of ensuing years, where allowing the entire expenditure in one year could give a very distorted picture of the profits of a particular year."

- 4.** With the above observation, the Assessing Officer held that assessee to provide amount of being generation as the Revenue which is book and could claimed expenses against above said deemed Revenue but assessee has not made any provisions for the

same. Since, no Revenue has been claimed during the year, no expenses can be allowed. Accordingly, he disallowed the expenses claimed by the assessee and the relevant depreciation under the Income Tax Act. Accordingly, he made an addition of Rs.2,35,30,309/- to the income of the assessee.

5. Aggrieved assessee preferred an appeal before the Ld. CIT(A)-6 and filed detailed submissions before him. After considering the detailed submissions of the assessee, Ld. CIT(A) allowed the claim of the assessee by observing as under:-

“3.2.3 I have carefully considered the submissions and the facts of the case and find that the company is engaged in the business of generating, transmitting, distribution and supply of electricity since 1995 and has an agreement for supplying electricity with Haryana Power Generation Corporation Limited (HPGCL) at present Haryana Power Purchase Centre (HPPC) under a 15 year Power Purchase Agreement (PPA) which was suspended by HPGCL/HPPC w.e.f. 10th May, 2005 in compliance with the order of Haryana Electricity Regulatory Commission (HERC). Accordingly the company has not accounted for deemed generation (fixed tariff) from May 10, 2005 onwards since no fixed tariff (deemed generation) has accrued to the company since then. Against the said non payment of fixed tariff both the parties i.e. the appellant company and the HPGCL/HPPC have filed a suit in the Supreme Court and which is pending as on date. Therefore the objection of the AO that appellant has not accounted for revenue is misfounded.

The AO also objects that there is no business activity during the previous year and therefore expenses are not allowable which the AR has explained in detail above that the company was engaged in the business of power generation and supplying electricity to Haryana Power Generation Corporation, however, commercial production was temporarily suspended due to differences with them in interpretation of various clauses of agreement. The AR has referred to para 9.4.1. of paper book which gives the details of expenses claimed and which I have perused.

The AO in AY 2009-10 u/s 143(3) has allowed the expenses claimed in the Profit & Loss Account and there is no change in the facts and circumstances of the case to deviate from this view. Copy of assessment

order u/s 143(3), audited Annual Accounts and Computation of Income has been filed at page 60 to 91 of Paper Book.

In view of the above facts I am of the considered view that the appellant company has incurred the expenses in connection with its business of power generation and are fully allowable as business expenses. Accordingly, this ground of appeal is allowed and the addition of Rs.2,35,30,309/- is deleted. ”

6. Aggrieved with the above, Revenue is in appeal before us raising following grounds of appeal:-

7. At the time of hearing, the Ld. DR submitted that the assessee has discontinued its business in Financial Year 2005-06 and since then assessee has not declared any Revenue, therefore, in the current Assessment Year i.e., 2012-13 has not generated any income and claimed certain business expenditure, therefore, the assessee is not eligible to claim any business expenditure when the income of deemed Revenue should have declared by the assessee in order to claim the relevant expenditure. In this regard, he relied on the findings of the Assessing Officer

8. On the other hand, Ld. AR submitted that the business of the assessee was temporarily closed to the fact HPGCL under 15 years power purchase agreement HPGCL has suspended the power purchase with effect from 10th May, 2005 in compliance with the order of HERC. He submitted that the business of the assessee is temporarily suspended but it has to maintain its plant, therefore, it is incurred certain expenditure for upkeep of the plant and the relevant depreciation on the asset utilized in the business. He agreed with the Ld. DR that assessee has not declared any revenue during the year. Considering the fact that power purchase

agreement was suspended and no fixed tariff has accrued to the company and he heavily relied on the findings of the Ld. CIT(A).

9. Considered the rival submissions and material placed on record, we observed that the assessee is having a huge plant for the purposes of generating, transmitting, distribution and supply of electricity since 1995 with an agreement for supply of electricity with HPCL, at present HPPC for 15 year power purchase agreement, however, the same was suspended by HPCC w.e.f. 10th May, 2005 in compliance with the order of HERC. We observed that the assessee has not received any payment of fixed tariff from HPPC and has filed a suit in Supreme Court which is pending as on date. It is a fact on record that assessee has not declared any income due to non realisation of fixed tariff and Assessing Officer has objected to the same and opined that the assessee should have declared deemed income in order to claim of the expenditure. We are in agreement with the findings of the Ld. CIT(A) until the relevant fixed tariff are realisable the same cannot be declared as income in the hands of the assessee and further the assessee has to keep up the plant in running condition it has to incur certain expenditures. As and when withdrawal of the suspension of power purchase agreement the assessee may continue to generate power, therefore, the temporarily suspension of the business is with a proper reason declared on record, therefore, in our view assessee is eligible to claim the Revenue expenditure as well as the relevant depreciation of the fixed assets during the current year, therefore, we are

inclined to agree with the findings of the Ld. CIT(A) and, accordingly, appeal filed by the Revenue is dismissed.

10. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced on 23rd August, 2024.

Sd/-

(MS. MADHUMITA ROY)
JUDICIAL MEMBER

Dated: 23/08/2024

Pk/sps

Copy forwarded to:

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

Sd/-

(S.RIFAUR RAHMAN)
ACCOUNTANT MEMBER

ASSISTANT REGISTRAR
ITAT, NEW DELHI